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REPORT ON THE QUESTIONS
RAISED BY THE BAILEY PLAN
SO FAR AS IT AFFECTS
THE ARNOLD ARBORETUM

WITH COMMENTS ON THE OPINION OF ROPES, GRAY,
BEST, COOLIDGE & RUGG DATED MAY 1, 1951



SUBMITTED TO THE OVERSEERS' COMMITTEE
TO VISIT THE ARNOLD ARBORETUM

MARCH 1, 1952

ROBERT G. DODGE
HERRICK, SMITH, DONALD, FARLEY & KETCHUM

LETTER OF TRANSMITTAL.

To the Committee to Visit the Arnold Arboretum:

We enclose herewith our Report regarding the Bailey Plan, prepared by us as your counsel.

In this Report it seemed advisable not only to examine and deal with the arguments advanced by counsel for the Harvard Corporation, but also, in view of the time which has elapsed since our former opinions were submitted, to review the whole situation. For this reason the present Report is longer than we wish it were, but in view of the many matters requiring discussion this was unavoidable.

However, the principal question which underlies all others can be outlined briefly, and it is important for those reading the detailed discussions in this Report to keep the issue raised by this question constantly in mind. The issue is whether or not the Bailey Plan violates the most fundamental rule governing the conduct of a trustee, namely, that he must administer the trust solely in the interest of the beneficiary and without regard for other interests represented by him.

The Coordinating Committee on Biological Sciences of the Overseers, in giving its reasons for approving the Bailey Plan, said:

"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."

Except for the use of the word "corporate," this is a fair statement of the issue. The view adopted by the Committee was obviously the underlying theory in accordance with which the Bailey Plan was drawn up, and approved by the then Dean and by the Harvard Corporation. What they respectively did and said cannot reasonably be otherwise explained. It is clear to us that this theory is unsound and that the Coordinating Committee was wrong in regarding it as the "proper concept."

Inasmuch as the Corporation is trustee of the Arboretum property, it is contrary to all established principles of law and right conduct that it should ignore the interest of its beneficiary and apply the trust funds as a tool in its own "overall interests." On this issue counsel for the Corporation do not venture to argue to the contrary.

In our judgment the opinion of counsel for the Corporation, while prepared with great industry and skill, indicates the difficulty of defending the position and action of the Corporation in this matter, and there is nothing in that opinion which leads us to change or qualify our criticisms of the action of the Corporation with regard to the Arboretum.

Irrespective, however, of the arguments of counsel on either side, the question remains as to what should now be done.

The course of action of the Harvard Corporation as trustee of the Arnold Arboretum has been and continues to be seriously questioned by a committee representing the beneficiary, although the individual members of that committee and their counsel are all, for varying reasons, also deeply interested in Harvard. In these circumstances, unless the pending issues can be settled on a basis satisfactory to all concerned and reasonably sure to be permanent, we

believe it essential that, in accordance with the usual practice of trustees in such cases, the judgment of the courts be sought by the Corporation.

ROBERT G. DODGE

HERRICK, SMITH, DONALD, FARLEY & KETCHUM.

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REPORT ON THE QUESTIONS RAISED BY THE BAILEY PLAN SO FAR AS IT AFFECTS THE ARNOLD ARBORETUM

WITH COMMENTS ON THE OPINION OF ROPES, GRAY, BEST,
COOLIDGE & RUGG DATED MAY 1, 1951.

I.

INTRODUCTION.

The adoption of the Bailey Plan in January, 1946, by the President and Fellows of Harvard College,* without prior consideration of the legal consequences of such a step, has given rise to a prolonged controversy between the Corporation and the Committee to Visit the Arnold Arboretum. This controversy has made it necessary to determine, for the first time, the duties of the Harvard Corporation under the indenture of 1872 with the trustees under the will of James Arnold, whereby the Arnold Arboretum was founded, and the terms upon which the present \$4,000,000 endowment of the Arboretum is held.

Before entering upon a discussion of the questions raised by the Bailey Plan and the arguments advanced in the opinion of Ropes, Gray, Best, Coolidge & Rugg, the sequence of events leading up to the present situation should be briefly reviewed and the issues presented by the Ropes, Gray opinion stated.

For many years prior to 1945, various institutions and agencies connected or affiliated with Harvard and concerned with various aspects or sub-divisions of botany had been carrying on their work without adequate

*Generally referred to herein as the Corporation.

co-ordination or correlation and with occasional duplication.*

These institutions and agencies were of varied origin and status. While each had a somewhat distinct field, in some respects these fields overlapped. There were occasional disagreements between the various staffs.

Two of these institutions withered on the vine.† The Arnold Arboretum, however, founded in 1872, not only gained world-wide distinction in the field of horticulture, but also obtained more funds than any of the other so-called "orphan institutions."

The Arboretum was developed with consummate skill and indefatigable industry by Professor Charles S. Sargent until his death, in 1927. He gave to it generously in his lifetime, and by his will set up funds which were to accumulate for one and two hundred years, respectively. After his death it was enriched by a fund raised in his memory to continue and support the Arnold Arboretum. Later many other substantial gifts were received. From the beginning the Arboretum steadily grew in importance, and

*The institutions referred to as "independently endowed botanical agencies" or "orphan institutions" in the Bailey Report were the Arnold Arboretum, the Atkins Institution, the Botanic Garden, the Botanical Museum, the Bussey Institution, the Cabot Foundation, the Farlow Library and Herbarium, the Gray Herbarium, and the Harvard Forest. The status of each of these agencies depends, of course, on the circumstances of its founding and the terms of its endowment. Some may, in fact, be agencies of the University, and some, like the Arboretum, may have the status of separate institutions whose property is held in trust.

†The Botanic Garden, of little utility and with an inadequate endowment, ceased to exist in 1948. Under a *cy-pres* decree of the Supreme Judicial Court, dated August 3, 1948, the income from its funds may now be used for "any botanical purposes." The Bussey Institution, founded with land and endowment given to Harvard in trust, ceased to exist as an institution in 1936 and its funds are now utilized for miscellaneous botanical purposes. The Bussey was discontinued without the sanction of judicial proceedings.

became one of the most widely known of the institutions associated with Harvard, certainly the best known of those in the field of botany and horticulture.

However, the general situation regarding the institutions and agencies "concerned with various theoretical and applied aspects of botany" was not considered satisfactory. During World War II Professor Irving Widmer Bailey was asked to study and report on "Botany and its Applications at Harvard." His Report was published in June, 1945.

In due course the Bailey Report was filed with Dean Buck of the Faculty of Arts and Sciences (now also the Provost). In August, 1945, he submitted it to "interested members of the University," with comments indicating his approval.

In the first instance, the Report was approved by most, if not all, of those in the institutions and agencies concerned. The Report, however, gave little or no consideration to legal questions, and a number of those who later objected to the Plan did not fully understand its implications. This is not surprising, for the Bailey Plan is difficult reading, and its full purport with respect to administrative and other matters is not apparent without careful study.

In these circumstances the Plan was submitted to the Corporation and was approved by it in January, 1946. The Corporation was not at this time advised of any legal questions or difficulties inherent in the Plan, and it is probable that its members did not fully realize some of its implications from an administrative standpoint. The Corporation, furthermore, may not have been familiar with all the circumstances in which the Arboretum was founded, as they were not set forth in the Bailey Report, and up to this time no material questions regarding the theory, and few as to the practice, of administering the Arnold Arboretum had arisen.

But as the implementation of the Plan proceeded, and what it would mean to the Arboretum began to be realized, opposition developed. The manner in which the Bailey Plan would affect the Arboretum was not brought to the attention of the Visiting Committee, at least formally, until the fall of 1949, although individual members had some knowledge of it prior to that time. As a result of objections advanced by some members of the Visiting Committee, the question of the effect of the Plan on the Arnold Arboretum was referred to the Coordinating Committee on Biological Sciences of the Board of Overseers, which took it under advisement. On January 9, 1950, the Chairman of the Coordinating Committee asked the President of the University to arrange for legal counsel for the guidance of their Committee. Then, for the first time, legal advice was sought.

The lawyer consulted did not, in the opinion which was rendered in due course, adequately discuss the crucial questions on which differences of opinion have since arisen, but he did make it clear that to use the proceeds from the sale of Arboretum property toward paying for the proposed new morphology building in Cambridge, as voted by the Corporation, would involve a misuse of funds. Accordingly this part of the Corporation's vote was rescinded, some four years after it had been passed.

After receipt of this opinion of counsel the Coordinating Committee submitted a report, in May, 1950, approving the Bailey Plan as modified on the advice of counsel. This report was submitted to the Visiting Committee of the Arboretum shortly before the meeting of the Committee that spring. The impact of the Bailey Plan upon the Arboretum was then for the first time fully realized.

In view of the impending meeting of the Corporation in June, 1950, at which further implementation of the Bailey

Plan was anticipated, most of the members of the Visiting Committee joined in a request that the Corporation defer further action regarding the Plan until the fall. This the Corporation did.

At this point a number of the members of the Visiting Committee asked the law firm of Herrick, Smith, Donald, Farley & Ketchum to look into the situation and report upon its legal aspects.

Investigation disclosed the somewhat surprising situation that there were serious legal questions involved which had not been sufficiently considered, and which were not adequately dealt with in the report of the Coordinating Committee or in the opinion given to it by its counsel.

Herrick, Smith, Donald, Farley & Ketchum reported on September 28, 1950, that the carrying out of the Bailey Plan would, in their opinion, violate trusts upon which the Arboretum funds and property are held by the Harvard Corporation, as trustee. The Visiting Committee approved this report, authorized its transmittal to all concerned, and sent various resolutions to the Corporation, approved by all but one member of the Committee, disapproving of many elements of the Bailey Plan and asking the Corporation to suspend implementation of that Plan and to reconsider the whole matter.

In the meantime other counsel, Robert G. Dodge, had been consulted. He rendered an opinion, dated January 2, 1951, agreeing in its conclusions with the report of Herrick, Smith.

At the October, 1950, meeting of the Corporation action on the new morphology building in Cambridge, proposed by the Bailey Report, was deferred. The Visiting Committee was then told informally that the firm of Ropes, Gray, Best, Coolidge & Rugg, counsel for the Corporation, had been asked for their advice as to the validity of the Bailey Plan.

In May, 1951, the Visiting Committee received copies of an opinion of Ropes, Gray, Best, Coolidge & Rugg, dated May 1, 1951. This opinion is hereafter referred to as the Ropes, Gray, or the R-G, opinion, and sometimes merely as R-G. The Ropes, Gray opinion differed materially in most of its conclusions from those of counsel for the Visiting Committee. These differences are summarized in the section immediately following and are discussed at length later in this Report.

The Ropes, Gray opinion, however, acknowledged that the Herrick, Smith and Dodge opinions were correct in certain respects. The opinion conceded, for the first time in the discussions between the Visiting Committee and the President and Fellows, that the Arboretum and its endowment were held by the Corporation in trust and that decisions with respect to the management of the Arboretum and the expenditure of its funds must be made with a view to promoting the purposes of the Arboretum. The opinion further found the *quid pro quo* salary arrangements adopted by the Corporation under the Bailey Plan to be of doubtful legality and recommended that the Corporation consider their discontinuance. On May 7, 1951, the Corporation voted that it was prepared to eliminate the *quid pro quo* arrangements in so far as they related to the Arboretum.

Thereafter counsel for the Visiting Committee conferred with representatives of Ropes, Gray. No conclusions were reached at this conference, and it was agreed that further conferences would be deferred until the completion of a report in rebuttal of the arguments and statements of the Ropes, Gray opinion.

It is in these circumstances that the following Report has been prepared and is now submitted.

II.

THE ISSUES PRESENTED.

The opinion given on May 1, 1951, to the President and Fellows of Harvard College by Ropes, Gray, Best, Coolidge & Rugg supports in large measure the legality of the Bailey Plan. We disagree with many of the conclusions of that opinion. The basic issues upon which we differ may be summarized as follows:

1. The R-G opinion takes the position that there is nothing in the administrative changes proposed by the Bailey Plan, so far as the Arboretum is concerned, which involves a breach of trust as to the management of the Arboretum or the use of its funds or in any other way.

We are of opinion that, as the Arboretum's property is admittedly held by the Harvard Corporation as trustee, the Plan, which was devised in the sole interest of Harvard and not in that of the beneficiary and without any reference to the trust, involves a breach of trust with respect to the control of the Arboretum and the use of its funds, and the practical destruction of its identity as an institution in its own right, in violation of the terms of its endowment.

2. The R-G opinion takes the view that the removal of a large part of the library and herbarium to Cambridge would promote the interests of the Arboretum and would be proper.

In our opinion the proposed removal, while possibly advantageous from the point of view of the general botanical interests of the University, would not be undertaken by a trustee motivated solely by consideration of the welfare of the Arboretum, and there is serious doubt not only as to the wisdom but as to the legality of such removal.

3. In the R-G opinion it is claimed, as a principal ground for the views expressed, that, while the endowment of the Arboretum as it existed at the beginning of 1927, repre-

senting gifts received before that date, is held on the terms of the original trust, the Sargent Memorial Fund and subsequent gifts, comprising three-quarters of the present endowment, are held upon a new and different trust, which justifies the treatment of the Arboretum provided for in the Bailey Plan.

We are of opinion that no new trust was created by the terms of the gifts to the Memorial Fund, that those gifts, made as additions to the existing endowment, and for the purpose of perpetuating and extending the work of the Arboretum within the scope of the original trust, were, like all the gifts ever made to the Arboretum, intended to be held by the Corporation as trustee of that trust. And we furthermore raise the point that, even if there were a new trust, the Bailey Plan would involve the same breaches of trust as are referred to above.

*4. In the R-G opinion it is claimed that the Arboretum is a mere botanical department of Harvard University, and may be controlled and dealt with as such and as if owned by the University.

We take the position that the Arboretum is obviously not a department of the University in the ordinary sense of the term, like the Department of Biology or other similar divisions of the fields of instruction in the University, which are fully subject to control by the governing boards in any way which is deemed to be for the general benefit of the University, and may be merged with other departments or abolished. We say that the status of the Arboretum is fundamentally different, and that the obligations of the Harvard Corporation to it are those of the trustee of an express trust, which must be administered solely for the benefit of the Arboretum, with an eye single to its interests, and without regard to the separate interest of the trustee in general botanical science at Harvard.

III.

THE ARBORETUM WAS ESTABLISHED AND HAS GROWN AS AN ENDOWED INSTITUTION WHOSE FUNDS ARE HELD IN TRUST AND TOWARD WHICH THE HARVARD CORPORATION OWES THE DUTIES OF A TRUSTEE.

(a) The Origin and Development of the Arboretum.

The Arnold Arboretum was established under an indenture executed on March 29, 1872, by the trustees under the will of James Arnold and the President and Fellows of Harvard College (which is the legal name of the Corporation). By this indenture a formal and definite trust was established. The Arnold fund was conveyed to the Corporation "upon the trusts following," and the Corporation as trustee was required to hold the fund "as a separate and distinct fund"; and it agreed that it would hold the property and all future property so received "upon the trusts herein declared." A copy of the indenture is annexed to this Report.

The purposes for which the income of the Arnold fund could be used were set forth in the indenture. In brief, the Harvard Corporation agreed to hold the funds in trust to found and maintain an arboretum, to be called the Arnold Arboretum, to be located on specified land in West Roxbury and to contain, so far as practicable, all the trees, shrubs and herbaceous plants which could be raised in West Roxbury.* The Arboretum was to be under the "care and management" of a professor, to be called the Arnold Professor, who was to teach the knowledge of trees in the University. The funds were to be used for no other purpose, "however meritorious or kindred." The Corporation agreed "to dedicate exclusively to the purpose of said Arboretum" the parcel of land in question.

*The part of West Roxbury in which the Arboretum is located is now known as Jamaica Plain.

It is clear that the Corporation by accepting the trust became bound to establish and maintain the Arboretum as an institution having its own distinct purposes as ends in themselves, its own name, its own management and its own separate location, affiliated with Harvard, it is true, but in no sense an agency or integral part thereof.

In 1873 Charles Sprague Sargent was appointed Director of the Arnold Arboretum, and in 1879, when the Arnold fund had increased to \$150,000, he was appointed Arnold Professor, a position which he held until his death in 1927.

One of the first of Professor Sargent's achievements was an agreement with the City of Boston, concluded in 1882, whereby the City took title to the Arboretum lands, added certain adjoining lands and forthwith leased the whole tract back to the Corporation for a thousand years, at a rental of one dollar a year, renewable for another thousand years, "and so on from time to time forever." The City agreed to build and maintain roads and walks and police the grounds, and for its part the Corporation agreed to keep the Arboretum open to the public every day in the year from sunrise to sundown. Thus by 1882 the Arnold Arboretum was not only a place where trees and shrubs were cultivated for scientific and educational purposes, but it had also taken on some of the attributes of a park, a place of beauty open to the public every day in the year.

The original Arboretum land had been received by the Corporation under the will of Benjamin Bussey and was held by it in trust. The statute authorizing the execution of the lease by the city (Acts of 1880, c. 144) provided that the leased land should be held by the President and Fellows "to the same uses and purposes as the Arboretum is now held under the trusts created by the wills of Benjamin Bussey and James Arnold"; and the lease provided that the Harvard Corporation as lessee should hold

the premises upon the trusts declared by the two wills and the indenture of March 29, 1872.

Subsequently a series of gifts and purchases between 1882 and 1922 added more than 100 additional acres to the area of the Arboretum. One of these purchases, a tract of 16 acres formerly belonging to the Bussey Institution, was bought for the Arboretum in 1919 by its friends from the Corporation.

With adequate space assured "forever," Professor Sargent devoted his efforts toward making the Arboretum pre-eminent in its field. A staff was assembled, including some of the best-known horticulturists of their day. Field expeditions in North and South America, Europe and Asia brought back hitherto unknown species of trees and woody plants. A library was begun and moved in 1892 to a brick headquarters building given by Horatio Hollis Hunnewell on the Arboretum grounds at Jamaica Plain. An herbarium was started in 1878 to aid in "the correct determination of the living collections and for successful dendrological studies," and in 1905 a four-story fireproof wing was added to the headquarters building to house the herbarium. A number of distinguished books and serial publications were written at the Arboretum and published under the Arboretum name.*

On Professor Sargent's death Professor Oakes Ames served as Supervisor of the Arboretum for a nine-year period. Professor Elmer D. Merrill was appointed Director of the Arboretum and Arnold Professor in 1936, serving until 1946, when he resigned. Dr. Merrill was succeeded by Dr. Karl Sax, the present Director of the Arboretum. There has been no Arnold Professor since 1946. These three men who have had the care of the Arboretum since

*The history of the Arboretum in this period is told by Professor Sargent in "The First Fifty Years of the Arnold Arboretum," 3 *Journal of the Arnold Arboretum* 127 (1923).

Professor Sargent's death, Professor Ames, prior to his death in 1950, Dr. Merrill and Dr. Sax, have all strongly opposed the Bailey Plan as its operation would affect the work of the Arboretum.

After Professor Sargent's death in 1927 his friends were successful in raising \$1,000,000 as the Charles Sprague Sargent Memorial Fund for the Endowment of the Arnold Arboretum. To assist in the fund raising an elaborate 37-page brochure was prepared entitled *The Arnold Arboretum and Its Future*. This brochure, which will be discussed at greater length later in this Report, placed its entire emphasis on the Arboretum as a self-contained organization, having its own purposes and staff and engaging in its own activities. The brochure recited that "The title and ultimate responsibility for the Arboretum is lodged in the President and Fellows of Harvard College as trustees" and asked for the "addition" of \$1,000,000 to the Arboretum's "permanent endowment."

Prior to Professor Sargent's death, and to a greater extent in the years since his death, other friends of the Arboretum by gift and legacy have brought its total endowment to more than \$4,000,000. These gifts were made directly to the Arboretum or to the Harvard Corporation for the "use" or for the "benefit" or "purposes" of the Arboretum. Many of the gifts were made without specification of the use to be made of the money. Other donors or testators specified that the money should be used for particular purposes, all of these purposes being within the scope of the normal activities of an arboretum.

From its foundation until the Bailey Plan was approved in 1946 the Arnold Arboretum was a self-contained institution with a locus in Jamaica Plain and a world-wide reputation under its own name. The Arnold Professor or the Director,* who controlled its staff, was immediately re-

*In this term we include Professor Ames during the period when he was Supervisor.

sponsible to the President and Fellows and communicated directly with them as to budgets and other matters requiring consultation with the trustee. As the endowment increased, the activities of the Arboretum were broadened, but within the limits of its normal functions and in harmony with the indenture of 1872. Scientific research in matters associated with the purpose of an arboretum was carried on by its staff under the direction of the Arnold Professor or the Director, sometimes in co-operation with the Department of Biology or with one or another of the eight other "orphan institutions." Co-operative work with outside departments or institutions was carried on, but only if and to the extent the Arnold Professor or Director deemed it of benefit to the Arboretum. On the Arboretum grounds the herbarium and library grew to outstanding positions in their field under the direction of its scientists.

For its first seventy-five years, therefore, apart from such control as could appropriately be exercised by its trustee, the Arnold Arboretum was managed and controlled by its own staff. As an institution under its own name it progressed and gained widespread recognition and fame, collections and a library of great value, and an endowment of more than \$4,000,000.

(b) *The Terms of the Arboretum Trust.*

As we have seen, the Harvard Corporation by accepting the indenture of 1872 became trustee of an express trust, under which it was to maintain the Arboretum as an institution having its own distinct purposes as ends in themselves, its own name, its own location and its own management.

The language of the indenture is definite in setting forth limitations on the use of income from the endowment. The

indenture provides that the trust fund "shall not be diminished by supplementing any other object, however meritorious, or kindred in its nature." This, of course, states the general rule applicable to trust funds, but in this case it cannot be regarded as mere surplusage. It must be read in connection with the qualifying language which immediately follows it: "*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.*"

The indenture thus by its express terms provides in effect that the Arboretum's resources must be used solely for its own purposes, the only exception being that plants which the Arnold Professor is willing to spare can be had by the Corporation for ornamenting the college grounds. This was the only provision for using Arboretum property for the separate benefit of the University.

The provision quoted above emphasizes the limited nature of the Corporation's control over the Arnold Professor. Further language in the indenture expressly limits the control which the Corporation may exercise over the Arboretum. Paragraph Third provides that the Arnold Professor "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.*"

The indenture did not say simply that the Arnold Professor was to be "subject to the control of said President and Fellows" as it would have if unlimited control had been intended. Some pains were taken to define and limit the Corporation's powers in terms of its then relationship to an existing institution, the Bussey.

Under Benjamin Bussey's will a large tract of land became vested, subject to certain life interests, in the President and Fellows "upon the trust and confidence" that they would establish an "institution" to be called the "Bussey Institution" and provide there a course of instruction in "practical agriculture" and allied subjects, and "cause such courses of lectures to be delivered there" at such seasons and under such regulations "as they may think best adapted to promote the ends designed"; and the will directed that a building be erected on the land "suitable in all respects for said institution." The residue of the testator's estate also came to the President and Fellows as part of the same trust, one-half of the income to "be appropriated to the support of said institution, and of such branches of instruction in the physical sciences, there or at Harvard College, as are subservient thereto, and connected with the great objects of said institution;" the remainder of the income to be divided equally between theological education and the law school.

At the time the Arnold indenture was signed, the Bussey Institution had just got under way. The stone building, which Mr. Bussey in his will had ordered erected for the accommodation of the "officers and pupils of said institution," had been completed, greenhouses had been erected, a faculty appointed, a curriculum established, and students enrolled.* The parties to the Arnold indenture thus had before them the example of a new, self-contained institution, attached to Harvard University but separate from the college, having its own distinct identity, its own personnel, and its own "great objects" as ends in themselves, and established under an express trust.

*The Harvard University Catalogue for 1871-72 describes the Bussey Institution in a separate section, as a "School of Agriculture and Horticulture," with a Dean and fourteen Instructors, a regular course of study, a separate student body, and separate entrance examinations.

The control to which professors in the Bussey Institution were subject was necessarily limited by the terms of the Bussey trust, which, like the Arnold indenture, was manifestly designed to create a self-contained entity with distinct and separate purposes of its own. Its professors were doubtless to be appointed by the Harvard governing boards by the same procedure as professors in the college, and the salaries were doubtless to be fixed with the approval of the Corporation. In these respects we agree with the R-G opinion (pp. 39-40). The control, however, which could be exercised over the Bussey professors was restricted in various ways. The subjects which they were required to teach were prescribed by the will, certain courses of instruction were required to be given at the Institution, and any instruction given at the college was restricted to subjects subservient to and connected with the *great objects of said Institution*. And, as the property and funds were held in trust, the professors could not be controlled in any way which would involve a failure on the part of the President and Fellows to manage the Institution solely in its own interest.

The indenture of 1872 refers to the control to which the Bussey professors "are *now* subject." It cannot be supposed that, in the very year in which the Bussey Institution was opened, its professors were being "controlled" by the Corporation in a manner inconsistent with the trust, nor does it appear that such was in fact the case.*

*It seems that in later years the Corporation has completely failed in performing its obligations under the Bussey Trust. The Bailey Report states (p. 5):

"With the loss of its degree-granting function and the transfer of a majority of its staff to the Biological Laboratories the Bussey Institution lost its individuality in research and teaching, and since 1936 has become a holding agency, whose

We disagree with the following statements in the R-G opinion:

"The terms of Benjamin Bussey's will indicate that he intended that the Corporation should have as much control over professors in the Bussey Institution as it had over instructors in any other department of the University." (P. 39.)

Certain votes of the Corporation "clearly show that Bussey professors were on the same footing *vis-à-vis* the Corporation as instructors in any other department of the University, and were subject to the same administrative controls." (P. 40.)

"The Bussey Institution was clearly an integral part of the University. Its professors were clearly subject to the same administrative controls as were other Harvard professors. It would have been fanciful to regard it as in any sense a separate or autonomous institution." (P. 41.)

We find no valid ground for supporting any of these statements.

In short, at the time the 1872 indenture was executed the Corporation's control over the Bussey professors was not unlimited. It had only such control as a trustee may properly exercise for the sole purpose of carrying out the trust purposes. The purposes of the Bussey trust clearly contemplated that the Bussey should be an institution conducted for its own great objects as ends in themselves and not for the general benefit of the trustee. By the express terms of the Arnold indenture the Corporation's control over the Arnold Professor is limited in the same way.

funds are utilized to further various inter-institutional activities."

It may be noted that in describing the Bussey Institution the Bailey Report (pp. 4-5) fails to mention the fact that the Institution is held in trust.

Not only the original Arnold Fund but all subsequent gifts to or for the benefit of the Arboretum, whether for its general purposes or for some special purpose, are held by the President and Fellows as trustees of the original trust. In the R-G opinion (pp. 33, 37) it is conceded that the part of the Arboretum Endowment which was given to it before the Sargent Memorial Fund campaign of 1927, so far as made up of gifts not accompanied by a designation of a particular purpose, "is to be held in accordance with the terms of the indenture of 1872." In our view there is no ground for excluding from this statement such gifts as were made for particular purposes. In our opinion every gift made to the Arboretum or to the Harvard Corporation for its benefit is to be held by the Corporation as trustee of the trust of 1872.

In the R-G opinion the contention is made that the Sargent Memorial Fund of 1927, and all gifts thereafter made to the Arboretum, are held upon a new and different trust from that of 1872, and to a large extent the conclusions of the opinion supporting the Bailey Plan, so far as concerns these later gifts, are based on this contention. We deal with this later, in part VII of this Report.

(c) *The Corporation's Duties as Trustee of the Arboretum.*

As trustee of the Arboretum, the Harvard Corporation unquestionably is subject to all the duties and obligations of an ordinary trustee, and cannot properly administer the trust to advance its own interests, i.e., the interests of the University of which the Corporation is the legal embodiment. The Corporation is in no sense the beneficial owner of the Arboretum property.

There is a fundamental difference between gifts to a charitable corporation outright, either for its general purposes or for special purposes within its corporate powers,

where the corporation becomes the "owner" of the property, and gifts to such a corporation upon an express trust, where the corporation does not own the property, but holds it like any other trustee for the sole purpose of carrying out the intention of the donors as set forth in the trust instrument. The distinction is stated in *Animal Rescue League of Boston v. Assessors of Bourne*, 310 Mass. 330, at pages 333-334:

"A person may make a conveyance or a devise to a charitable corporation either without any restrictions upon its use or for some designated purpose within the chartered powers of the corporation, and in either case the corporation becomes the exclusive owner of the property. Its subsequent use of the property, however, would be confined in the first case to the purposes for which it was organized and in the second to the particular purpose for which the property was given. It is in this broad sense that it has been sometimes said that such a corporation holds its property in trust for its corporate purposes [citing cases]. On the other hand, one may make a conveyance or devise in trust to a charitable corporation and, if accepted, the latter would be bound to use the property for the purpose in accordance with the terms of the trust. But there is a difference between an absolute transfer and one in trust to a charitable institution. In the former, the property becomes an asset of the corporation to be used in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes, while in the latter, the property is held by the corporation not as its own but in its capacity as a trustee and as an instrumentality of the settlor or testator in carrying out his directions in its use of the property."

See also *Chase v. Dickey*, 212 Mass. 555, 561-562.

It is true that our court sometimes refers to gifts to a charitable corporation outright, with or without a specification of the purposes for which they are to be used, as be-

ing held "in trust,"* but this phrase in such cases is used only in a "broad sense," as stated in the above quotation from the opinion in the *Animal Rescue League* case. As further stated in that opinion, where a gift is upon an express trust, the corporation holds the property "not as its own but in its capacity as a trustee and as an instrumentality of the settlor or testator in carrying out his directions in its use of the property."

Once the directions and intent of the creators of the trust are ascertained, the trust must be administered according to that intent. Latter day considerations of expediency or policy cannot be substituted for the intent of the donors. See *President & Fellows of Harvard College v. Attorney General*, 228 Mass. 396, 407-408; *Trustees of Andover Theological Seminary v. Visitors*, 253 Mass. 256, 285. It makes no difference that the terms of the trust are set forth in what Professor Bailey, with apparent impatience, calls "more or less rigidly worded bequests and indentures" (Bailey Report, p. 33).

An educational or other charitable corporation may accept funds in trust for the establishment of a new institution within the scope of its charter powers, and the performance of a trust so created will be enforced by the court.

In *Trustees of Andover Seminary v. Visitors*, 253 Mass. 256, the court was dealing with a theological seminary founded, as the Arboretum was, by gifts in trust to an existing educational corporation, Phillips Academy. In discussing the nature of this institution within an institution, Chief Justice Rugg said (pp. 268-269):

"Those who made the first gifts for the establishment of the Theological Institution in Phillips Acad-

*See Scott on Trusts, § 348.1; *Wellesley College v. Attorney General*, 313 Mass. 722, 724; *Mass. Charitable Mechanic Assn. v. Beede*, 320 Mass. 601, 610.

emy were its founders in the technical sense [citing English cases]. Although the trustees of Phillips Academy had been incorporated and had received donations for the establishment of the academy for general education more than twenty-five years before, yet there was no theological institution or department until the donations of those who executed as expressive of the terms of their gifts the three instruments already described and called the constitution, the associate statutes and the additional statutes. There was no incompatibility in making those gifts to an existing educational corporation and at the same time becoming, in the strictly legal meaning, founders of the new department, institution or school to be established within and as a corporate part of the preestablished academy. * * * The institution which they were endowing was in its aim and curriculum entirely distinct and separate from the existing academy."

In that case the court enjoined the further execution of a plan for closer affiliation with the Harvard Divinity School. After referring to the Theological Institution as "a public charitable trust" (p. 285), the court said that the tendency of the plan "as a practical matter is toward the complete disappearance of Andover with all its distinctive characteristics and its merger in the new theological school of Harvard" (p. 292) and that the provisions "in substance and effect place such a dominating power in Harvard as to disable the trustees and visitors of Andover in the exercise of their own free, untrammelled judgment from executing the will of its founders" (p. 294).

The Harvard Corporation as trustee of the Arboretum has a duty not to exceed the powers conferred upon it under the indenture, but it cannot discharge its duties merely by keeping within the limits of those powers. Like any trustee, it has an affirmative duty to promote the trust purposes actively and diligently. Among other things, it

must organize the administration of the Arboretum so that those who control its affairs are persons who have both the duty and the inclination to make it a strong institution and who are primarily concerned with carrying on its work. It must see that the trust funds are expended so as to bring about the maximum possible benefit to the Arboretum, and must deal with its living collections, its library and herbarium, so that they can be used for Arboretum purposes in the most effective possible manner. The Corporation must not be diverted from the single-minded, faithful and diligent performance of these duties by a desire to benefit Harvard botany or to advance the general interests of the University.

The governing principle, of course, is the trustee's duty of loyalty. Our Supreme Judicial Court has recently said, in *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 140:

"The general principles governing the conduct of a fiduciary in dealing with trust property have been frequently declared by this court. 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."

In Scott on Trusts, sections 170, 170.25, the rule is stated as follows:

"The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust, but because of the relationship which arises from the creation of the trust. A trustee is in a fiduciary relation to the beneficiaries of the trust. * * * In some relations the

fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust. It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries."

"A trustee occupies a position in which the courts have fixed a very high and very strict standard for his conduct whenever his personal interest comes or may come into conflict with his duty to the beneficiaries. As long as he is not acting in his own interest the standard fixed for his behavior is only that of a reasonable degree of care and skill and caution. When, however, the trustee acts in his own interest in connection with the performance of his duties as trustee, the standard of behavior becomes more rigorous. In such a case his interest must yield to that of the beneficiaries. * * *"

The rule is fully applicable to charitable trusts (Scott, sec. 379).

The rule thus stated is not mentioned in the R-G opinion. The writers of that opinion were, indeed, confronted with a difficulty in establishing that the Bailey Plan, which, as we shall see, was framed without any consideration of the fact that the Corporation was a trustee, and solely in the interests of the University, was nevertheless valid as to the Arboretum.

IV.

THE BAILEY PLAN WAS FORMULATED WITHOUT REGARD FOR THE OBLIGATIONS OF THE HARVARD CORPORATION AS TRUSTEE OF THE ARBORETUM AND WITH THE SOLE PURPOSE OF FURTHERING THE INTERESTS OF HARVARD.

On January 7, 1946, the Harvard Corporation voted to adopt the report prepared by Professor I. W. Bailey entitled *Botany and its Applications at Harvard*, in which he made sweeping recommendations intended to "integrate"

the activities and resources of nine "independent botanical agencies" affiliated with Harvard, among them the Arnold Arboretum, all for the purpose of benefiting Harvard's work in the field of general botany.*

The Bailey Report discusses the Arboretum at length, but fails to mention that its property is held in trust. The only reference to the indenture of 1872 is on page 7, where the writer contents himself with this statement:

"In an indenture executed in 1872 between the President and Fellows of Harvard College and the Trustees [under the Arnold will] it was agreed that the income from the fund should be used for the establishment of an Arnold Arboretum upon part of the Bussey Farm in West Roxbury, and to support an Arnold Professorship in the college. It was specified, in addition, that the funds were to accumulate until the principal had reached \$150,000."

There is no suggestion in the Report that the indenture created a trust. There is no mention of the Arnold Professor throughout the Report except in the passage just quoted.

A brief consideration of the Bailey Report amply supports our contention that the Plan was devised solely with a view to promoting the interests of the University in the broad field of general botany.

In essence the Plan involves treating the Arboretum, in the words of the Coordinating Committee of the Overseers, 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" (Report of the Coordinating Committee on Biological Sciences, pp. 8-9).

*The eight other botanical agencies are listed in the footnote on page 2, above.

In Dean (now also Provost) Buck's Foreword, written after the receipt by him of the Report setting forth the provisions of the Plan, and in contemplation of a discussion of the proposals by interested members of the University, he says:

"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."

The Plan throughout deals with the Arboretum as if it were indeed one of Harvard's "set of resources," thus referred to by Dean Buck, and therefore a "tool" of the University.

It may be fairly stated that the effect of the Bailey Plan would be to destroy the Arboretum as an endowed entity and to make its endowment of \$4,000,000 available as a fund for the support of Harvard botany in general.

In voting to approve the Plan the President and Fellows acted, of course, in entire good faith. But it is obvious that they had not given consideration to the origin and status of the Arboretum and the terms upon which it is held. They thus unwittingly disregarded the first duty of trustees, commonly referred to as the duty of loyalty, and proceeded to act in their own interests, i.e., in the interest of Harvard University at large, and not in that of their beneficiary, the Arboretum.*

*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.

The Plan proposes (pp. 34-37) to combine the Arboretum and the eight other "independent botanical agencies" in two administrative and budgetary "Areas" or "Institutes," and thus to integrate their activities and their resources for the benefit of botanical science as a whole, and in particular to improve and make more efficient the work of research and instruction in botany at Harvard.

On page 27, after referring to the past era in which the nine agencies had developed independently and had become the subjects of "encystment," the Report speaks of the fact that there has been "no effective administrative mechanism for dealing with the welfare of Harvard's botany as a whole," and says that in recent years progress has been made "in developing objective and unbiased discussions of the future welfare of the Department [of "Botany"], and of Harvard's botanical setup as a whole."

On page 31, after referring to Harvard's large investment in properties utilized for various botanical activities,* and its past accomplishments in the early stages of America's botanical developments, the Bailey Report proceeds:

"By efficient integration and utilization of these resources, Harvard can resume outstanding future leadership in the botanical field.

"It is essential, accordingly, to initiate a searching analysis of all of our botanical agencies and to attempt to formulate broadly conceived and fundamentally sound plans and policies for the future developments of botanical science at Harvard."

The section of the Report outlining the proposed new "administrative organization" states (p. 33):

"The complexities and the salient defects in the present botanical setup at Harvard are the heritage

*It is apparent from the context that the Arboretum trust fund is included in "Harvard's investments."

of 70 years of haphazard growth. Without a broad and soundly conceived plan for an integrated and well-balanced development of botany as a whole, various independent, often mutually antagonistic and financially competitive agencies were created and allowed to develop under the dominating control of influential individuals and under the aegis of more or less rigidly worded bequests and indentures. During a prolonged period of excessive individualism, there was no effective organization of staff members capable of formulating wise, unbiased opinions regarding general policies or of functioning in an efficient advisory capacity.

"If these difficulties are to be rectified and avoided in the future, it is essential to have efficient mechanisms for formulating sound judgments and policies regarding future trends of botanical development.

"How may present divergencies and complexities be integrated and simplified to attain such an objective?"

And at pages 34-35:

"It is evident to anyone who has been long and intimately associated with these agencies [the nine, including the Arboretum] that an efficient mechanism is needed for integrating their activities and for correlating them with those of the Department of Biology.

"Should the latter agencies be combined in one or two budgetary areas and administered by an advisory body comparable to the Department of Biology?"

The Report proceeds to answer the question in the affirmative. It states that the "activities of the 'orphan institutions' fall into two distinct, natural categories or areas," and accordingly proposes to set up (1) an *Area of General Morphology*, including the library and herbarium of the Arboretum and also the libraries and herbaria of the Gray Herbarium, the Farlow and the Botanical Museum, and "fields of research entirely or partly dependent upon such accumulations of preserved material, i.e.,

taxonomy, phytogeography, palaeobotany, comparative anatomy and descriptive aspects of economic botany" (p. 34); and (2) an *Area of Experimental and Applied Botany*, including the Arboretum "proper" and the four remaining "orphan institutions," and "research in plant genetics, plant physiology, horticulture, silviculture and the experimental aspects of economic botany" (p. 35).*

Professor Bailey describes the two Areas or Institutes as follows:

"In view of such facts as these, it appears advisable to combine the nine independent botanical agencies in two administrative and budgetary areas. A representative body with a theoretically rotating chairmanship, comparable to the Department of Biology, should be created within each of these areas. * * * Research in such subjects as mycology and developmental morphology within the Department of Biology should be integrated with activities in the area of general morphology, as should mycology, experimental morphology and plant physiology in the area of experimental and applied botany.

"To insure an adequate consideration of the future development of botany in its relationships to other biological disciplines, the chairmen of the two areal research bodies, the Chairman of the Department of Biology and the Director of the Biological Laboratories should constitute a Biological Council through which all major deliberations and recommendations regarding botanical, zoological and general biological matters should be transmitted to an appropriate Dean. . . .

"Such a system of administrative organization should insure a comprehensive and thorough consideration of the future welfare of botany as a whole. It would broaden the scientific outlook and integrate the activities of the more or less encysted independent botanical agencies." (P. 36.)

*The two Areas are identified as "Institutes" in the organizational chart included in the Bailey Report (p. 37), printed herein at p. 35.

After proposing that half of the salaries of "all botanists of professorial or potentially professorial rating" should be paid by the Faculty of Arts and Sciences through the Department of Biology, the Report proceeds (p. 38):

"The remaining half plus a research budget should be paid either through the area of general morphology or that of experimental and applied botany."

Although, as we understand it, the *quid pro quo* proposal for the division of salaries (see pages 38-40) has been or is to be abandoned in so far as the Arboretum is concerned, the funds of the Arboretum, which is included in both "Areas," are committed in unspecified amounts to a budget for general research which may or may not be undertaken with a view to the Arboretum's interests.

The Report gives to one or the other of the two Areas and to the Department of Biology effective control of appointments to the Arboretum staff. Thus on page 70 the following statement is made:

"Under the proposed scheme of re-organization, the initiative in preparing briefs for candidates [for professorships] might well become a responsibility of the areas of general morphology and experimental and applied botany, but the qualifications of each candidate should be examined and voted upon by the Department of Biology."

And on page 71:

"Recommendations of candidates for the more important non-professorial posts, particularly those having possible implications of permanency, should not be based solely upon the judgement of a single individual, but should be subjected to scrutiny by the staff either of the area of general morphology or of experimental and applied botany."

Many more statements might be quoted from the Report to indicate that it completely disregards the obligations of

the Arboretum trust, and contemplates the future management and control of the Arboretum as a mere adjunct of the Department of Biology, its resources being "integrated" with those of the other agencies for the general botanical purposes of the University.*

The functions of the Arboretum and the other "orphan institutions" would be tailored by the chairmen of the two Areas or Institutes and by the Biological Council to fit into a grand design for the general welfare of botany at Harvard. They would have importance not as ends in themselves, but primarily as a contribution toward the objectives of the overall scheme.

The programs laid down for the newly created Areas or Institutes are in effect substituted for the trust purposes as the primary object to which the resources of the Arboretum are to be devoted.

THE CARRYING OUT OF THE BAILEY PLAN WOULD INVOLVE THE HARVARD CORPORATION IN VARIOUS BREACHES OF TRUST.

The Bailey Plan, if put into full operation, would have a serious effect upon the work of the Arboretum and would be injurious to its future. The Plan involves a failure to keep faith with the many donors who have contributed so largely to the endowment of the Arboretum on the understanding that it would always be concerned with trees and shrubs and managed in its own interests as a separate institution. To effect the changes contemplated by the Plan without obtaining the sanction of a court would impair general confidence in the University's observance of trust

*It is even suggested that Harvard has the right to "eliminate" the independent agencies (p. 44), to "dispose of" the taxonomic activities of the Arboretum (p. 45), and to "abandon" the living collections of the Arboretum, although it is conceded that these should not be "casually sacrificed" (p. 53).

provisions, would seriously discourage future gifts to the Arboretum and might, indeed, be damaging to the University itself; and in our opinion such sanction could not be obtained.

It seems obvious to us that, so far as the Arboretum is concerned, the Plan involves the President and Fellows in a breach of trust in several respects.

(a) *The Administrative Features of the Bailey Plan are Incompatible with the Corporation's Duties as Trustee.*

As trustee of the Arboretum, the Harvard Corporation has, as we have seen, separate and distinct duties. In this capacity it must act solely in the interests of the institution whose property it holds in trust. In its ordinary capacity as the corporate body owning and controlling Harvard University, the Corporation is naturally interested in the welfare of botany as a whole. It is contended that the interests of Harvard in general would be better served if the resources of the Arboretum could be used in the interests of all Harvard botany, rather than as the endowment of a separate entity concerned with trees and shrubs. But the Corporation cannot properly use the Arboretum's property in this way any more than any trustee can use trust funds for his own benefit.

The indenture of 1872 provides for the care and management of the Arboretum by the Arnold Professor. It was thus intended by the parties to the trust that the Arboretum should be under the charge of a responsible official, concerned primarily with its welfare. As we have seen, the Arnold Professor is subject to a measure of control by the Corporation as trustee, but this control is by no means unlimited. It may be exercised only in a manner consistent with the Corporation's duty as trustee to conduct the affairs of the Arboretum with an eye single to the Arbore-

tum's interests, and so as to promote the trust purposes in the most effective possible manner.

Before the inception of the Bailey Plan, the trust provisions relating to the Arnold Professor appear to have been substantially complied with (except that for some years after Sargent's death there was no Arnold Professor, his functions apparently being vested in Ames as Supervisor). As we have pointed out above, it was the Arnold Professor or his equivalent who was primarily responsible for the budgeting of Arnold Arboretum funds and the determination of its program and policies, subject to the approval of the Corporation as trustee. With some minor exceptions this officer dealt directly with the President and the Corporation. No department of the University exercised administrative or budgetary control over the affairs of the Arboretum.

Under the Bailey Plan, questions of policy and programs, expenditures, appointments, promotions and salary increases are to be dealt with by the Corporation on the recommendations of the Chairmen of the Areas, the Biological Council and the Provost, and such questions are to be answered as the interests of general botany may require.

The "system of administrative organization" proposed by the plan is set up as an affirmative answer to the question posed by Professor Bailey with respect to the "independently endowed botanical agencies," including the Arboretum:

"Should the latter agencies be combined in one or two budgetary areas and administered by an advisory body comparable to the Department of Biology?"

So far as the Arboretum at least is concerned, the provisions of the plan for its *administration* by such an advisory body seems plainly to involve the Corporation in a breach of trust.

The Bailey Plan "integrates" the Arboretum with Harvard botany by splitting it in half. It places the Arboretum library and herbarium, and related taxonomic work, in the Area of General Morphology, and the collection of living plants, together with the remaining activities, in the Area of Experimental and Applied Botany (pp. 34-36).*

These two Areas or Institutes are described in the Report as "administrative and budgetary" Areas, each under its own "theoretically rotating" chairman. Both Areas are under a Biological Council, which is given general charge and direction of the acts of the Areas. The general purpose for which this Council is set up is to "insure an adequate consideration of the future development of botany in its relationships to other biological disciplines." It is through the Council that it is proposed that "all major deliberations and recommendations regarding botanical, zoological and general biological matters should be transmitted to an appropriate Dean" (p. 36).

"Such a system of administrative organization," it is said, "should insure a comprehensive and thorough consideration of the future welfare of botany as a whole" (p. 36) and "integrate" the activities of the Arboretum and the other independent agencies with those of the Department of Biology (p. 34).

The Harvard Corporation adopted the Bailey Report by the following vote:

"VOTED: that this board approves in principle the reorganization of Botany contained in the revised edition (D.R. No. 138) of Professor Irving W. Bailey's report of June 1945, as shown in the chart on page 37,

*In the chart (Bailey Report, p. 37) the Arboretum is not listed as such in the list of agencies assigned to the Area of General Morphology, but this is plainly a mistake. There is no "Sargent" herbarium and library and those of the Arboretum were meant.

and that the Provost be authorized to proceed with the reorganization."

It thus appears that in approving the "reorganization of Botany" the Corporation had particularly in mind the organizational chart in the Bailey Report. A copy of this chart appears on the opposite page.

The Bailey Report makes it clear that each of the new Areas or Institutes is to be administered as an integrated unit. It says: "The only alternative to unification of the independent agencies is the elimination of one or more of them" (p. 44).

With regard to the Area of General Morphology it is stated at pp. 45-46:

"Through unification and integration in a broadly conceived, strategic plan for the development of an area of general morphology, many economies and a much improved efficiency in the utilization of existing resources and personnel can be effected."

And at pp. 84-85:

"So long as our botanical institutions are kept separate in their present physical, budgetary and administrative units, most of the duplication must continue. If we can achieve a physical and administrative fusion of the units, however, we can eliminate [the duplication]."

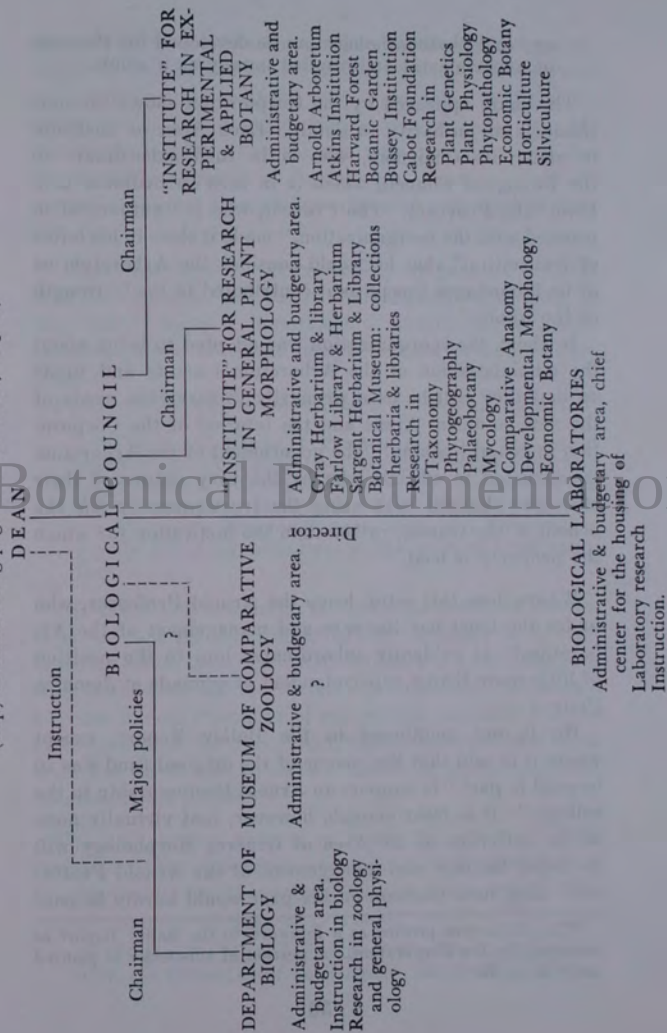
Again on page 45 the Report speaks of the role of "Harvard's taxonomic agencies" "in combination," and states:

"It seems essential . . . to unify and revivify rather than to eliminate taxonomic activities at Harvard."

And with regard to the research activities of the Area of Experimental and Applied Botany the Report states (p. 57):

"... integrated programs of fundamental researches in genetics, economic botany, plant physiol-

(Copy of Chart facing page 87 of the Bailey Report)



ogy and phytopathology can be developed for the area of experimental and applied botany as a whole."

The chart approved by the Corporation shows the new channels of authority in detail. Each Area or Institute is under its Chairman, who is in turn subordinate to the Biological Council, which is in turn subordinate to a Dean (the Provost). The Provost, who is "authorized to proceed with the reorganization," made it clear in his letter of transmittal* that he would consider the Arboretum as of no importance except as it contributed to the "strength of the whole."

In short, the reorganization was adopted to bring about the administration of the Arboretum's assets and funds so that they will be used primarily to serve the needs of the new botanical Areas and the interest of the Corporation in general botany. The government of the Arboretum is entrusted to officials who by the very nature of their office are charged with using the trust property for the benefit of the trustee, rather than the institution for which the property is held.

Where does this setup leave the Arnold Professor, who under the trust has the care and management of the Arboretum? It evidently subordinates him to the position of little more than a superintendent of grounds at Jamaica Plain.

He is not mentioned in the Bailey Report, except where it is said that the income of the original fund was to be used in part "to support an Arnold Professorship in the college." It is clear enough, however, that virtually none of the activities of the Area of General Morphology will be under the care and management of the Arnold Professor. Any such function on his part would hardly be con-

*This letter was printed as a foreword to the Bailey Report as approved by the Corporation. A portion of this letter is printed above at p. 25.

sistent with the "unification and integration" of programs, resources and personnel, and the proposed "physical and administrative fusion of the units," including the libraries and herbaria, and would be inconsistent with the new administrative chart. The same is true with regard to the "integrated programs of fundamental researches" to be carried on in the Area of Experimental and Applied Botany.

It has been pointed out repeatedly by persons familiar with the situation that the new arrangements, so long as they stand, make it impossible to secure any properly qualified person to accept an appointment as Arnold Professor.

Professor Merrill, the last Arnold Professor, has stated:

"The worst phase of the new plan was the power given to the Biological Council, which could block any suggestions or plans presented by the Director of the Arboretum, thus leaving the head of the institution very largely a director in name only, and it very thoroughly killed all initiative on the part of staff members."

One of the primary duties of the Corporation, as trustee, is to see that the Arboretum is ably managed in its own interests. But the Corporation appears to have created a situation which makes it virtually impossible to attract any new Arnold Professor of real stature and ability to the management of the Arboretum, where he would be a mere underling of those who have planned the complete subordination of his position.

The R-G opinion seeks to minimize the extent to which control over the Arboretum and the Arnold Professor is to be exercised by the Chairmen of the new Areas and the Biological Council. At page 53 it is said:

"In practice, the Chairmen of the two areas discuss with the directors of each agency the budget for the

agency, appointments to its staff, promotions, and all other matters relating to its administration. Each director still has the responsibility for the preparation of the budget for his agency, but it is now subjected to the scrutiny of the appropriate Chairman before transmittal to the Provost, who transmits it to the Corporation for final action."

What may have been done in practice should not be confused with what is provided for in the Plan. As the Bailey Report has been adopted by the Harvard Corporation, we must look primarily to what it provides rather than how far it has been carried out thus far. In any event the foregoing statement cannot be reconciled with a letter written on February 1, 1951, by Provost Buck to the Chairmen of the two Areas (not to the Director of the Arboretum).

"Dear Sirs:

"I enclose herewith two sets of forms on which I should like you to prepare the budget for the Arnold Arboretum for the year 1951-52. I shall appreciate the return of your estimates as early as possible and by March 1 at the latest. Will you please return one set of estimates including two copies of the Corporation salary sheets and retain the other set for your files.

"It is essential that your accompanying budget letter explain fully the purposes for which the budget allowances are requested. I am asking for this information in order that I may have a clear picture of your total budget, and the general financial plans for the coming year.

"Mr. Gillis, my financial assistant, will be happy to assist you and answer any questions which you may have in connection with your budget. Matters of budgetary policy, appointments, promotion, allocation and size of funds, etc. will remain in my hands. I shall, of course, be available myself to discuss any of these problems with you."

Again, the Ropes, Gray opinion states, at p. 54:

"The Bailey plan does not give to the Chairmen of the two areas or to the Biological Council any direct

authority over the Director of the Arboretum; they are merely to advise and assist him in coordinating Arboretum activities with those of other botanical departments of the University."

Apart from the fact that the Arboretum is by no means a "botanical department of the University," if the customary meaning be given to the word "department," there is nothing to justify the claim that the two Chairmen and the Council are merely to "advise and assist" the Director of the Arboretum in "coordinating" Arboretum activities. There is no suggestion in the Bailey Report that they are to communicate with the Director about anything. From beginning to end of that Report there is nothing to indicate what the function of the Arnold Professor or the Director of the Arboretum is to be under the Plan. His status in the future was evidently not regarded as of sufficient importance to be worthy of mention. The obvious intent of the Plan is to take from him all substantial authority and vest the control in the Chairmen and the Biological Council, subject only to the final decision of the President and Fellows, who, of course, if the Plan is put into full effect, will follow its objectives and adopt a course which will advance the cause of general botany, regardless of the special interests of the Arboretum.

It is said further at page 59 of the R-G opinion:

"It was not contemplated by the Bailey Plan, nor has it been the practice under it, that either the Chairman of the two areas or the Biological Council or the Provost should dictate policies for the Arboretum or usurp the managing powers of its Director. None of them is given any authority to do so. Their function is rather to assist the Director in coordinating the lawful activities of the Arboretum with the activities of the University's other botanical departments."

There is nothing whatever in the Bailey Report to justify this statement. It is nowhere suggested that the func-

tion of the Chairmen, the Council or the Provost is "to assist the Director" in any respect, or that he is to be left with any "managing powers."

Even if it be assumed that the functions of the new Chairmen, the Biological Council and the Provost are merely advisory, it seems to us clearly improper for a trustee, whose own interest is involved, to set up as its advisers between it and its beneficiary a group of men who are in a position to have dominant influence and will act primarily in support of the interest of the trustee and not in that of the beneficiary.

The writers of the R-G opinion proceed to say (p. 59) that, if the Director differs with the Chairmen or the Biological Council or the Provost, "he is free to present his views to the Board of Overseers through its Committee to Visit the Arboretum," and that finally "he has a right to appeal to the Corporation." Neither the flimsy right to reach the Board of Overseers through the Visiting Committee nor the alleged right of appeal is based on anything in the Report.*

What measure of success would be likely to attend the Director's presentation of his views, either to the Overseers (whose Coordinating Committee has already declared that the Arboretum should be a mere tool of the University to be used in the interests of botany as a whole and of the University), or to the Corporation, in the face of a contrary

*Indeed, the adoption of the Bailey Plan was followed by the abolition of the Gray Herbarium Visiting Committee. The present tendency is to abolish the visiting committees to the independent botanical agencies in favor of an overall Visiting Committee for the Department of Biology. Compare the situation 25 years ago, when there were visiting committees for six of the "orphan institutions" with the situation today, when there are only two, for the Arboretum and the Harvard Forest. If all the provisions of the Bailey Plan with respect to the Arboretum were to be carried out, there is no assurance that the Arboretum Visiting Committee might not also be abolished.

conclusion arrived at by Chairmen of the Areas, the Biological Council and the Provost in the interests of general botany? It would be contrary to the whole tenor of the Bailey Plan for the Corporation to give any weight to the separate interests of the Arboretum as against those of general botany and the interest of the University therein.

(b) *Under the Bailey Plan the Income of the Arboretum would be Diverted to Purposes Foreign to Those of the Trust.*

Under the terms of the indenture of 1872 the Arboretum is endowed as a separate institution having its own purposes, its own name, its own management and its own location. The indenture requires that the trust fund shall be held as "a separate and distinct fund" and that its expendable net income shall be devoted in every year to the support of the Arboretum and of the Arnold professorship, and to no other purpose.

It is the duty of the Corporation to see that the income of the Arboretum is used in its entirety for its benefit as an institution, under the general direction of the Arnold Professor, and not for the benefit of general botany or for the benefit of Harvard University. This requirement is not met merely by spending Arboretum income somewhere or other in the University for a type of work which might come within the scope of its endowment. The funds must be expended by or for the institution as such, and the work supported must be selected in accordance with the interest of the institution itself in having some particular activity then carried on.

The Bailey Plan was formulated without any regard to this requirement, or even to the fact that the funds are held

in trust. The Plan proposes to deal with the income of the Arboretum as part of a consolidated fund, including the income of various others of the so-called independent agencies and of the Department of Biology, and to devote the whole to general botanical purposes under the direction of those in control of the two Areas or Institutes, whether or not those purposes relate to matters with which the Arboretum has any concern, or, if they do, whether or not they involve expenditures which a trustee concerned solely with the interests of the Arboretum would incur as against its competing needs for the use of the money in other directions.

The provisions of the trust appear to have been substantially complied with by the Harvard Corporation until 1946. The Bailey Report recognizes that until the formulation of the new Plan the Arboretum, like the other "orphphan institutions," had been "separately financed and administered" (p. 26), and that all of these agencies had been "kept separate in their present physical, *budgetary* and *administrative* units" (p. 84). And the Plan proposes to end all this by "fusion" (p. 85).

The intent of the Plan, stated over and over again in the Report, is to "integrate" the independent agencies and to correlate them with the Department of Biology. The Plan combines not merely the activities of these agencies, but their income. The Arboretum has much the largest endowment of any of these agencies and is indeed recognized in the Report as "the goose that lays the golden eggs" (p. 53); and its funds are of particular interest to those desirous of advancing the cause of general botany at Harvard.

It is interesting to note how frequently *integration* of resources is set forth as an essential part of the Plan. The

botanical resources of Harvard and those of the independent agencies are treated indiscriminately as *belonging* to Harvard, and the funds of the agencies are assumed to represent sums "invested" by Harvard (p. 31). And it is declared that "by efficient *integration* and utilization of these resources, Harvard can resume outstanding future leadership in the botanical field" (p. 31).

"Integrate," according to Webster's New International Dictionary, means "to form into one whole."

The word is constantly used in the Report, not only with reference to the activities of the independent agencies, but also with respect to their resources. See, for example, pp. 35, 36, 43, 45, 49, 57.

There is nothing in the Bailey Report which provides that the Arboretum shall prepare a separate budget, and whether or not its income, as a matter of mechanics, is separately budgeted, its budget is of importance under the Plan primarily as a part of the overall financing of the new administrative and budgetary Areas, rather than as a budget for the Arboretum.

In dealing with the administrative features of the Plan, we have already discussed the integrated and unified character of the whole programs of the Morphological Area and of the research programs of the Area of Experimental and Applied Botany. It is quite evident that they are not to be planned or administered as Arboretum programs, and that the work conducted will not be Arboretum work in the sense that it is controlled, planned or initiated by the Arboretum, or that the Arboretum will have any connection with it apart from paying for it. Indeed, the needs and desires of the Arboretum, as such, are entirely immaterial, since the object is the "health and vigor of botany itself."

The combined income of the various institutions or agencies is to be expended for the benefit of Harvard botany in general, under the auspices of the two Institutes, and Arboretum moneys are to be used for work which is not designed to promote Arboretum purposes, is completely divorced from the Arboretum and cannot be identified as its work. Such expenditure represents a diversion of trust funds held for the benefit of the Arboretum.

Such use of the Arboretum's funds is objectionable essentially because it violates the duty of the trustee to administer the Arboretum's funds as the endowment of an institution. If not spent for the Arboretum, the income is diverted even if it is all spent for work which could come within the Arboretum's field, *i.e.*, for work relating to trees and shrubs.

It is also the duty of the Corporation, of course, to see that income is spent for activities of a sort which fall within the scope of the Arboretum endowment. Under the Bailey Plan, however, there would be expenditures of Arboretum funds for types of work entirely outside of the Arboretum's field.

The purposes of the Arnold Arboretum, like those of any arboretum, cover but a limited field of the large domain of scientific botany.

The word "arboretum" is defined in Webster's New International Dictionary as "a place where trees and shrubs are cultivated for scientific or educational purposes; a botanical garden of trees." All dictionaries define the word in substantially equivalent terms.

The Arnold Arboretum is what its name implies, namely, an institution devoted to work with trees and shrubs and not to general botanical science. This has been recognized from the beginning in all the various articles and reports which have appeared regarding the scope of its work.

Professor Sargent himself wrote (as quoted in R-G, p. 17):

"The Arnold Arboretum is a station for the study of trees as individuals in their scientific relations, economic properties and cultural requirements and possibilities."

Various other early descriptions of the Arboretum stating its purposes are quoted in the R-G opinion (pp. 11, 12, 14, 15), all of similar purport.

In the brochure, heretofore referred to, which was distributed so widely in the Sargent Memorial Fund Campaign in 1927, the service rendered by the Arboretum is thus described (p. 12):

"It serves science by progressively increasing the volume of the world's knowledge of shrubs and trees. It renders an economic service by acting as a research laboratory where trees and shrubs may be studied from the viewpoint of a fuller exploitation of their commercial possibilities. It renders a cultural service by serving as a center where landscape architects and gardeners may increase their knowledge of indigenous trees and shrubs and may become acquainted with hundreds of new species that are being brought to the Arboretum from all parts of the world."

Every contributor to the Arboretum endowment has known it as an institution entirely concerned with trees and shrubs, and has given to it as such.

Scientific botany covers many fields of no interest to an arboretum and others in which its interest is remote. Full implementation of the Bailey Plan will call for the use of the Arboretum income to finance the integrated programs of the new botanical Areas, regardless of the separate interests of the Arboretum.

As we have seen, the Bailey Plan proposes integration of part of the Arboretum's activities and funds into the

Area of General Morphology and the rest into the Area of Experimental and Applied Botany. The integration is to be accomplished by "physical and administrative fusion of the units" (p. 85), and each area is classified as an "administrative and *budgetary* area" (pp. 36, 37).

The greater part of the Arboretum's library and herbarium and its taxonomic activities are to be moved to Cambridge and there merged into the combined programs of the morphological Area or Institute as an unidentifiable part of an undivided whole (pp. 44-47, 50-51, 84-85). We deal with this phase of the Plan at greater length below in Section VI.

The "broadly conceived strategic plan" for this Area is described as including "research and instruction in taxonomy, mycology, phytogeography, comparative anatomy, developmental morphology, palaeobotany and certain aspects of economic botany" (pp. 43-44). Special emphasis is to be placed on palaeobotany (p. 49). The goal is that "Harvard [shall] attain outstanding international leadership in the area of general morphology by efficient use of its available funds, material resources and personnel" (p. 47).

It is quite obvious that whatever relation the foregoing program bears to the study of trees and shrubs is entirely incidental.* The object to be achieved is entirely different from the purpose for which the Arboretum is endowed. Yet substantially half the funds for the program is to be contributed out of Arboretum income.

In the Area of Experimental and Applied Botany there are to be "integrated programs of fundamental researches in genetics, economic botany, plant physiology . . . developed for the area of experimental and applied botany as

*For example, palaeobotany has no connection with the work of an arboretum, and phytogeography is of very remote interest.

a whole." The "laboratory aspects" of the research are to be "centered in Cambridge" and the field aspects in "Forest Hills" (p. 57). Toward the support of the work of this Area is to be devoted the balance of the Arboretum's available income, over and above that applied to the Area of General Morphology.

The Bailey Report provides that in each of the two new Areas the botanical agencies, including the Arboretum, shall contribute toward a "research budget" (p. 36). This would presumably result in an improper expenditure of Arboretum funds (see R-G opinion, p. 68). The more serious diversion, however, is the use of the Arboretum's entire available income to support the work of the new Areas, whose main objectives differ so widely from those of the Arboretum.

The importance of the Arboretum's income to the new botanical programs is indicated by the tabulation of the sources of funds for the support of activities in the Area of General Morphology (p. 50) and the similar tabulation of the sources of funds for the expenditures of the Area of Experimental and Applied Botany (p. 59). In the first of these tables it appears that, out of a total expense of \$150,660, the Arboretum would contribute \$72,000, three other independent agencies an aggregate of \$48,000 and the Department of Biology \$30,660. Similarly, toward the expenses of the other Area the Arboretum would contribute \$76,000, including \$20,000 from the Case gifts (which were gifts in trust for the benefit of the Arboretum), three other independent institutions \$35,000 and the Department of Biology \$25,060, the total being \$136,060.

As of June 30, 1944, the endowment of the Arboretum amounted to more than the aggregate endowments of all of the other eight independently endowed agencies (p. 29). At the time of the preparation of the Bailey Report the

"financial status of five of the nine agencies" was "unsatisfactory" (p. 30). Today, with its endowment amounting to more than \$4,000,000, the Arboretum's share of the aggregate endowment of the nine agencies may be somewhat larger. Even in 1943-1944 its income largely exceeded the total yearly expenditures of the Department of Biology and the Biological Laboratories (pp. 29-30).

It is not surprising that the Arboretum is described as "the goose that lays the golden eggs."

In the R-G opinion (p. 68), after a statement that under the *quid pro quo* arrangement for the payment of salaries (which is now in effect, though evidently to be abandoned) the Arboretum made a financial gain, it is said:

"But it should be noted that the provision of the Bailey Plan for payment by the Arboretum and other botanical institutions of certain expenses in connection with research (other than salaries) has not been put into effect. If it had been, these financial gains by the Arboretum might well have been reversed."*

If the research provisions have not been put into effect, the fact is immaterial. If they had been, the R-G opinion concedes that financial losses to the Arboretum might well have resulted. The Plan contemplates that they *shall* be put into effect, and the important question is, of course, as to the *powers* given the new management, whether or not they have as yet been exercised.

In the R-G opinion (p. 60) it is stated that, even if the Chairmen of the two Areas, or the Biological Council or the Provost, in deciding upon a particular use of Arboretum funds, are actuated by consideration of the welfare of botany as a whole, the use of the funds would be objectionable "only in those unusual instances when the welfare of botany at Harvard might be inconsistent with the

*Emphasis supplied.

welfare of the Arboretum, measured by the terms upon which its endowment is held."

We cannot agree that the instances of inconsistency would be unusual. The offices of the Chairmen of the two Areas, and the Biological Council, were set up for the very purpose of administering the general botanical programs described above, which are essentially different in their purposes, scope and emphasis from the purposes for which the Arboretum is endowed. Furthermore, the test is not accurately stated. An expenditure of funds not actually inconsistent with the Arboretum's welfare might be one not in its best interest at the time.

(c) *The Effect of the Bailey Plan would be the Destruction of the Arboretum as a Separate Identifiable Institution.*

We have seen that the Plan "integrates" the Arboretum with Harvard botany by splitting it in two and merging its administration, its physical resources and its income into the new administrative and budgetary Areas. Under these arrangements the Arboretum will inevitably be so dealt with that it will, in effect, cease to exist as an institution.

With respect to the Bussey Institution the Bailey Report makes this statement (p. 5):

"With the loss of its degree-granting function and the transfer of a majority of its staff to the Biological Laboratories, the Bussey Institution lost its individuality in research and teaching, and since 1936 has become a holding agency, whose funds are utilized to further various inter-institutional activities."

Under the Bailey Plan much the same thing would happen to the Arboretum.

The Bailey Report leaves nothing which can be identified as a program or purpose of the Arboretum as such. So far as it has a program, it will be laid down by the Chairmen of

the Areas, or by the Biological Council, and passed on to the Corporation through the hands of the Provost, whose general point of view has been plainly indicated. The income of the Arboretum will, in effect, be mingled with the income of the other "orphan institutions" and with funds of the Department of Biology, and the expenditures will be effectively controlled by those in charge of the Areas, so as to promote the unified programs of the Areas as a whole.

It would seem apparent that substantially all that would be left of the Arboretum as a separate entity, after full implementation of the Bailey Plan, would be the land and living collections in Jamaica Plain and the professional staff members immediately concerned with their management. Even these would be governed by the program for the Institute of Experimental and Applied Botany, rather than any program for the Arboretum as such.

The Coordinating Committee of the Board of Overseers in its report (pp. 8-9) makes this statement, which we have heretofore quoted in our letter of transmittal:

"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."

In expressing the belief that the latter is the "proper concept," the Committee evidently adopts the views of those who framed the Bailey Plan.

Although the Arboretum is, of course, not a *corporate* entity, it is an institution, a separate entity, which is affiliated with Harvard through the trusteeship vested in the President and Fellows. The indenture contemplated that

this should be the status of the Arboretum, that is, that it should be an institution identifiable as such and having existence in its own right. As such an institution it acquired through the years worldwide celebrity and recognition. Ever since an early period in its existence it has been the recipient of gifts to its endowment, aggregating a large amount. Every such gift has been made for the purpose of the institution itself and not for the advancement of the science of botany, or the interest of the University therein.

Before the adoption of the Bailey Plan the Arboretum was from the beginning consistently described as a coherent unit having its own staff, its own purposes and its own activities. This is apparent from the material collected in the R-G opinion (pp. 11-22). In 1923 it was so pictured by Sargent in his history, heretofore referred to, of "The First Fifty Years of the Arnold Arboretum." And in the brochure used in the 1927 Sargent Memorial Fund Campaign it is described throughout as a great institution in its own right, conducting its own activities as ends in themselves and not subservient to the botanical programs of Harvard.

The brochure emphasizes the separate identity and individuality of the Arboretum, and this could be made manifest by quotations from almost every page. We select some examples:

"The Arnold Arboretum stands in the front rank of the great collections of living trees and shrubs on the earth. It is the only collection of woody plants in the United States which can be compared to Kew Gardens. . . . Such a scientific institution must move forward with the advance of knowledge." (P. 3.)

As a result of the lease from the city "the Arboretum has all the advantages of perpetual ownership of the land it occupies and is relieved of burdens that weigh heavily upon the budgets of most similar institutions." (P. 7.)

"For fifty years the officers and agents of the Arboretum have continued to explore the forests of North America . . ." (P. 8.)

" . . . it is more complete than any other institution of its kind in the world." (P. 10.)

The Arboretum "serves science . . . It renders an economic service. . . . It renders a cultural service . . . Exactly how does the Arboretum fulfill this three-fold function?" (P. 12.)

"The service of the Arboretum in introducing new trees into America is by no means confined to adding to the beauty and grace of the American landscape." (P. 16.)

"The Arboretum serves as a storehouse of knowledge and a center of research." (P. 18.)

The Arboretum "is a research laboratory for experiments . . ." (P. 19.)

"In the chain of timber production the Arboretum is an important link." (P. 19.)

"Experiments in both cannot proceed without the scientific information which it is the practice of the Arboretum to assemble." (P. 20.)

"Since the foundation of the Arboretum three kindred institutions have been formed in America, the New York Botanical Garden, the Shaw Botanical Garden of St. Louis, and the Morton Arboretum near Chicago. . . . The Arnold Arboretum already exists as the desired northeastern station and will moreover be in a position to supply valuable assistance to the other arboreta as and when they are formed. These institutions are not competitive but cooperative. None appreciate more clearly than the administrators of these newer institutions the debt of the country to the Arnold Arboretum and the importance of continuing its work." (P. 21.)

" . . . the arrangement already referred to by which the Arboretum is relieved of the burden of maintaining roads and fences and of policing its grounds, produces the happy result that the whole of its income can be devoted to its plantations and collections, and to ex-

ploration, experimentation, and the publication of results or other methods of instruction." (P. 26.)

"In short, it is the case not only that the Arboretum has already been brought to a point where it is actually one of the best stations of its kind in existence, but it has been so organized that it can play its useful rôle amid exceptionally helpful surroundings more economically and with greater assurance of permanence and continuity than could be hoped for in a new institution." (Pp. 26-27.)

Throughout the brochure the Arboretum is defined as an "institution," and the emphasis everywhere is on what "it" has done, is doing and can do.

Other printed matter distributed during the Sargent Fund campaign is to the same effect. A widely circulated appeal, "For America's Tree Garden," reproduced a letter by David Fairchild, the horticulturist, which described the Arboretum as "the Great Pioneer Tree Institution of the American Continent," and made no mention of Harvard.

Even the speech given by Professor Ames during the Sargent Fund campaign, which is so heavily relied on in the R-G opinion (p. 44) with respect to creation of a new trust,* speaks of the Arboretum as "an influential unit," which is able to perform services beyond the powers of any other arboretum as a result of the help of "related institutions" at Harvard.

Lacking its own purposes and its own management and staff, and becoming merely a "holding agency," like the Bussey Institution, with no identity of its own, the Arboretum would, of course, be no longer a "unit" and no longer capable of being "influential." Virtually the only service it could render, apart from the maintenance of its living collections, would be to furnish funds for the general botanical programs.

*See pp. 67-68 below.

In the Bailey Report itself the Arboretum is referred to as "that institution" (p. 28), and is included among the so-called "orphan institutions" or "independent botanical agencies"; and it is said that through Sargent's work "the Arnold Arboretum became a Mecca, not only for the general public, but also for professional horticulturists, landscape architects and wealthy amateurs"; and that "the herbarium of the Arnold Arboretum is now internationally recognized as a center for the study of the ligneous floras of specific parts of the old world" (p. 8). And, as we have pointed out above, the Report recognizes that, until the formulation of the new plan, the Arboretum and the other orphan institutions had been "separately financed and administered" (p. 26) and that all these agencies had been "kept separate in their present physical, budgetary and administrative units" (p. 84).

The Bureau of Internal Revenue has for many years listed "The Arnold Arboretum, Jamaica Plain, Mass.," as an organization contributions to which are deductible for income tax purposes.

It is clear that those who have contributed to the endowment of the Arboretum have had it in mind as an organization which they could identify. Gifts to the Arnold Arboretum for its endowment or for its benefit or for its purposes have been plainly made for the support of the institution as such. They are not the same as gifts for general botany at Harvard, or gifts for the study of trees and shrubs at Harvard. The Bailey Plan would abolish the distinction. A gift for the Arboretum would be treated as nothing more than a gift to support botanical work in one part of the University or another.

The adoption of the Bailey Report thus involves a complete disregard of the intention of the many donors who have contributed to the support of the Arboretum. Apart

from legal considerations it seems highly undesirable that the Corporation should put itself into the position of breaking faith with those who have sought to aid the Arboretum itself.

VI.

THE PROPOSED REMOVAL OF THE GREATER PART OF THE ARBORETUM LIBRARY AND HERBARIUM IS NOT IN THE INTEREST OF THE ARBORETUM.

(a) *The Purposes for which the Library and Herbarium are Held.*

The Arboretum's books and herbarium specimens are held in trust for the same general purposes as its endowment funds and its living collections. All are held as resources of a unified institution, and each plays its part in serving the purposes for which the institution was founded and has been endowed.

Both the library and the herbarium were begun in Professor Sargent's house in Brookline. The herbarium, as Sargent said, was started in view of "the necessity of a collection of dried plants for the correct determination of the living collections and for successful dendrological studies."* The library, he wrote, "was begun in 1873 when the Director bought for his own use a few books needed for the arrangement of the future Arboretum."

Both the library and the herbarium were greatly expanded during Sargent's regime. In the beginning they were entirely financed by Sargent, and as time went on both by Sargent and from general Arboretum funds, or in some cases funds given especially for the purpose.

Sargent saw the library and herbarium as part of the tools needed by the Arboretum to carry on its underlying

*The statements by Professor Sargent are taken from his article "The First Fifty Years of the Arnold Arboretum," 3 *Journal of the Arnold Arboretum* 127 (1923). See also Sargent's Report for the Academic Year, 1879-80, quoted in the R-G opinion, p. 11.

purpose: "The Arboretum, in the conception of its managers, is a museum founded and carried on to increase the knowledge of trees." "... during its first half century it has been managed not merely as a New England museum but as a national and international institution working to increase knowledge of trees in all parts of the world ... [it] must be equipped to answer any question about any tree growing in any part of the world which may be addressed to it."

Accordingly he saw the library as containing "the books in all editions and languages devoted to the description of trees"; "... the library [is] intended to furnish the best possible opportunity for the study of trees." With regard to the herbarium: "If the Arboretum is to become a great institution for gathering and spreading information about trees and allied plants, specimens and a series of photographs of every species of tree in the world should be found in its herbarium."

Both in Sargent's time and since his death, the living collections and the herbarium have together grown as a result of Arboretum expeditions which brought back living specimens and dried herbarium specimens of trees and shrubs from distant parts of the world, especially the far east and the Pacific.

Since the earliest years, part of the Arboretum's budget has been devoted to the support of taxonomic work with ligneous plants, i.e., the description and classification of trees principally on the basis of structure, physiology, genetics and habitat. The herbarium and library were built up principally in this connection and are the principal tools used in the Arboretum's taxonomic work.

The express purposes of the trust are, of course, to create and maintain as large a living collection as possible and to support an Arnold Professor, who is to teach the knowledge of trees as well as care for and manage the whole

institution. Although not expressly provided for in the indenture, the Arboretum's taxonomic work, including the creation and maintenance of its library and herbarium, is proper because it enhances the usefulness of the living collections and contributes in general toward the knowledge of trees and shrubs and their cultivation.

(b) What the Removal to Cambridge Involves.

As we understand it, the modified plans for the new central botanical building provide for four stories and a basement. The top three floors are planned to house the libraries and herbaria of the Gray Herbarium* and the Arnold Arboretum. The ground floor is reserved for plant morphology and palaeobotany, and the basement for palaeobotany and for laboratories and seminar rooms for University instruction. The purpose for which the new combined library and herbarium would exist and be conducted would be the general purposes of the Area of General Morphology. The Bailey Report (p. 43) gives as the main reason for the unification: "Harvard, having attained outstanding recognition in both phanerogamic and cryptogamic taxonomy in the past and having entered into successive commitments and agreements for their support, can profitably retain and integrate them in a strong, broadly conceived development of general morphology." As we have already noted above, the Area would include research and instruction in taxonomy, mycology, phyto-geography, comparative anatomy, developmental morphology, palaeobotany, and certain aspects of economic botany, some of which are of no interest, or only remote interest, to the Arboretum.

The combined library and herbarium would be manned by a unified and reduced staff of curators and assistants,

*Now housed in a building which we are informed is admirably adapted for its purposes.

and the activities of botanists, research fellows, etc., working in the Area of General Morphology would center in the new morphological building. As we have pointed out above, the Bailey Report estimates that about \$150,000 a year would be required to support the activities of the Area of General Morphology, and plans that the Arboretum contribute just under half of this amount, or \$72,000, on the ground that this is the average amount it was spending annually for its taxonomic work at Jamaica Plain at the time the Bailey Report was written.

The activities of the Morphological Area with its combined facilities and combined staff would be administered by the men in control of the Area of General Morphology. It appears that the Arboretum would not have any voice in determining who was to be appointed or in what work he was to engage, what programs were to be undertaken, what books and periodicals purchased, what herbarium specimens acquired. The central purpose of the unification is of course to permit the use of funds, resources and personnel in a combined program, and it would be inconsistent with this purpose to allow the program or a part of it to be regulated for its own purposes by the Arboretum.

In short, the removal of the library and herbarium is not mainly a matter of rehousing the books and collections. It is important chiefly because it means also the merger of the Arboretum's taxonomic work into the unified and integrated program of the Area of General Morphology, a program for the support of which the Arboretum would contribute \$72,000 or more annually, plus costs of building operation.

There are conflicting estimates as to what the Arboretum would be charged in connection with the cost of operating the new building, in addition to the \$72,000 of its funds which are to be budgeted to support botanical work in the

Area of General Morphology. We have estimated \$30,000 a year as the total cost of operating the new building on the ground that such costs were estimated at \$22,000 as of 1947 and have risen some 40% since that time.

Although the Corporation voted to use general University funds to erect the building, it has made no provision for its maintenance out of general funds. Prior to the publication of the Ropes, Gray opinion it had been understood by the Director, on the basis of conversations with Professor Bailey, that the endowments of the Arboretum and the Gray Herbarium, whose books and collections would be combined in the new building, were to be charged with the whole cost of operating it. The entire income of the Gray Herbarium is only about \$30,000, so that the Gray could hardly be expected to bear more than \$5000 of the cost of operating the new building. This would leave a balance of about \$25,000 to be borne by the Arboretum. On the other hand, the R-G opinion (p. 78) estimates the annual operating costs at \$22,000 to \$25,000 and states that the Arboretum's share of this would be 40% to 45%, or about \$10,000.*

There are also conflicting estimates as to what it would cost to provide adequate and safe housing for such parts of the library and the herbarium specimens as are to be left in Jamaica Plain, and as to the amount which would be saved in Jamaica Plain operating costs by the move to Cambridge.

These estimates involve questions of fact which we do not think can be conclusively determined one way or the other on the basis of the present evidence, and which in any event we do not regard as controlling the question of whether or not the proposed move should be made.

*It should be noted that all estimates are of little value in the face of constantly rising costs.

(c) *The Legality of the Proposed Move.*

As we have indicated, the removal of the library and herbarium must be considered as part of the general plan to merge the taxonomic work of the Arboretum into a unified program for general morphology. In our opinion the present plan is improper because it will not only not promote Arboretum purposes, but will have definitely the reverse effect.

First: The proposed move will end the Arboretum's control over the funds, resources and personnel it has hitherto employed in taxonomic work. This work, as we have seen, is justified only to the extent that it is necessary and appropriate to carry out the purposes of the trust. The work to be carried on in the new central botanical building will not be planned from this point of view and cannot be justified on this basis. It will evidently have no connection with the Arboretum.

Second: The proposed unification would commit the Arboretum to excessive expenditures for morphology at the expense of its living collections and would prevent flexible use of its income.

The Bailey Report fixed the amount to be expended by the Arboretum in the Morphological Area on the basis of what was called "past normal expenditures" for taxonomic work. Actually these expenditures represented an abnormally high proportion of Arboretum income in the years before the Bailey Report was written because of the great expansion of taxonomic activities under Dr. Merrill, and because outside work was perforce curtailed by the shortage of labor during the war. The Bailey Report commits the Arboretum to expenditures in the Area of Morphology of some \$72,000 a year plus costs of building operation which would come to \$15,000 a year at the very least,* making a

*Taking the R-G estimate of only \$10,000 as the Arboretum's share of Cambridge building operations, plus \$5000 as the amount

minimum total of \$87,000. A commitment of this size is definitely excessive in the opinion of the present Director of the Arboretum.

The planned unification is also detrimental to the Arboretum because it divides its income rigidly between Experimental Botany and Morphology. The Arboretum is endowed as one institution, whose work must be viewed as a whole, and each phase of whose work must be assessed from time to time in terms of what it contributes to the general purposes for which the Arboretum's property is held. From time to time emphasis may be placed on one or another of the Arboretum's activities, depending on which under the circumstances then existing represents the most effective way of using the Arboretum's resources. It is therefore important that flexibility be preserved. For instance, it may prove that in some years it will be desirable to cut down other work in order to finance an expedition of particular interest to the Arboretum or some particularly promising research project, or to spend a considerable amount on the Arboretum grounds, or to take advantage of the talents of some horticulturist especially qualified to make progress in the Arboretum's work. This of course is not possible if the Arboretum is committed to a large fixed annual expenditure to support the Area of General Morphology.

Third: As we have previously emphasized, the proposed unification of taxonomic and morphological activities, including libraries and herbaria, is entirely inconsistent with the existence of the Arboretum as an institution in accordance with the terms of its endowment.

The Harvard Corporation, as Arboretum trustee, must decide which of two alternatives it would pick if it were

of Jamaica Plain building costs allocable to housing the "working collection" which R-G advises be retained in Jamaica Plain.

acting solely as Arboretum trustee and had no interest in Harvard in general. One is to plan the expenditure of the Arboretum's funds, and the use of its books and collections, for taxonomic work primarily on the basis of the recommendations of the Director and staff of the Arboretum. The other is to go ahead with a plan whereby Arboretum funds would be spent, personnel selected, programs planned, books and specimens acquired, in accordance with the recommendations of officials charged with administering a unified program for general morphology as a whole. It seems to us that the trustee could only pick the former as being the better plan for promoting Arboretum purposes.

VII.

THERE IS NO BASIS FOR THE ROPES, GRAY ARGUMENT THAT THE SARGENT MEMORIAL FUND AND OTHER LATER GIFTS ARE HELD, NOT UNDER THE ORIGINAL INDENTURE, BUT ON DIFFERENT TERMS WHICH JUSTIFY THE BAILEY PLAN.

(a) *The Sargent Memorial Fund.*

A large part of the R-G argument in defense of the Bailey Plan is based on the surprising claim that the Sargent Memorial Fund, raised shortly after Professor Sargent's death in 1927, is shown by the solicitation material to have been given to the Corporation to hold upon a new trust, different from that of 1872. The solicitation material, on which the R-G opinion relies, consisted chiefly of the elaborate brochure, heretofore referred to, which is said by R-G (p. 20) to have been "generally recognized as setting forth the terms of the Sargent Memorial Fund."

It is necessarily conceded by R-G that the Corporation received the new gifts *as trustee*, but it is contended that a new trust was created, enlarging the scope of the permissible activities of the trustee, and justifying the Bailey

Plan so far as concerns the use to be made of the Memorial Fund and all gifts made to the Arboretum thereafter.

It is conceded by R-G (p. 33) that substantially all gifts made before the campaign for the Sargent Memorial Fund are to be used for the purposes of the trust of 1872. It is said, however, that these gifts comprise only about a quarter of the total endowment (p. 37).

In support of the argument that a new trust was created, the R-G opinion seizes upon one sentence in the brochure, stating in substance that of the additional income needed a part should be used to increase the research staff of the Arboretum in order to enable it to take an influential part in the scientific work of the other botanical stations and departments (R-G, pp. 20, 38, 70). But this does not involve any *new* trust, as the use of funds for this purpose is fully authorized under the terms of the indenture of 1872, provided the work supported is in the interest of the Arboretum. The R-G opinion indeed appears to concede that the research activities referred to are authorized "by implication" under the terms of that indenture (pp. 64, 79).

It is clear to us that there is no ground whatever for the contention that a new trust was created in 1927. The purpose for which the Memorial Fund was raised was to increase the existing endowment of the Arboretum as it had been established and theretofore conducted by Professor Sargent. The uses to be made of the new fund as stated in the solicitation material are plainly within the scope of the original trust. There is nothing whatever in that material which would lead a donor to suspect for a moment that he was being asked to contribute to a new trust, or that the separate status of the Arboretum was to be affected in any way.*

*Under the rule of *Cary Library v. Bliss*, 151 Mass. 364, 376-377, gifts made to or for the Arboretum after the original trust was established are to be held upon the terms of that trust unless a

We may fairly assume that it is extremely unlikely that a fund raised in memory of Professor Sargent as a contribution to the great work which he had done at the Arboretum, and to insure that it would continue to progress, should be given upon a trust different from the one he knew and to which he gave legacies in his own will.

Professor Sargent died in March, 1927, and the plan for raising the fund was instituted only a few months later. By his will he left, in addition to a legacy of \$20,000 for the increase of the library of the Arboretum, a legacy of \$10,000, of which the income was to be added to the principal for 100 years and to half of the resulting principal for a second hundred years. After the respective periods of accumulation it was provided that the net income of each half should be

"expended for the care and maintenance of the Arnold Arboretum according to the trusts and conditions upon which said Arboretum is now held under a certain indenture dated the twenty-ninth of March 1872 . . ."

The will provided that, if the income should cease to be accumulated or used as directed, the principal with accumulated interest should go to the Museum of Fine Arts.

There is a short answer to the R-G argument regarding a new trust. Even if a new trust had been created enlarging the scope of the Arboretum activities beyond the limits of the trust of 1872, and covering the matter suggested by R-G as new, this would in no way support the validity of the Bailey Plan with respect to funds given the Arboretum in 1927 and thereafter. All of the points heretofore presented in this Report as to the improprieties of the Bailey

contrary intention is indicated. The Sargent Fund material affirmatively indicates an intention to add to the funds held under the original trust.

Plan would still be fully applicable. The new funds being held in trust could not be used to advance the interest of the trustee in general botany, and the administrative arrangements of the Bailey Plan and the integration of assets therein provided for would be just as improper as under the original trust. And the alleged new trust would in no sense convert the Arboretum into a tool to be used by the trustee for its own purposes.

But it is obvious that no new trust was intended. The general purpose for which the addition to the endowment was sought is thus stated in the brochure:

"It remains for those who knew and honored the leader who has died, for those who would encourage research and the collection of exact knowledge in the field in which he labored, and for those who would foster the important arts of arboriculture and gardening in our country to see to it that the *Arboretum shall go on uninterrupted* to a full realization of the vision Professor Sargent saw steadily and whole." (P. 4.)

And again:

"In the amassing of this Memorial Fund the participation of the friends and admirers of Professor Sargent is invited, of those who are interested in the *preservation and continued growth of a great institution*, of believers in the value of research and of the quest of scientific knowledge, and of all lovers of trees and shrubs, of parks and gardens, and of natural beauty as an important cultural element in life." (Pp. 28-29.)

And the particular uses to be made of the new funds are explicitly stated in the brochure. This document, as is said in the R-G opinion, "contains a clear statement . . . of the uses to which the increased endowment would be put" (p. 35). After stating that "the whole of its income

*The italics in this and succeeding quotations from the brochure are ours.

can be devoted to its plantations and collections, and to explorations, experimentation and the publication of results or other methods of instruction" (p. 26), the brochure proceeds to state the uses to be made of the new funds as follows (pp. 27-28):

"The Arboretum's present income from endowments is not more than \$60,000; whereas its average expenditure during the last five years has been \$80,000, with a pretty steady tendency to increase. Even if the costs of maintenance do not rise, at least \$20,000 a year will be needed to cover the current deficits. They are now met by gifts which, from the standpoint of sound finance, should be added to principal. But costs of operation will increase. 'Additional funds are needed,' says Professor Oakes Ames, the newly appointed Supervisor, 'not only for the upkeep and development of the existing collections but for making possible an increase in the research staff and to enable the Arboretum through its personnel and resources to take an influential part in the scientific work of the other botanical stations and departments, including the Harvard Forest and the experiment station at Soledad in Cuba.' At least \$10,000 a year ought always to be available for the expense of exploration and collection. Five thousand dollars to \$10,000 more ought to be similarly available for the upkeep of the Library, and for the expense of publishing the results of investigations. Thus it would be unsafe to look ten or fifteen years ahead without providing as much as \$50,000 annual income, in addition to what is now received from endowments."

And again at page 34:

"That the Arboretum has been able for many years to make both ends meet through the annually renewed generosity of friends and admirers of its Director and his work is a remarkable circumstance. But it is no criterion for the future. *No great institution* can be expected to live from hand to month. Its continued effectiveness depends upon its ability to meet operating expenses out of current income from endowment. If

the Arboretum is to continue without loss of momentum it must therefore have an addition of \$1,000,000 to its permanent endowment."

The brochure thus sought an addition of \$1,000,000 to existing trust funds, which, as the R-G opinion concedes, were held under the terms of the original trust of 1872.

The statement of Professor Ames, which appears in the first of the above quotations, is the sentence relied upon in the R-G opinion. It suggests the use, in order "to take an influential part in the scientific work of other botanical stations and departments," of what would appear to be one-fifth of the additional income which it was hoped would be yielded by the additions to the existing endowment. This would hardly suggest to anyone who read the brochure and made a gift to the Memorial Fund that the *entire* fund was to be held, as is argued by R-G (p. 71), upon a new trust, nor indeed that any part of it was to be so held.

No change in the status or activities of the Arboretum is to be implied from Professor Ames' statement, which merely emphasizes co-operation with other botanical stations and departments.*

Such co-operation, at the initiative and under the direction of the Arnold Professor, is certainly within the scope of the indenture of 1872, and the Arboretum had been so engaged for a long period of time. The brochure states (p. 24) that the facilities of the Arboretum are "augmented at no cost to its own endowment by close proximity to and intimate association with other related facilities," and that the personnel of the botanical and other zoological departments of Harvard "will always be available to the Arboretum for collaborative work." The Bailey Re-

*It might be inferred from the R-G opinion (pp. 20-25, 34-35, 44-45) that Professor Ames and Mrs. McKelvey both endorsed the Bailey Plan. In fact, after grasping its purport, they both opposed it strongly.

port itself (p. 9) states that the resources of the Arboretum were being utilized, among other things, in various kinds of special research "in co-operation with other agencies." Such co-operation, engaged in for the benefit of the Arboretum, in no way affects its existence as a separate institution, and it does not involve any integration of funds nor any change in the administrative relation between the Corporation and the Arboretum (and its Arnold Professor) which was established by the trust of 1872.

Co-operation between the Arboretum and other botanical agencies at Harvard under the direction of the Arboretum staff is, of course, unobjectionable and desirable, provided it is limited to matters within the normal activities of an arboretum and is undertaken only when it is in the interest of the Arboretum, and not conducted for the purpose of advancing the interest of the trustee in general botany. The test is not merely whether the particular activity falls within the class of activities in which the Arboretum might properly engage under the terms of the trust, but whether it is an activity in which a trustee, motivated solely by concern for the interests of the Arboretum, would cause it to undertake at a particular time, in preference to other activities.

There is nothing whatever in the brochure from beginning to end which suggests in the remotest way that contributions were being asked for purposes not within the scope of the existing trust. It is not intimated in any way that the management of the Arboretum is to be changed, that its funds are to be mingled with the funds of other agencies, or that its independent status is to be affected. There is no intimation that the donors were being asked to contribute funds for general botanical programs of the University. Thus, as we have pointed out above, even if

a new trust had been created, there is nothing in the brochure that could justify the Bailey Plan.

On the contrary, throughout the pamphlet entire emphasis is on the Arboretum as a separate institution having purposes of its own for which, and not for Harvard College, gifts were sought. Stress is laid throughout on what the Arboretum has accomplished in horticulture, and by increasing the knowledge of trees and shrubs, and on its increased usefulness in this field which would be the result of a substantial addition to its funds.* Where Harvard is mentioned it is for the purpose of showing the benefits flowing to the Arboretum through its connection with the University. Its administration by Harvard as trustee is referred to as an assurance of "permanence and continuity of policy", and as affording the Arboretum the benefits of scientific work carried on at Harvard "at no cost to its own endowment" (brochure, p. 24).

If the brochure had any bearing on the permitted scope of the Arboretum's functions, its effect would be to define rather than to enlarge them. Far from seeking funds primarily for the advancement of botany in general, the brochure, as we have already indicated, emphasizes that the Arboretum is an institution concerned with trees and shrubs, especially its living collections.

If pages 9 through 23 of the brochure are examined, it will be found that the appeal for funds was aimed first at horticulturists and landscape gardeners, and second at commercial growers of trees, such as fruit growers and timber companies.† Where the brochure mentions the scientific and research aspects of the Arboretum's work, it refers to matters immediately relating to trees and shrubs.

*See the quotations from the brochure on pages 51-53, above. Many others to the same effect might be added.

†See the quotation from p. 12 of the brochure, at p. 45, above.

For instance, the importation of a pear tree showing a high degree of resistance to blight; research into scientific forest culture so as to insure a plentiful supply of timber; and selective breeding and hybridization of trees so as to increase crops and timber production. The library and herbarium are mentioned especially as being of value to foresters, and an example is given of their being used by Chinese botanists preparing a work on tree forms.

The last sentence in the pamphlet states: "It was the vision of its founder that all the hardy plants of the world should be represented in the Arboretum—a vision which it will take time and money to realize."

(b) *The Case Gifts.*

In the R-G opinion (pp. 36-37) there is a statement with respect to recent large gifts made by two of the Case sisters for the benefit of the Arboretum. It is said that "it is not likely that the Case sisters intended that their gifts should be upon the terms of the indenture of 1872," and that in fact the "gifts may be held upon even broader terms" than the supposed terms of the Sargent Memorial Fund. This last statement, which appears in a footnote on page 37, is not explained; and we find no ground whatever for either of the statements.

As a matter of fact, there were three Case sisters, one of whom, Mrs. Caroline S. Freeman, is not referred to in the R-G opinion. She was the first of the sisters to make a gift to the Arboretum. She died in 1919, leaving, in memory of her mother, a gift of \$25,000 to the Harvard Corporation, "to be known as the Laura Lucretia Case Fund, the income thereof to be used for extending the work of the Arnold Arboretum." This bequest became effective *before* the Sargent Memorial Fund campaign, and during Professor Sargent's lifetime.

The other two sisters, who had large estates in Weston, with greenhouses and extensive landscaping and plantings, made their gifts and bequests in the early 1940's. Both were friends of Professor Sargent, whom they frequently consulted about horticultural matters, and both took great interest in horticulture and in the Arboretum.

Miss Marian Case by her will left all her real estate and a large legacy to the Harvard Corporation "for the use and benefit of the Arnold Arboretum, the income only to be used for the general purposes of the Arboretum." She imposed no restrictions upon the use of the property "except that the land or its proceeds and the pecuniary bequests shall be used for the general purposes of the Arnold Arboretum."

Miss Louisa Case made an *inter vivos* gift in 1942 of her large estate in Weston to the Harvard Corporation for the benefit of the Arnold Arboretum, together with \$50,000 in cash for its maintenance. It was specified that the cash should constitute a fund to be called "The James Brown Case Fund," in memory of her father, and should be used for the benefit of the Arboretum. By her will she left the remainder of her real estate and two-thirds of the residue of her property to the Harvard Corporation "to be added to The James Brown Case Fund in the hands of said corporation as established by gift from me in 1942, for the general purposes of the Arnold Arboretum." Her will, like her sister Marian's, imposed no restriction upon the use of the property except that the land or its proceeds and the bequest should "be used for the general purposes of the Arnold Arboretum."

Marian and Louisa each expressed in her will the "earnest hope" that her land would be used "as an adjunct to the Arnold Arboretum in order that the work of that institution may be amplified in a non-urban center reasonably close to the City of Boston."

Marian and Louisa had no interest in or contact with Harvard University as a whole. The provision for the Arboretum in Marian's will and the *inter vivos* gifts made by Louisa were the subject of much discussion by them with Dr. Merrill, the Arnold Professor, during which they showed that their interest was entirely in the Arboretum as a horticultural institution.

Notwithstanding the foregoing facts the R-G opinion even goes to the length of saying (p. 27, note 1) that the gifts of Louisa Case were not held in trust at all, basing this on the statement that the *inter vivos* gift of real estate was "outright" to the Harvard Corporation. The word "outright" appears in a letter written by Miss Case to Dr. Merrill on August 26, 1942, some weeks before the gifts were made. After a reference to Miss Case's "proposal to present" her estate in Weston "with a certain endowment to the President and Fellows of Harvard College for the benefit of the Arnold Arboretum," the letter proceeds:

"1. I wish to present outright to the President and Fellows of Harvard College for the benefit of the Arnold Arboretum the following property located in Weston, Mass. [Then follows a description of the real estate.]

"2. With this property I also wish to present \$50,000 either in cash or securities which will be acceptable at current value by the Treasurer of Harvard College.

"3. I present both the estate and the endowment without restrictions, except that both be used for the benefit of the Arnold Arboretum of Harvard University."

The word "outright" in paragraph 1 obviously means no more than that the trustee was to have the title of the real estate in fee simple.

It is plain that all of the Case sisters intended that their gifts should be held by the Corporation in trust for the Arboretum under the indenture of 1872.

VIII.

THERE IS NO BASIS FOR THE CLAIM THAT THE ARBORETUM CAN BE DEALT WITH AS A MERE "DEPARTMENT" OF THE UNIVERSITY.

Apart from the contention that the sums given to the Sargent Memorial Fund were to be held on a new trust, the R-G opinion advances the argument that the Arboretum is a "department" of Harvard University, that it is so described in the brochure, and that as a department it can be freely controlled and administered by the Corporation in the manner provided for by the Bailey Plan.

But calling the Arboretum a "department" in no sense determines its legal status. An institution like the Arboretum, whose endowment is held in trust by the President and Fellows may, of course, be loosely referred to as a department, but such use of the word throws no light on the nature of the control which the Corporation may exercise over it. The powers and duties of the Corporation with respect to it are determined by the terms of the instrument creating the trust.

The R-G opinion (pp. 42-43) would have it that the Arboretum cannot be at the same time a "self-contained institution," as we have called it, and a "department" of the University. But clearly it can, if the word is used in a general sense. In *Trustees of Andover Theological Seminary v. Visitors of the Theological Institution in Phillips Academy in Andover*, 253 Mass. 256, which we have heretofore cited, the court referred (p. 269) to the Theological Institution as a "new department, institution or school." In the very next sentence the court referred to it as "the institution," describing it as being "in its aim and curriculum entirely distinct and separate from the existing academy" and as being "new in every particular except that its administration was entrusted to

an existing educational corporation." In the following parts of the opinion repeated reference is made to it as an institution and, its property being held in trust, the decision was based on the principle that the intention of the founders as set forth in the instruments creating the trust must govern the use of the funds.

Ropes, Gray have collected various early letters and writings which, it is argued, indicate that the Arboretum is a botanical department of the University.

There are quoted, for instance (pp. 7-8), two letters from George P. Emerson (one of the three trustees under James Arnold's will), written to Dr. Peabody and President Eliot in 1869. These letters show that Emerson had various preliminary ideas for the use of the Arnold Funds, which were not carried out. We do not think either of them can properly be used to characterize what was finally done under the carefully drawn, definite trust agreement of 1872.

In the R-G opinion (pp. 10, 42), the Corporation minutes of March 18, 1872, are twice quoted as authorizing "a contract for an Arboretum at the Bussey Inst." This is incorrect, because the quotation is not from the vote of the Corporation but from a marginal heading, inserted in all probability by a clerk who copied out the minutes.

Also cited are early descriptions of the Arboretum written after the indenture of 1872 was executed. Obviously, such remarks cannot affect the meaning of the trust instrument and would not be considered by a court in interpreting it.* And it is conceded by Ropes, Gray that substantially all gifts made before 1927 are held under the terms of the original trust. Furthermore, if anything, the

*President Eliot's reference to the Arboretum in 1879 as a department of the Bussey Institution was perhaps natural, because up to then there had been no Arnold funds available for its support, and it was helped out by Bussey funds. Of course, the President was in error.

material collected at pages 11 to 16 of the R-G opinion emphasizes the status of the Arboretum as an institution in its own right.

It is also contended that the Arboretum is a department of the University because of the provision in the indenture of 1872 giving the Corporation the same control over the Arnold Professor as it then had over professors in the Bussey Institution. We have already dealt with this contention in part III (b), where it is pointed out the Corporation does not have the same unlimited control over the Arboretum as it does over an ordinary department of the University like the Department of Biology.

The assertion that the Arboretum is an ordinary department of the University appears, however, to be based primarily on one statement in the brochure (p. 24) in which the Arboretum is referred to as "administratively a department of the University."

This phrase occurs in a section of the brochure headed "Responsible and Efficient Management", which describes how the Arboretum benefits from being connected with Harvard:

"... it would be hard to imagine more ideal arrangements than those which surround the Arnold Arboretum, or arrangements which guarantee to the contributor a greater certainty that his money will be economically and profitably employed. The title and ultimate responsibility for the Arboretum is lodged in the President and Fellows of Harvard College as trustees. This guarantees permanence and continuity of policy. Being administratively a department of the University, the facilities of the Arboretum are furthermore augmented at no cost to its own endowment by close proximity to and intimate association with other

*A statement by Tamblin and Brown, a New York fund-raising firm temporarily employed during the Sargent Fund campaign, is also represented by Ropes, Gray to be authority for the Arboretum's being a department of the University (p. 17).

related facilities . . . The personnel of its botanical, entomological and other zoological departments will always be available to the Arboretum for collaborative work. This fact assures both good work and economy."

The statement that the Arboretum is "administratively" a department means in this context nothing more than that the Corporation has the "title and ultimate responsibility" as trustee. The statement cannot be intended to contravene the treatment of the Arboretum, from beginning to end of the brochure, as an institution, an entity in its own right plainly separate from, and wholly unlike, the ordinary departments of the college, such as the Department of Biology. There is no suggestion anywhere in the brochure that the Arboretum may be treated as an ordinary department, and lose its separate individuality in the general botanical interests of the college. There is indeed no intimation that the status of the Arboretum was to be altered in any way, or that the original trust was not to govern the use of the funds.

In the R-G opinion the above-quoted statement in the brochure that the Arboretum is "administratively" a department of the University has been utilized as a basis for asserting that it is a department, omitting the word "administrative" or any other qualifying word.

Thus section II of the opinion (p. 5) is headed: "The Establishment and Growth of the Arnold Arboretum as a Botanical Department of Harvard University" (and see the similar heading B on page 10).

On page 26 of the opinion is the wholly unwarranted statement that the Arboretum "was intended to be (as it now is) a botanical department of the University. This was the intention of the parties to the indenture of 1872. It was also the intention of those who solicited and of those who contributed the Sargent Memorial Fund."

Again, on page 38 it is said:

"The brochure describes the Arnold Arboretum as a department of Harvard University for the study of trees, shrubs and woody vines (and originally also herbaceous plants) and states that as such it 'has a three-fold function, scientific, economic, cultural'."

The first part of this sentence is inaccurate as the brochure nowhere describes the Arboretum in that way. Nor did the brochure state that the Arboretum had a threefold function "as such" (i.e., as a department of the University).

On page 61 this extraordinary statement appears:

"And one need only read the brochure of 1927 to realize the importance placed by the sponsors of the Sargent Memorial Fund upon the Arboretum's role as a University department."

Apart from the above-quoted statement on page 24 of the brochure, to the effect that the Arboretum is "administratively a department of the University" there is not another word in the brochure which refers in any way to the relation between the President and Fellows, or the University, and the Arboretum, except the statement on page 4 that the President and Fellows became trustees of the Arnold bequest in 1872 and provided a site for the Arboretum, and on page 7 that the President and Fellows became the lessee of the lands after the City of Boston took title. The President and Fellows are not mentioned anywhere else in the brochure except in the statement on page 26 as to the appointment by them of Professor Ames as Supervisor of the Arnold Arboretum and Chairman of the Standing Committee of the University's Botanical Collections.

The emphasis throughout the brochure is placed on the separate identity of the Arboretum and on what "it" has

accomplished and is doing; and over and over again it is referred to as an "institution."* Least of all is there any indication in the brochure that the Arboretum was then, or was to become, a tool to be used for the general botanical interests of the University. On the contrary, emphasis is placed on such facts as that the intimate association of the Arboretum with other related facilities augments its own facilities "*at no cost to its own endowment*" (p. 24), and that "*the whole of its income*" can be devoted to its own work (p. 26).

It may be noted that nowhere in the Bailey Report itself is the Arboretum referred to as a department of the University. It and the other "orphan institutions" are over and over again called "independently endowed botanical agencies" or, in many instances, "independent botanical agencies."†

IX.

CONCLUSION.

We trust that the statements and arguments advanced in our opinion will not be considered to indicate any lack of interest or understanding of the desirability and importance of advancing knowledge in the field of botany as a whole, or of the interests of Harvard University. Effective and harmonious co-operation between Harvard and the Arboretum is desirable and should be feasible. But we cannot believe that it is desirable from any standpoint that such a result should be sought by adopting a plan which sacrifices an institution like the Arboretum, of which the Harvard Corporation is trustee, and which in our judgment involves breaches of trust.

*See the many quotations from the brochure in part V(c) of this Report (pp. 51-53, above).

†See pages 28, 29, 30, 34, 35, 36, 38, 39.

We believe it unfortunate that the questions at issue in this matter should be the subject of controversy except before a tribunal with authority to render a decision.

Material questions of law are involved which concern the proper administration of trust funds of which the Harvard Corporation is trustee. We think the arguments we have advanced are sound.

Whether or not the trustee of these funds, or counsel for the trustee, agree with our position, it cannot be doubted that there is a serious question regarding the propriety of the action of the trustee.

In such circumstances, unless these differences of opinion can be resolved satisfactorily to all concerned, the trustee should seek the judgment of a court of competent jurisdiction.

Comparable matters in which Harvard has been involved have several times been determined by the courts, as in the case of the McKay trust, where the President and Fellows filed a bill for instructions.

We suggest that this is another instance where such a solution should be sought, unless a full and mutually satisfactory settlement of the questions raised can be agreed upon. Prolonged argument other than before a court is not likely to be either satisfactory or conclusive.

ROBERT G. DODGE

HERRICK, SMITH, DONALD, FARLEY & KETCHUM.

APPENDIX.

The Indenture of 1872.

This Indenture made and executed on this twenty ninth day of March in the year of our Lord one thousand eight hundred and seventy two, by and between George B. Emerson, John J. Dixwell, and Francis E. Parker, Esquires, as they are Trustees under the will of James Arnold, late of New Bedford, in the County of Bristol, Merchant, deceased, Party of the first part, and The President and Fellows of Harvard College, Party of the second part, Witnesseth,—

That whereas the said James Arnold by his last will devised and bequeathed to the said party of the first part one and a quarter twenty fourth parts of the residue of his estate “in trust, to be by them applied for the promotion of Agricultural or Horticultural improvements, or other Philosophical or Philanthropic purposes at their discretion, and to provide for the continuance of this trust hereafter to such persons, and on such conditions as they, or a majority of them, may deem proper, to carry out the intention of the donor”;—

And whereas Benjamin Bussey late of Roxbury in the County of Norfolk, Merchant, deceased, by his last will and testament devised to the said party of the second part an estate in remainder subject to certain life estates in the estate on which he had lived in said Roxbury, called “Woodland Hill”, consisting of over two hundred acres of land, in trust and confidence that they would “establish there a course of instruction in practical agriculture, in useful and ornamental gardening, in botany, and in such other branches of natural science, as may tend to promote a knowledge of practical agriculture and the various arts subservient thereto, and connected therewith, and cause such courses of lectures to be delivered there, at such seasons of the year, and under such regulations as they may

think best adapted to promote the ends designed:—the institution so established to be called the “Bussey Institution”;

And whereas the said party of the first part have agreed and determined, in the exercise of the discretion given them under the will of the said James Arnold, that the disposition of the property devised and bequeathed to them as aforesaid in the manner and for the purposes and upon the conditions hereinafter set forth 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, to carry out the intention of the donor.

Now therefore it is agreed, bargained, and covenanted by and between the said Party of the first part and the said Party of the second part as follows:—

First, The said Emerson, Dixwell, and Parker, Trustees, party of the first part, in consideration of the covenants, agreements and undertakings of the said President and Fellows hereinafter set forth do hereby give, grant, bargain, sell, convey, assign and transfer to the said President and Fellows of Harvard College, party of the second part, and their assigns forever, the whole property and estate devised and bequeathed to them, the party of the first part, under and by virtue of the will of the said James Arnold, which has been already received or shall be hereafter received by the said party of the first part, (excepting and reserving therefrom a sum sufficient to pay the actual expenses incurred by said party of the first part) a schedule of which so far as received is hereto annexed,* 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 trusts following, namely,—

That the said party of the second part shall hold the same as a separate and distinct fund, and shall allow the

*The schedule is omitted from this appendix.

whole nett income thereof, (after deducting the necessary expenses of managing the same, and also deducting, if they see fit one third part of such nett income in each year as is hereinafter provided,) to accumulate and add the same to the principal, until the said fund shall amount, at a just valuation, to One hundred and fifty thousand dollars, and until the land at West Roxbury hereinafter described shall come into the possession of the said party of the second part as an estate in possession free of all life tenancies, or other incumbrances.

Second, When both said events shall have happened, that the said party of the second part shall accumulate five per centum of the said nett income, in every year, and add the same to the capital, as a part of the said permanent and separate trust fund.

Third, That the said party of the second part shall devote the remainder of the said nett income in every year, 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 labelled, 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. 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.

Fourth, Until the happening of both of the events named in the first clause, the said party of the second part may expend one third part of said nett income in every year, and no more, in such preparation of the land hereinafter named, and in such collecting or raising of specimens, and the necessary superintendence thereof, as will promote the general and ultimate purpose above stated, but in no other way.

Fifth, 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.

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 trusts herein declared; and further, in consideration of said transfer and payment, they agree to dedicate exclusively to the purpose of said Arboretum, a parcel of land lying in West Roxbury, in the County of Norfolk, shewn on the plan accompanying and to be recorded with this indenture, and bounded and described as follows, namely, beginning at the junction of South Street and Bussey Street in said West Roxbury,

and bounded Southerly and Southeasterly on said South Street about three thousand one hundred and eighty five feet; northerly and northeasterly on land of Bradstreet about one thousand four hundred and thirty eight feet; northeasterly on land of Goldsmith about nine hundred and fifty five feet; northwesterly on land of Weld about nine hundred and thirty feet; northwesterly and northerly on land of Lewis about twelve hundred and twelve feet; northwesterly on Centre Street about thirteen hundred and twenty feet; Southerly and Southwesterly on land of Howard about thirteen hundred and four feet; westerly on land of Smith about two hundred and ninety feet; and Southwesterly on Bussey Street about thirteen hundred feet to the point of beginning. The said land is part of the land devised to the said President and Fellows of Harvard College by the said Benjamin Bussey, as before recited, by his will which is of record in the County of Norfolk; and the interest of the said President and Fellows therein is an estate in remainder which will become an estate in possession upon the expiration of certain lives now in being; and it is hereby agreed that from and after the time when said estate becomes an estate in possession the said President and Fellows will hold the same as hereinbefore declared and not otherwise. But it is agreed and provided, nevertheless, that the said President and Fellows may reserve out of said land for the purpose of sites for school buildings, green houses, tool houses, and other like buildings, and of the grounds appurtenant to such buildings, and of the mansion house, such a parcel, or such parcels of land as they may deem necessary, not exceeding in all fifteen acres; and it is provided also that for the purpose of fixing the time when the said President and Fellows shall be entitled to use the entire income (less five per centum) of the said accumulated fund, the life estate now existing of Thomas Motley, Esquire, in one parcel of said

land, shall not be considered as a life estate or incumbrance within the intent of this agreement.

In witness whereof the said George B. Emerson, John J. Dixwell and Francis E. Parker, Trustees, Party of the first part, and the said President and Fellows of Harvard College, Party of the second part, by Charles W. Eliot, President, and Nathaniel Silsbee, Treasurer of said College, have hereunto set their hands and seals on the day and year first above named.

In presence of,

The words "so far as received" on page five, the words "and all future property so received" on page nine, and the words "and of" on page twelve, first interlined,

s/Robert Levi, witness to

G.B.E.

J.J.D.

F.E.P.

s/E.R.Hoar, to F.E.P.

s/F.P.Vinton to C.W.E.

Pt.

s/F.P.Vinton " N.S. Tr.

s/GEO. B. EMERSON (seal)

s/J J DIXWELL (seal)

s/FRANCIS E. PARKER (seal)
TRUSTEES

THE PRESIDENT AND FELLOWS
OF HARVARD COLLEGE by

s/Charles W. Eliot, President

s/Nath. Silsbee Treasurer

[Seal Harvard College

1636.]

Commonwealth of Massachusetts

Suffolk Ss. Boston, March 29th 1872. Then personally appeared the within named George B. Emerson, John J. Dixwell, and Francis E. Parker, and acknowledged the foregoing instrument to be their free act and deed;

Before me,

s/H. K. FROTHINGHAM

Justice of the Peace

for Middlesex Co.

Commonwealth of Massachusetts

Suffolk Ss. Boston, May 28th 1872. Then personally appeared the above named Charles W. Eliot and Nathaniel Silsbee, and acknowledged the above written instrument to be the free act and deed of the President and Fellows of Harvard College; .

Before me,

s/H. K. FROTHINGHAM

Justice of the Peace

for Middlesex County

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FOR THE
ARNOLD ARBORETUM, INC.

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[As of November 30, 1954]

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MEMORANDUM

By Counsel

R. G. DODGE

and

J. W. FARLEY

Concerning the Decision of the
Supreme Judicial Court of Massachusetts
in the Case of

John S. Ames and Others

v.

The Attorney General of Massachusetts

Relating to the Arnold Arboretum

September 15, 1955

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

Incorporated in 1953 as a nonprofit Massachusetts corporation

50 STATE STREET • BOSTON 9, MASSACHUSETTS

The Association is an independent organization having no connection with Harvard University and is not to be confused with the Harvard-sponsored "Friends of the Arnold Arboretum". Organized to protect and support the Arnold Arboretum in the public interest, the Association is opposed to Harvard's present plan for the Arboretum.

Attached you will find a memorandum by Messrs. R. G. Dodge and J. W. Farley relative to the decision of the Supreme Judicial Court of Massachusetts in February 1955 in the case of *Ames et al v. Attorney General*. In this decision the court declined to interfere with a decision of the Attorney General of Massachusetts that he would not permit the use of his name in a test suit concerning the legality of Harvard's plan for the Arnold Arboretum, the court's decision being based on the ground that the Attorney General's conclusion was a "purely executive decision which is not reviewable in a court of justice".

Mr. Dodge (Harvard '93, Harvard Law School '97) and Mr. Farley (Harvard '99, Harvard Law School '03) are the senior members respectively of Palmer, Dodge, Gardner & Bradford and of Herrick, Smith, Donald, Farley & Ketchum, both of Boston. They jointly acted as counsel to the Visiting Committee on the Arnold Arboretum appointed by the Board of Overseers of Harvard University and, after exhaustive study, advised that Harvard's plan for the Arnold Arboretum involves serious questions of breach of trust as to which Harvard, as trustee for the Arboretum, should ask judicial instructions. When Harvard declined to apply for court instructions, they represented a group of ten petitioners, most of them members of the Visiting Committee, who sought permission from the Attorney General of Massachusetts to bring a test suit in his name. After his refusal they then represented these petitioners in *Ames et al v. Attorney General*.

They have prepared this memorandum on their own initiative, having long felt that the misunderstandings as to the scope and effect of the court's decision should be cleared up.

T. V. RANKIN
Executive Secretary

MEMORANDUM

By Counsel

R. G. DODGE

and

J. W. FARLEY

Concerning the Decision of the
Supreme Judicial Court of Massachusetts
in the Case of

John S. Ames and Others

The Attorney General of Massachusetts

Relating to the Arnold Arboretum

September 15, 1955

Memorandum concerning the decision of the Supreme Judicial Court of Massachusetts in *John S. Ames and Others v. Attorney General* ([1955] Massachusetts Advance Sheets 111, 332 Mass. 246, 124 N.E.2d 511)

In order to clear up misunderstandings with regard to the above decision rendered by the court in February 1955, we undertake in this memorandum to state the scope and effect of the decision and to explain what the court did not decide as well as what it did.

In January 1953 the Harvard Corporation adopted a plan for the Arboretum as to which, under advice of counsel, serious questions of breach of trust were raised by graduates of Harvard and by other interested parties. Nevertheless, the Harvard Corporation refused repeated requests that it apply to the court for instructions as to its right to carry out the plan. Ten responsible persons then, in April 1953, applied to the Attorney General of Massachusetts for leave to use his name in a test suit for a declaratory judgment. In July 1953 the Attorney General adopted a written decision by Assistant Attorney General Booras refusing permission to use his name. In December 1953 a petition for mandamus was filed by the applicants in the Supreme Judicial Court asking for a review of the Attorney General's refusal of the use of his name.

Knowing that the court could not *order* the Attorney General to grant an application to him for the use of his name in the proposed suit, we pointed out in our mandamus petition the manifest errors of law and abuse of discretion in the Booras decision, and asked only that the Attorney General be ordered to reconsider the matter and render a new decision based on the application of correct principles. We were convinced that the application of correct principles would lead to a reversal by the Attorney General of his action on our application.

In asking for this relief we relied on prior decisions of the court on petitions for mandamus against other public officials charged with having misapplied the law in exercising discretionary powers of an executive character. No case, however, had been decided by our court involving a decision of this sort by the Attorney General, so that there was no binding precedent.

In cases involving ordinary trusts the beneficiaries have full access to the courts for the enforcement of their rights where a breach of trust is threatened. In the case of a charitable trust for a public institution like the Arnold Arboretum, however, the public are the beneficiaries and they are represented by the Attorney General. In a case like the present no one else has any standing, and a suit to enforce the provisions of the trust must be instituted by the Attorney General or in his name. In the case of the Arnold Arboretum the Harvard Corporation is the trustee of an express public charitable trust created by an indenture of 1872 by which a fund was transferred to the Corporation for the primary purpose of establishing and maintaining an arboretum. The Corporation was a party to the inden-

ture and expressly accepted the trust; and it thereby became subject to the laws governing any trustees of a charitable trust. When the Corporation itself refused (improperly, we believe) to apply to the court for instructions, the necessary next step was to apply to the Attorney General. And when the Attorney General (improperly, we believe) refused to permit the use of his name, the only recourse was to petition a court for an order directing him to reconsider the matter and render a new decision based on proper legal grounds.

The Decision of the Supreme Judicial Court

The decision of the court was that a refusal of an Attorney General to institute a suit of this character relating to a public charitable trust, or to permit the use of his name by interested individuals offering to act as relators, is a "purely executive decision which is not reviewable in a court of justice".

In other words the court held in effect that, even if the decision of the Attorney General was obviously based on a misunderstanding as to the law, and involved a misconception of his duties as to the enforcement of charitable trusts and a disregard of the prior practice of Attorneys General in such matters, and even if arbitrary and an abuse of discretion, the court had no jurisdiction to do anything about it. There is nothing in the decision of the court either approving or disapproving the Attorney General's refusal to allow the use of his name. It was merely decided that the court had no power to review his refusal.

There is nothing in the opinion relating to the merits of our controversies—first with the Harvard Corporation and later with the Attorney General.

The opinion does not refer in any way to any of the following questions:

1. Whether the action of the Corporation with regard to the removal from Jamaica Plain to Cambridge of most of the Arboretum's library and herbarium would or might involve a breach of trust.

2. Whether the refusal of the Corporation to submit the matter to the court for instructions was consistent with its duties as trustee.

3. Whether the plan of the Corporation was adopted in the interest of general botany at Harvard rather than in the primary interest of the Arboretum.

4. Whether the Booras decision, affirmed by the Attorney General, was founded on sound principles of law or was on its face based on obviously mistaken grounds.

5. Whether Mr. Booras was led into error by a letter of advice full of unsound arguments which he received from counsel for the Corporation and of which we knew nothing until after the Booras decision had been announced and we had filed the mandamus petition.

6. Whether the Attorney General, knowing that there was conflicting evidence on the issues of fact on which the question of breach of trust depended, could properly, without hearing the evidence or undertaking to find the facts, rule as a matter of law that there was no breach of trust.

7. Whether, where responsible parties interested in a charitable trust present to the Attorney General a case having the appearance of merit, and at least presenting a question of doubt, the Attorney General should allow the use of his name upon being properly indemnified against cost, or should undertake finally to

... became subject to the laws of the Corporation itself refused instructions, the necessary next step was to ask the Attorney General (in his name, the only recourse was to consider the matter and render

Judicial Court

The Attorney General to institute a trust, or to permit the use of his name, is a "purely executive function".

... in the decision of the Attorney General as to the law, and in the management of charitable trusts and in such matters, and even if the court has no jurisdiction to do anything but either approving or disapproving of his name. It was merely a refusal.

... merits of our controversies—the Attorney General.

... the following questions:

... regard to the removal from the Arboretum's library and herbarium and to submit the matter to the court for

... voted in the interest of general welfare of the Arboretum.

... Attorney General, was founded on obviously mistaken

... matter of advice full of unsound reasoning and of which we have been announced and we had

... there was conflicting evidence and each of trust depended, could not find the facts, rule as a

... in a charitable trust present the question of merit, and at least perhaps should allow the use of his name or should undertake finally to

decide the case without taking testimony or undertaking to determine the essential facts, and thus prevent any judicial hearing and decision on the merits.

The opinion of the Supreme Judicial Court is silent on all the foregoing points. There is not a word in it to give any indication of the extremely strong case which we presented to Assistant Attorney General Booras, and the even stronger case which we were able to submit to the court after the Booras decision and after our learning of the letter above referred to from counsel for the Corporation. There is no reference in the court's opinion to the conflicting loyalties of the Corporation and the part which these other loyalties were claimed to have played in influencing the Corporation to adopt its plan for the Arboretum. There is no reference to the considerations which should govern the Attorney General as to the use of his name in a case like the present where there is no other way of obtaining a judicial decision on the merits. There is nothing which indicates approval of the Booras decision or gives sanction to the way in which the matter was handled in the Attorney General's department.

Nothing could be more misleading than the statement of Professor Howard in his recent circular letter to the members of the Association for the Arnold Arboretum, Inc. that the court "upheld" the Attorney General's ruling affirming the legality of the plan of the Corporation as trustee of the Arboretum. Professor Howard's statement is utterly incorrect. As above noted, the court neither approved nor disapproved of the Attorney General's opinion, but merely held that the court could not review it.

It is plain that no court having power to deal with the matter could possibly "uphold" the Booras decision, which, as pointed out below, is fallacious on its face since it is expressly based on a ruling of law made without any determination of the facts on which any such ruling must depend.

The court's decision means that any determination by the Attorney General, however ill-advised, and though arrived at without any hearing of evidence or findings of the essential facts, and based upon a complete misunderstanding of the principles which should govern his conduct, cannot be dealt with by the court, even though this misunderstanding has been fomented by the trustees themselves. This, however, is now the law of Massachusetts and only the legislature can change it.

The scope of the decision of the court and the extent to which it goes is made manifest by a consideration of the case as presented by us to Mr. Booras, his decision, and the arguments later made by us before the court.

The Proceedings before the Assistant Attorney General

When counsel for the petitioners first brought the matter to the attention of the Attorney General in the spring of 1953 he directed them to take it up with Assistant Attorney General Booras. As Booras states in his decision, he was assigned by the Attorney General to "resolve upon a decision in the matter". Counsel for the petitioners then had two interviews with Mr. Booras and some correspondence, and filed some material documents with him. They pointed out to him that the controversy originated in the so-called Bailey Plan, an elaborate document which had been prepared in 1945 by a professor of botany at Harvard, and

which provided in effect for the integration of the Arboretum and eight other independently endowed establishments in some way concerned with botany and then affiliated in one way or another with the University, and for their practical merger in the Department of Biology for the benefit of research and instruction at Harvard. It was further pointed out that this plan involved a plain breach of trust as regards the Arboretum; that the plan had been prepared without any knowledge that the Arboretum was held on an express trust, and was approved by the Corporation in 1946, without any recognition of the trust; that throughout the document setting forth the plan the Arboretum was treated as a disposable asset of Harvard which could be utilized for the benefit of instruction and research at the University, without regard to any trust for the Arboretum; that such benefit for other Harvard interests was the object of the plan; and that the Co-ordinating Committee on the Biological Sciences, appointed by the Overseers, to which the Corporation had referred the question of a breach of trust when first raised by the Visiting Committee, had erroneously described the Arboretum in its report as "a tool to be used in the development of botany as a whole and in the overall interests of the University".

Mr. Booras was further informed that the controversy with the Corporation was initiated and carried on by no less important a body than the Overseers' Committee to Visit the Arboretum, which, when steps were later taken to implement the Bailey Plan, and the effect of it upon the Arboretum began to be recognized, raised the question of breach of trust and repeatedly requested the Corporation to submit the matter to the court on a bill for instructions. The Visiting Committee had approximately twenty-six members, many of them highly skilled in the field of horticulture.

While the Corporation from the start declined to ask the court for instructions, it appears gradually to have come to a realization that the Bailey Plan might well involve a breach of trust as to the Arboretum. Accordingly, in January 1953, it adopted a resolution, for the first time officially recognizing that it held the Arboretum property in trust, and providing in paragraph 1 that the plan should not apply to the Arboretum or to the principal or income of its endowment. Later on in the resolution, however, the Corporation re-established two of the features of the plan most adverse to the Arboretum's interests, namely, that involving the removal to Cambridge of the main parts, relating to research, of both the library and herbarium of the Arboretum, and that calling for the use of Arboretum income toward the maintenance of a new building in Cambridge.

It was pointed out to Mr. Booras that in retaining these parts of the Bailey Plan the Corporation appeared clearly to have acted with a view to advancing the work in general botany at Cambridge and not in the sole interest of the Arboretum.

Mr. Booras was fully informed as to the mass of expert opinion which had been gathered to the effect that the carrying out of the proposed action with regard to the library and herbarium would be damaging to the Arboretum and destructive of its interests, and was advised that other questions of fact as well as questions of law were involved. He was offered the names of ten highly responsible persons to serve as relators on the information which the Attorney General was asked to authorize and which was to seek a declaratory judgment as to the right of the Corporation to take the proposed steps. It was also pointed out that,

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the Corporation as trustee having refused to petition for instructions, this was the only possible way of obtaining a judicial decision.

Mr. Booras was asked to follow the course always adopted by former Attorneys General in similar situations where the question involved is doubtful and the matter is of public importance. Reference was made to an opinion of former Attorney General Knowlton, in which he stated the practice as follows:

"It is not necessary that the Attorney General should be satisfied that the information which he is called upon to sign can be maintained. If the questions raised by it are doubtful, and the matter is one of public importance, it is his duty to sign the information, even though he may be of opinion that it cannot be maintained, for the reason that the questions involved cannot otherwise be determined".

Mr. Booras' attention was also called to various decisions of the Supreme Judicial Court in cases where it was obvious that the Attorney General had granted the use of his name without having undertaken himself to decide upon the merits, but where the application was made to him by responsible parties who raised questions seemingly proper for judicial determination. In each of these cases the ultimate decision was that no breach of trust was established, but no criticism was made of the Attorney General for permitting the use of his name.

In such cases the Attorney General is not regarded as responsible for the propriety of the suit. As our court said in a case in which the Attorney General, on the relation of a group of individuals, filed an information to remedy an alleged diversion of funds held on a charitable trust:

The Attorney General "depends on the relation of persons whose names are inserted in the information as relators, and, as the suit is carried on under their direction, they are regarded as answerable to the court for the propriety of the suit and for the conduct of it."

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The Booras Decision

This decision is shown on its face to be based on erroneous views as to the duty of the Attorney General, and mistakes as to the rules of law which should govern his conduct.

Mr. Booras' glaring error was in ruling that there was no breach of trust, when such ruling could not properly be made without a determination of the disputed questions of fact. He contented himself with the statements that the proposed relators "have cited many professional authorities in support of [their] contention" that the transfer of most of the library and herbarium "would not only be against the interests of the Arboretum, but would cripple it as an institution and that * * * on the other hand, the University maintains that the transfer will be solely for the best interests of the Arboreum and will more greatly promote the purposes and aims of the trust" and that "equally significant professional authorities approve and highly recommend the action".

Without hearing testimony on this crucial question of fact in issue between the parties no tribunal could possibly determine whether a breach of trust was involved. Yet Mr. Booras ventured to assert: "There is no legal breach of trust"; and he proceeded to deny the application.

Mr. Booras failed to mention various other questions of fact in his decision, one of which was the conflicting interest of the Corporation in furthering the cause of general botany at the University, which was claimed by the relators to have influenced the adoption by the Corporation of the plan with regard to the library and herbarium. Other incidental questions of fact were raised which Mr. Booras did not undertake to pass upon. He misinterpreted certain provisions of the trust indenture, cited as authority a decision of the Supreme Judicial Court which does not bear upon this situation, and committed the basic error of attempting to pass on the merits of the case instead of merely determining whether the controversy was a proper subject for submission to a court.

His decision was influenced throughout by the letter above referred to which he received from counsel for the Corporation and which was full of unsound and misleading arguments and errors of fact and law, and which counsel for the relators had no opportunity to answer and had not seen or heard of until after the Booras decision was rendered.

It may be confidently asserted that no Attorney General has ever before, in the case of a public charitable trust, denied the use of his name where the application to him has been made by responsible parties on such compelling grounds as were here presented or where it was so highly appropriate that there should be a judicial determination of the issues.

The Letter from Counsel for the Corporation

In reading this letter we were impressed at once by what appeared plainly to be unsound arguments and bad law contained in it. These matters were stressed by us in our brief in the mandamus case, in which we discussed ten of them, which so plainly dominated the decision of Mr. Booras.

At the outset the letter misstated the issue presented to the Attorney General by saying:

"I understand that your principal question is whether this transfer will constitute in law a breach of trust."

And the writer later urged the Attorney General to take no action in this case unless it clearly appeared that a breach of trust was at law about to be committed. This is doubtless what led Mr. Booras to undertake to decide the merits of the case as a matter of law without any determination of the facts upon which conclusions of law must necessarily depend.

This is not the place in which to refer to the other points in the letter, which we pointed out in our brief. We may call attention, however, to one of the serious errors in the letter, namely, the argument that the court would have no jurisdiction over a petition for instructions, whether brought by the trustees or by the Attorney General, where the trustees themselves personally entertain no doubt as to their duty. This is plainly not the law. The petitioner for instructions may personally have no real doubt as to the matter, but conflicting contentions by others may furnish ample grounds for seeking judicial instructions. The writer of the letter should have re-examined the case of the McKay Trust, where, in 1915, the Harvard Corporation filed a petition for instructions as to whether it might

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lawfully carry out an agreement it had made with the Massachusetts Institute of Technology, the petition reciting that the Corporation had been advised that it might lawfully carry out the agreement alleged in the bill for instructions and that it believed the agreement to be within its powers as trustee, but brought the suit because other interested parties expressed doubts. Instead of dismissing the bill for want of jurisdiction the Supreme Judicial Court promptly decided the case, holding that the agreement involved a breach of trust on Harvard's part.

Incidentally, the McKay case in its early stages closely resembled our Arboretum case. The Corporation was asked by counsel for the McKay estate, who believed that a breach of trust was imminent and were much concerned about the matter, to ask the court for instructions, but the Corporation declined at the time to accede to the request. The case differs from ours, however, in that the then Attorney General, when asked by prominent Harvard graduates to allow the use of his name in a suit to test the question of breach of trust, properly and promptly granted the request, and the Corporation then decided to bring its own bill for instructions, rather than to be sued.

Some of the unsound arguments in the letter were expressly adopted in the Booras decision, and all doubtless had their influence.

The Argument before the Court

As the case came before the Supreme Judicial Court on the Attorney General's demurrer and motion to dismiss, the court was bound to accept as true for the purposes of the decision the facts alleged by us. In our petition we set out all the facts above outlined, with much more detail. We included a full statement of the facts as to the adverse effect upon the Arboretum of the Corporation's plan, — facts which, if established by the evidence which we were prepared to introduce, would make the plan a plain breach of trust by the Corporation.

Among these facts, as mentioned in the petition, were: (1) That the original Bailey Plan was adopted by the Corporation in January 1946 with the central aim of advancing the cause of general botany at Harvard irrespective of the special purposes and interests of the Arboretum, and evidently without investigation of the terms upon which the property of the Arboretum was held by the Corporation and without any consciousness that the Corporation held the Arboretum's property upon a special trust; (2) That although the Corporation in its vote of January 19, 1953, modifying its plan for the Arboretum, finally recognized that it holds the Arboretum's property upon a special trust which must be administered in the Arboretum's interests, that vote retained two of the most important features of the Bailey Plan claimed to be against the Arboretum's interests, namely, the removal to Cambridge of the "main body of the library and herbarium related to research" and the use of part of the Arboretum's income for the maintenance of a new building in Cambridge; and (3) That the effect of the removal of most of the Arboretum's library and herbarium would be to transfer to Cambridge most of the important research work heretofore conducted at the Arboretum, and thereby to break up the integration of the Arboretum and seriously damage it as a scientific institution.

In support of this claim that Harvard's plan for the Arboretum would be contrary to its interests and consequently a breach of trust, the petition set forth that, as stressed by Professor Charles S. Sargent, Arnold Professor for the first fifty years of the Arboretum, a distinguished horticultural-botanical institution of this sort needs to have together in one location three main elements, namely: (a) an excellent horticultural-botanical library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs. The petition also mentioned the "virtually unanimous opinion" of "fifteen leading authorities throughout the United States, in no way connected with Harvard" that the removal feature of Harvard's plan "would break down the present integrated character of the Arboretum and would be contrary to its interests, especially as a scientific institution".

Altogether the petition clearly set forth facts, which if proved at a judicial hearing, would constitute a powerful case for the claim of breach of trust.

We believed we had stated such a strong case of abuse of discretion by the Attorney General that the Supreme Judicial Court might well decide that he had failed in the performance of his duty and that the writ of mandamus which we sought should be issued.

In Massachusetts the duty of the Attorney General with respect to public charitable trusts is defined by a statute which has been in effect for more than a century and which reads:

"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."

He is thus under a mandatory duty to prevent breaches of trust with respect to charities. In a recent case involving a proceeding to try title to a public office which could be instituted only by the Attorney General, Chief Justice Rugg said:

"His action can be invoked. Whether he shall seek relief by that procedure rests in his sound discretion. It cannot be presumed that he would fail to act if a petition in appropriate form and having the appearance of merit were presented to him."

This statement is, of course, just as applicable to a public charity as to any other class of cases where a suit can be brought only in the name of the Attorney General. Chief Justice Rugg did not indicate what the result would be if the Attorney General does *not* exercise a "sound" discretion, and *does* fail to act when a case of apparent merit is presented to him. It was not suggested that the courts would be devoid of power. In our case, while we had not actually drawn the petition for a declaratory judgment, Mr. Booras having advised us that it would be premature until the Attorney General's office came to a decision as to the use of his name, we certainly did present a case "having the appearance of merit" and we felt that, as Mr. Booras' decision was so obviously wrong, we might well be entitled to a remedy.

We presented an elaborate argument to the court, urging that in a case involving a public charity, where a question as to a breach of trust is presented by responsible persons, and where questions of fact or law or both are involved which are substantial and fit subjects for judicial inquiry, it is the duty of the

for the Arboretum would be of trust, the petition set forth Arnold Professor for the first agricultural-botanical institution three main elements, namely: 1) an excellent herbarium of living trees and shrubs. The opinion of "fifteen leading men" connected with Harvard would break down the present position as being contrary to its interests,

which if proved at a judicial trial would be a breach of trust.

of abuse of discretion by the Attorney General might well decide that he had no right to issue a writ of mandamus which we

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in or appropriated to public uses of trust in the administration

breaches of trust with respect to try title to a public office. Chief Justice Rugg said: "It is a relief by that procedure that he would fail to act if the merits of the case were presented

to a public charity as to any other in the name of the Attorney General. The result would be if the Attorney General, and does fail to act when it is suggested that the courts should have had not actually drawn the line. Having advised us that it would be a mistake to make a decision as to the use of the appearance of merit" previously wrong, we might well

court, urging that in a case where a breach of trust is presented by statute or law or both are involved in inquiry, it is the duty of the

Attorney General to permit the use of his name if responsible persons are willing to act as relators and assume the expense; and that the Attorney General's refusal to permit the use of his name is subject to judicial review where, as here, he has proceeded on incorrect legal principles with regard to his proper functions and his conclusions, and has arrived at a decision which is an abuse of discretion. We emphasized the fact that the available evidence, the nature of which was pointed out to Mr. Booras, would, if believed by the court, establish a breach of trust. We pointed out the manifest errors which appeared on the face of the Booras decision and showed that these errors had undoubtedly been caused by the unsound arguments contained in the letter from counsel for the Corporation.

As the Supreme Judicial Court decided, in effect, that the Attorney General's decision could not be reviewed *even if it involved a clear abuse of discretion*, all of the foregoing arguments went for naught; and there is nothing in the opinion to give any notion of the powerful case which we had against the Attorney General's action.

The Result Accomplished by Harvard

The decision of the court reflects no glory on Harvard, and in no way sustains the propriety of its conduct in the long controversy concerning the Arboretum.

By strenuous efforts the Harvard Corporation has prevented any judicial decision on a question as to a possible breach of trust seriously raised by responsible graduates on advice of counsel, and by other persons long interested in the University and in the Arboretum. It refused the repeated requests of the Visiting Committee that it ask the instructions of the court with respect to this breach of trust question, in accordance with the universal practice of competent and responsible trustees. It persuaded the Attorney General to disallow the use of his name in an information, by arguments obviously unsound, which there was no opportunity to answer and of which the objectors had no knowledge until too late. One must naturally conclude that a motivating influence leading the Corporation to fight so hard against any reference of the question to the courts is fear that the courts would rule that, in adopting this plan for the Arboretum, the Corporation has again, as in the McKay case, involved itself in a breach of trust.

The attitude of the Harvard Corporation fifty years ago with regard to funds held by it in trust appears to have been quite different. The preamble to an agreement entered into by it in 1905, with reference to the use of trust funds, recites that "as the University feels that faithfulness in the performance of these trusts which it has accepted is its first duty, to which all other considerations must yield, this agreement shall not go into effect until and unless the University shall have applied to the Supreme Judicial Court for instructions and the court shall have made a decree that this agreement may be carried out without violation of its duties as a trustee and in accordance with law and equity".

R. G. Dodge

J. W. Farley

Slate

A REVIEW OF THE ARNOLD ARBORETUM CONTROVERSY

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

Incorporated in 1953 as a nonprofit Massachusetts corporation

50 STATE STREET • BOSTON, MASS.

(The Association is an independent organization having no connection with Harvard University and is not to be confused with the Harvard-sponsored "Friends of the Arnold Arboretum". Organized to protect and support the Arnold Arboretum in the public interest, the Association is opposed to Harvard's present plan for the Arboretum.)

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APRIL • 1955

[Additional copies of this statement are available upon request.]

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OF THE

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A REVIEW OF THE ARNOLD ARBORETUM CONTROVERSY

Introductory

As of March 31, 1955, the Association for the Arnold Arboretum, Inc. had 1032 members from 41 States, the District of Columbia and Canada. The membership is widely representative of those interested in preserving the Arnold Arboretum as a distinguished horticultural-botanical institution and of those concerned with the reputation of Harvard University as a guardian of trust funds.

The purpose of this statement is to review the essential facts and present status of the Arnold Arboretum controversy for the information of our members and others.

Such a review is opportune at this time because of the recent decision of the Supreme Judicial Court in *Ames et al v. Attorney General*. For although the Court in no way dealt with the merits of the question whether Harvard's plan for the Arboretum involves a legal breach of trust, some have misinterpreted the decision as having approved the legality of the plan and as bringing the controversy to an end. In fact, as the Court's opinion makes clear, the ruling did not deal with the merits of the breach of trust question at all. Expressing no opinion whatever as to whether Harvard's plan involves a breach of trust, the Court merely decided that what the Court called the "purely executive decision" of the Attorney General in refusing the use of his name for a test suit was not reviewable in any court.

Despite some confusion caused by the technical character of this decision, it should be clearly understood that it still leaves undecided by any court whether or not Harvard's plan is legal, and that this issue still remains undetermined.

The Issues

The future of the Arnold Arboretum is now gravely threatened. The Arboretum has ranked as one of the most distinguished institutions of its kind, not only in the United States but in the world. This standing has been based upon a carefully balanced combination of the art of horticulture and the science of botany. This has been achieved through the integration of the three elements necessary to the combination: (a) a great living collection of trees and shrubs containing some 6000 species and varieties; (b) an almost unique library of nearly 50,000

books and 16,000 pamphlets; and (c) a fine herbarium containing nearly 700,000 dried specimens. Until recently all of these were located together at Jamaica Plain, Massachusetts.

Now, however, under a plan adopted on January 19, 1953 by the Corporation of Harvard University, trustee for the Arboretum, the Arboretum has been disintegrated through the removal in June 1954 of most of the Arboretum's library and herbarium from Jamaica Plain to a new botanical building in Cambridge. Beyond this, the plan calls for the use in Cambridge of a substantial amount of the Arboretum's income toward the maintenance of the new building. Through this separation of its research tools, the consequent separation of its staff and the diversion of income, the position of the Arboretum as a scientific institution would, in the opinion of many authorities, be gravely impaired if not destroyed.

The Arnold Arboretum controversy exists for three main reasons: *firstly*, because many believe that the present Harvard plan is a serious mistake of policy, in that it would greatly impair the usefulness of an institution which has been of great public value in the past and could be in the future; *secondly*, because many believe that the Harvard plan is a breach of faith toward donors to the Arboretum, in that these donors made their gifts in confidence that the Arboretum would be continued as an integrated horticultural-botanical institution, and did not give their money to aid botany in Cambridge or for any other purpose; and *thirdly*, because, although many are convinced that the Harvard plan also involves a legal breach of trust, Harvard, as trustee for the Arboretum, has opposed any judicial proceedings to test this strictly legal issue.

It is the last of these reasons which has caused the strongest indignation and the most adverse comment. The invariable practice of responsible trustees is to welcome a judicial ruling where serious questions are raised as to the legality of the trustees' administration. And yet, notwithstanding the opinion of eminent counsel that serious questions exist as to whether a legal breach of trust is involved, Harvard has refused to ask for court instructions and still continues obdurately to oppose all efforts to obtain a judicial hearing. This rigid attitude has aroused vigorous protest, not only among those interested in the

Arboretum but also among those concerned for Harvard's good name.

The result has been a growing conviction that Harvard's attitude in this regard is wholly unjustified.

It was these considerations that led to the organization of the Association for the Arnold Arboretum, Inc.

A principal purpose of the Association is to bring about the *reintegration* of the Arboretum. The further purpose is to support the work and development of the Arboretum along the lines which brought it world-wide fame as a scientific horticultural-botanical institution.

History of an Institution

The Arnold Arboretum was founded in 1872 pursuant to an agreement between the trustees under the will of James Arnold and the President and Fellows of Harvard College, commonly referred to as the Corporation.¹ The agreement provided for the creation of the Arnold Arboretum, with the Harvard Corporation as trustee of all its property and endowment.

In accordance with this trust agreement, the Corporation dedicated for Arboretum purposes certain lands in West Roxbury, Massachusetts (now Jamaica Plain) that had been left to Harvard in trust by Benjamin Bussey. This property, with later additions, now includes some 265 acres. On it the great collection of living trees and shrubs has been assembled over the years.²

By the trust agreement the Harvard Corporation agreed to hold the funds (originally about \$100,000) in trust for 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" in the climate of what is now Jamaica Plain. The agreement provided that the Arboretum was to be under the "care and management" of a professor, to be called the Arnold Professor, who was to "teach the knowledge of trees" in Harvard University. It also provided that the fund was not to be used for

"any other object however meritorious or kindred in its nature."

In 1872 Charles Sprague Sargent was appointed Director of the Arboretum, and in 1879 he was appointed Arnold Professor, a position which he held for nearly fifty years.

One of Professor Sargent's early achievements was an agreement made in 1882 between the Harvard Corporation and the City of Boston. By this agreement the City took title to the Arboretum lands, added certain adjoining lands and forthwith leased the whole tract back to the Corporation for a thousand years, at a rental of \$1 a year, renewable for another thousand years, "and so on from time to time forever". The City agreed to build and maintain roads and walks and police the grounds, while the Corporation agreed to keep the Arboretum open to the public every day in the year from sunrise to sundown.

With adequate space assured "forever", Professor Sargent devoted his efforts toward making the Arboretum pre-eminent in its field. A staff, including some of the best-known botanists and horticulturists of the day, was assembled. In 1892 a brick headquarters and library building was erected on the Arboretum's property at Jamaica Plain with funds given by H. H. Hunnewell. An herbarium was started in 1878 to aid in "the correct determination of the living collections and for successful dendrological studies" and in 1905 a four-story fireproof wing was added to the headquarters building to house the herbarium. Many distinguished books and serial publications were written at the Arboretum and published under its name. Field expeditions to various parts of the world, especially to Asia, brought back hitherto unknown species of trees and woody plants.³

After Professor Sargent's death in 1927, Professor Oakes Ames served as Supervisor of the Arboretum for a nine-year period. Professor Elmer D. Merrill was appointed Arnold Professor and Director in 1936, serving until 1946 when he resigned. Dr. Merrill was succeeded by Professor Karl Sax, who became Director in 1947 and served until February 1, 1954 when Dr.

¹ The Corporation is one of the two Governing Boards of Harvard. It functions to this day under its original Charter granted by the General Court of the Colony of Massachusetts Bay in 1650 and the 1657 'Appendix' to that Charter. It consists of seven members, i.e., the President and the Treasurer of Harvard College and five Fellows who serve without limit of time and appoint their own successors, subject only to the "consent" of the Overseers. The other Governing Board is the Board of Overseers dating from 1637 and now consisting of thirty members, five

of whom are elected each year by the alumni for terms of six years. The President and Treasurer are also members *ex officio* of the Board of Overseers.

² The Arboretum also has some 60 acres in Weston, Mass. (the gift of Miss Laura Case and Miss Marian Case) where various experimental plantings are located.

³ The history of the Arboretum in this period is told by Professor Sargent in "The First Fifty Years of the Arnold Arboretum", *3 Journal of the Arnold Arboretum* 127 (1923).

Richard A. Howard assumed the Arnold Professorship and, as such, became Director.

Under Professor Sargent's leadership the Arboretum grew steadily in resources and influence. The conjunction of the living collection, library and herbarium made possible a series of books and scientific papers of fundamental importance to the study of the woody plants of North America and other continents. The collecting expeditions to remote parts of the world resulted in the domestication of many new species now common to American parks and gardens.

On the financial side, generous additions were made to the original Arnold bequest, so that as of June 30, 1954 the endowment had a book value of \$4,062,000 and a market value of over \$5,000,000. The estimated endowment income for the academic year 1954-'55 is approximately \$210,000.

After his death, friends of Professor Sargent raised the Sargent Memorial Fund of about \$1,000,000 which now forms part of the Arboretum's endowment. By his will Professor Sargent himself made a striking bequest significant of his belief in the long-term value of the Arboretum. He left \$10,000 to the Arboretum with instructions that the income shall accumulate for 100 years from his death when the fund is to be split in halves, the income of one half to become available at that time, but the income of the other to accumulate for a second hundred years. Assuming an average interest rate of 4%, this second half of the Sargent bequest will ultimately (in the year 2127) amount to nearly \$34 million.⁴

Altogether the prestige of the Arboretum and its public usefulness grew steadily until Professor Sargent's death and was maintained for some time thereafter. In addition to Professors Sargent, Ames, Merrill and Sax, many other distinguished names are connected with the Arboretum, including Alfred Rehder and Ernest ("Chinese") Wilson. It was the work of such men as these that made the Arboretum famous. It stood at the head of the botanic gardens and arboreturns of the United States and has been a

credit to Harvard, to Massachusetts and to the country.⁵

Professor Sargent had a clear-cut conception of the Arboretum as an *integrated* institution. He built it up on that basis and stated his reasons on various occasions. In his report for 1923-'24 he said:

"The experience of the last fifty years shows that such an institution [an arboretum] 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 interest of the general public and for persons interested in gardening and living in climates similar to that of New England. . . . 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."

Emphasizing the importance of the herbarium he wrote that the aim should be to make:

"... a complete collection of dried plants which will make it possible to study in one place in a satisfactory manner the trees of the world and their original variations and distribution. Such a collection is needed and there is no better place for it than the Arnold Arboretum, for at the Arnold Arboretum there is one of the largest collections of living trees and shrubs which can be grown in such a severe climate and an unsurpassed library devoted to the subject."

There can be no question, therefore, that the plan adopted by Harvard in January 1953 whereby most of the Arboretum's library and herbarium has been separated from the living collection of trees and shrubs, is flatly contrary to Professor Sargent's conception.

It is also indisputable that it was on the faith of this conception that the major part of the Arboretum's endowment was given. This fact is emphasized by the representations made in connection with the raising of the Sargent Memorial Fund in 1927-'28. The elaborate brochure used during that campaign laid strong emphasis on the Arboretum as a *self-contained and integrated* institution, having its own purposes and staff and engaging in its own activities.

It cannot be too strongly stressed that the

⁴ This Sargent bequest provides that the income of the accumulated funds "shall be expended for the care and maintenance of the Arnold Arboretum according to the trusts and conditions upon which said Arboretum is now held . . ." under the trust agreement of 1872 and the terms of the contracts between the City of Boston and Harvard College. In case of nonobservance of these conditions, Professor Sargent's will directs the transfer of the principal and accumulated income of the funds to the Museum of Fine Arts in Boston.

⁵ An arboretum is a type of botanic garden restricted to trees and shrubs. A botanic garden

is defined by the late Liberty Hyde Bailey and E. Z. Bailey in *Hortus Second* (1941), p. 113, as "a controlled and staffed institution for the maintenance of a growing collection of plants under scientific management and control for the purposes of education and research, together with such libraries, herbaria, laboratories and museums as are essential to its particular undertakings." And as Prof. L. H. Bailey elsewhere wrote: "an Arboretum may be one of the integral parts of a botanic garden." See also "What is an Arboretum?" by John C. Wister in the "Bulletin of the Garden Club of America" for September 1954.

practical effect of Harvard's plan for the Arboretum under the Corporation's vote of January 19, 1953 is to destroy the Arboretum's integrated character. The world-wide reputation achieved by the Arboretum rested upon a highly successful combination of horticulture and scientific botany. And this combination rested in turn upon the location together, with an integrated staff, of the three fundamental elements of a well-rounded horticultural-botanical institution, i.e., the living collection of trees and shrubs (the "outdoor" collection) and the library and herbarium (the "indoor" collections).

Wholly ignoring this integrated character of the Arboretum upon which its prestige and public usefulness have depended, the Harvard plan calls for no less than the *disintegration* of the Arboretum. The removal to Cambridge of all the Arboretum's library and herbarium "related to research" has, in practice, meant the removal of virtually six-sevenths of its library and a like proportion of its herbarium.⁶

The result cannot be otherwise than virtually to destroy the Arboretum as a scientific horticultural-botanical institution. This is inevitable, since by removing essential "tools of the trade" the Arboretum's scientific staff are necessarily compelled to shift their major work from Jamaica Plain to Cambridge. The consequence is that if this plan remains in effect, the Arboretum itself can no longer be the focal point for important scientific research.

It is a peculiar irony that in directing this disintegration, the Harvard Corporation purported to "determine" that this removal of vital elements of the Arboretum's equipment was "in the best interests of the Arboretum." Nothing could be further from the fact, as could be shown by weighty testimony, if the issue is tried on the merits before an impartial judicial tribunal.

The distinguished men who built up the Arboretum conceived of it in a large way and as a permanent institution capable of important contributions to our civilization. They knew that this mission depended upon the well-rounded and integrated character of the institution. They would have been appalled at the disintegration called for by the Harvard Corporation's vote and amazed at the lack of understanding reflected in the "determination" that this could possibly be "in the best interests" of the Arnold Arboretum.

It is a principal purpose of this Association to remedy this disintegration and thus to restore the status and prestige of the Arboretum.

How the Controversy Began

The present controversy had its origin in a report made early in 1945 by Professor Irving W. Bailey of the Harvard Department of Biology. Professor Bailey had been asked to survey the field of botany at Harvard, with particular attention to coordinating the work of the nine independently endowed institutions or agencies affiliated with Harvard that were in any way concerned with botany. One of these institutions was the Arboretum. This report, entitled "Botany and Its Applications at Harvard", was originally submitted to the Dean of the Faculty of Arts and Sciences and was referred by him to the Harvard Corporation.

Professor Bailey's report called for "integrating" the resources of these nine institutions or agencies into two budgetary and administrative "Areas" or "Institutes" under a Biological Council, of which two of its four members would be the Chairman of the Department of Biology, and the Director of the Biological Laboratories. By this so-called Bailey Plan it was proposed that the funds and activities of the nine institutions or agencies should in substance be pooled under the control of the two "Institutes" and the Biological Council.

The Arnold Arboretum, under the Bailey Plan, was, in effect, to be split between the two Institutes or Areas, the Arboretum's living collection (referred to by Professor Bailey as "the goose that lays the golden eggs") being assigned to one Institute or Area, and its library, herbarium and research activities to the other. The Bailey Plan also provided that the Arboretum's library and herbarium and the libraries and herbaria of several other institutions and agencies and of the Department of Biology (all of which would be under the jurisdiction of an Institute of General Morphology) would be combined in a single building to be erected in Cambridge. This proposal was allegedly made to benefit Harvard by making more efficient use of what Professor Bailey called "Harvard's botanical resources". His report plainly revealed that no regard was paid to the interests of the Arboretum as an institution or to any special obligation or trust relative thereto.

Incredible as it may seem, this Bailey Plan was formulated by Professor Bailey and was later approved by the Corporation without legal advice. The property of the Arboretum was treated as though it were subject to the control of the

⁶ The report of Director R. A. Howard for 1953-'54 states that the herbarium contains 675,119 specimens of which nearly 600,000 have been

removed to Cambridge. As to the library, Director Howard gives the number of bound volumes as 48,673 of which "approximately 7000" are being retained at Jamaica Plain.

Corporation for Harvard's general purposes and interests and as though no special obligation with regard to the Arboretum existed at all.

As hereafter mentioned, it was later admitted by the Corporation that a special trust for the Arboretum does exist. But it is of crucial importance to recognize that when the Bailey Plan was conceived and approved the Arboretum was thought of as merely one of various institutions or agencies which could be dealt with as the Corporation chose, without reference to any trust obligation whatever.

In January 1946 the Harvard Corporation voted to approve the Bailey Plan. Proceeding as it did without legal advice, the Corporation acted with obvious carelessness. Unwittingly, but actually, it thus disregarded the first duty of trustees: the duty of loyalty to their trust.

As preliminary measures to implement the Bailey Plan were taken, their adverse effect on the status and work of the Arboretum began to be realized. Late in 1949 questions were raised by members of the Arboretum Visiting Committee which were referred to a committee known as the Coordinating Committee on the Biological Sciences.⁷

In May 1950 the Coordinating Committee submitted a report which, in approving the Bailey Plan, again overlooked the fact that Harvard held the Arboretum under a special trust. In fact, this report went so far as to declare as a proper concept that the Arboretum was "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."

This candid statement is a key to the entire Arnold Arboretum controversy. It clearly reveals the erroneous conception that no regard need be paid by Harvard to any legal or moral obligation to protect the Arnold Arboretum as an institution.

A majority of the members of the Arboretum Visiting Committee were not satisfied by the May 1950 report of the Coordinating Committee. On the contrary, it confirmed their impression that the Bailey Plan had been conceived and approved in total disregard of the Arboretum's interests. They were convinced that, if carried out, the Bailey Plan, as affecting the Arboretum, would be a mistake of policy and a breach of faith with donors. They also had doubts as to whether the carrying out of the plan would involve a legal

breach of trust under the law of Massachusetts. They felt that their protests were being ignored by the Harvard authorities.

Consequently, in June 1950, fourteen members of the Visiting Committee retained Mr. J. W. Farley (a former Overseer of Harvard and a lawyer of long experience) to give an opinion as to whether a legal breach of trust would be involved. In September 1950 Mr. Farley reported that in his opinion the Bailey Plan would in various respects violate the trust upon which the Arboretum's property and funds were held by the Corporation. At this point, instead of submitting a petition for instructions to the Massachusetts courts in order finally to settle the legal issues, the Corporation deferred action for the time being on the construction of the new building in Cambridge and asked its own counsel for another opinion. And thus the Arnold Arboretum controversy began.

Harvard Finally Acknowledges the Arboretum Trust

Following Mr. Farley's opinion of September 1950, counsel for the Harvard Corporation and counsel for the Arboretum Visiting Committee each prepared extensive reports on the legal aspects of the controversy.

In an opinion dated May 1, 1951, counsel for Harvard, although conceding that the original Arnold gift was held in trust, sought by a variety of legal arguments to question the applicability of the 1872 trust agreement to large portions of the Arboretum endowment. Meanwhile Mr. Robert G. Dodge had become associated with Mr. Farley as counsel and they were jointly retained by the Arboretum Visiting Committee as such.

In a comprehensive opinion dated March 1, 1952, Messrs. Dodge and Farley set forth views contrary to those of Harvard's counsel. They confirmed the previous opinion of September 1950 that there were serious questions as to the legality of the Bailey Plan and recommended that a judicial determination of all the legal issues should be sought — a recommendation then and ever since ignored or opposed by the Corporation.

At its meeting on April 29, 1952, the Arboretum Visiting Committee by a large majority adopted a constructive plan for the solution of the whole Arboretum question, and voted to submit this plan to the Corporation and Board of Overseers.

cluding a number of men and women well-versed in horticultural-botanical matters. The Coordinating Committee on the Biological Sciences is a committee of members of the Board of Overseers itself and in 1949-'50 had 9 members.

⁷ The Arboretum Visiting Committee is one of a number of committees appointed by the Board of Overseers "to review the activities" of various Schools and departments of the University. In 1949-'50 this Committee had 27 members, in-

This Visiting Committee plan specifically opposed the removal from Jamaica Plain to Cambridge of the Arboretum's library and herbarium as being obviously contrary to the Arboretum's interests. The Committee made a formal proposal for coordinated fund raising campaigns for the Arboretum and for botany at Harvard, expressing confidence that friends of the Arboretum would subscribe a substantial sum for the better housing of the Arboretum's library and herbarium in Jamaica Plain. This carefully prepared plan was wholly ignored by the Harvard Governing Boards.

These steps in defense of the Arboretum's interests were, as above mentioned, first undertaken by fourteen members of the Arboretum Visiting Committee, and later by the Committee as such. The Committee's recommendations were made in the light of serious questions which had been raised, not only as to the policy and morality of the Harvard plan, but also in view of serious questions as to the legal propriety of the Corporation's action.

In making their investigations and recommendations, the Visiting Committee did no more than fulfill their proper function. This was not the work of interlopers seeking to interfere with matters of administrative policy, but was action taken by a Committee duly appointed by the Board of Overseers. Intimations from Harvard sources that the conscientious efforts of the Visiting Committee constituted some sort of improper pressure are false and unjustified.

Between March and December 1952 several conferences were held between representatives of the Arboretum Visiting Committee and of the Harvard Governing Boards with a view to an adjustment and termination of the controversy. While all these efforts failed, they did have one significant result: the belated recognition by the Harvard Corporation in its vote of January 19, 1953 that the Corporation held the Arboretum's property and endowment upon a special trust and that in the administration of the trust it must act with a view to the best interests of the Arboretum.

By the same vote of January 19, 1953, the Bailey Plan was officially rescinded *in form* insofar as it applied to the Arboretum, but not, as we shall now see, in substance.

The Adverse Effect of Harvard's Plan

Although the first effort to move the Arboretum's library and herbarium to Cambridge had been checked in 1950 by the questions raised by members of the Arboretum Visiting Committee and Mr. Farley's legal opinion, the Harvard

Corporation was not turned aside from its resolve to put through those features of the Bailey Plan most adverse to the Arboretum. The plan to remove the bulk of the Arboretum's library and herbarium to a new building in Cambridge and to use a substantial amount of Arboretum income for the maintenance of that building was merely postponed.

The apparently fixed resolve to go through with these features was reflected in the Corporation's vote of January 19, 1953.

For although that vote conceded that the Arboretum's property was held by the Corporation subject to a special trust, the vote went on to say that "the Corporation determines 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 main body of the library and herbarium of the Arboretum related to research . . ." leaving at Jamaica Plain only such books and specimens as might be required for a so-called "working library and herbarium."

Moreover, the vote provided that "a part" of the expense of maintaining and operating the new Cambridge building shall be borne by the Arboretum's endowment, this indefinite amount to be determined in accordance with Harvard's "standard procedure."

Since nearly all of the library and herbarium was "related to research", the January 1953 vote actually called for the removal of the great bulk of the library and herbarium. And, as already mentioned, this has actually resulted in the removal to Cambridge in June 1954, of about six-sevenths of both the library and herbarium.

In purporting to "determine" that the removal would be "in the best interests" of the Arboretum, it should be remembered that the Corporation was approving an important feature of the original Bailey Plan; and that the very basis of the Bailey Plan was to strengthen Harvard botany, without regard to its effect upon the Arboretum.

It should also be remembered that the Corporation was presumably still influenced by the above-mentioned erroneous view of the Coordinating Committee of the Board of Overseers that the Arboretum was merely "a tool to be used . . . in the overall interests of the University", and by its previous commitment to centralize libraries and herbaria as called for by the Bailey Plan.

When the vote of January 19, 1953 was announced, many friends of the Arboretum and of Harvard were profoundly shocked. They felt that once the Arboretum's research collections were

merged with Harvard's own collections in Cambridge, the research staff of the Arboretum would inevitably owe allegiance to the Harvard Department of Biology. They felt also that the unique and fruitful research which had been based on the joint use at the same location of the "indoor" and "outdoor" collections would cease.

They were convinced that the remarkable combination of scientific botany and horticulture which had given the Arnold Arboretum its worldwide reputation would be destroyed for an indefinite time and perhaps forever. In short, they believed that the plan, with its removal and other features, was so far from being "in the best interests of the Arboretum" that, on the contrary, it would mean the virtual destruction of the Arboretum as a *scientific* institution.

The truth is that, except for the fact that under Harvard's plan the Arboretum would be technically administered by the Arnold Professor rather than by the chairmen of Professor Bailey's two Institutes, there is little difference in substance between the Arboretum as it would have been under the Bailey Plan and the Arboretum as dismembered under the January 1953 vote.

In either case, the research collections and the research activities of the Arboretum after removal to Cambridge would, in practice, be merged with the overall botanical activities of the Department of Biology in Cambridge. In either case the living collection would be left in splendid isolation at Jamaica Plain. Thereafter, without close association with the "indoor" scientists, the famous living collection would soon represent little more than an interesting public park.

Accordingly the purported cancellation of the Bailey Plan as regards the Arboretum by the January 1953 vote was without reality. It was a cancellation in form only. The substance and adverse effects of the Bailey Plan remained in practical effect so far as the Arboretum was concerned.

Harvard's Disregard of Its Duties as Trustee for the Arboretum

As we have seen, the Harvard Corporation adopted the Bailey Plan in evident ignorance of the fact that the Arboretum was held by the Corporation as trustee of a special trust. When

the existence of the Corporation's obligations under that trust was brought to its attention, it at first declined to recognize the trust and sought by a variety of legal arguments to deny or circumscribe its obligations. It was not until January 1953, seven years after the adoption of the Bailey Plan, that the Corporation was finally brought to concede that the Arboretum and its endowment are held by Harvard subject to a special trust.

Furthermore, even after the trust obligation was finally acknowledged, the Corporation refused and still refuses to recognize its duty to obtain judicial instructions. This refusal has been in the face of a generally recognized procedure whereby a trustee is obliged to file a petition for instructions with the appropriate court when, as in this case, the legal validity of its administration is questioned by responsible persons upon the advice of experienced counsel.

Both before and after the Corporation's vote of January 19, 1953, counsel for the Arboretum Visiting Committee repeatedly urged on Harvard the desirability of filing a petition for instructions. They pointed out that the filing of such a petition would make possible a judicial decision as to whether or not the plan was in the best interests of the Arboretum. They urged that the doubts and uncertainties which had disturbed so many friends both of Harvard and of the Arboretum would thus be settled; and that it was unprecedented for a trustee to refuse to file a petition in such circumstances.

These representations of counsel were supplemented by those of the Arboretum Visiting Committee itself. That Committee in its above-mentioned recommendation of April 29, 1952, declared it to be "inconceivable" that the Corporation should fail to apply for judicial instructions.

Nevertheless, Harvard's adamant refusal to make such an application still stands. Its stubborn refusal to place the matter before the courts has continued to the present time. The Corporation has claimed that under Massachusetts law the court has no jurisdiction over a petition for instructions filed by a trustee when the trustee has no doubts as to the legal propriety of his action, no matter how serious the legal questions which may be raised by others. We are advised

by counsel that this is not the law of Massachusetts.⁸

When a trustee refuses to file a petition for instructions, the only method in Massachusetts for enforcing an educational trust, such as the Arboretum trust, is through the Attorney General of the state. The Attorney General may file a petition on his own initiative or, more frequently, permits the use of his name by persons interested in the trust who act as "relators" and assume the cost of the suit.

In these circumstances, counsel for certain members of the Visiting Committee and others, acting as individuals, applied through counsel to the Attorney General of Massachusetts in April 1953 for permission to use his name in a judicial proceeding to determine the legality of the January 1953 plan. The Harvard Corporation then went to the extreme of opposing the application and succeeded in persuading the Attorney General to refuse the use of his name on grounds which counsel for the petitioners consider specious.

The natural reaction of friends of the Arboretum and of many friends of Harvard has been one of indignation. What is involved is the right to a "day in court", a long-cherished right under our institutions. The strong feelings aroused by the Corporation's course are the normal reaction of citizens with whom it does not "sit well" to be deprived of an opportunity to test the question of breach of trust before an unprejudiced tribunal.

In an effort to require the Attorney General of Massachusetts to reconsider his above-mentioned decision refusing the use of his name for a test suit, ten individuals (eight of whom were members of the Arboretum Visiting Committee) brought suit in the Supreme Judicial Court of Massachusetts asking for an order directing the Attorney General to reconsider his decision in the light of correct principles of law. This case, entitled *Ames et al v. Attorney General*, was

decided by the Supreme Judicial Court on February 11, 1955 with an opinion denying the relief asked for. As above mentioned, the Court's decision dealt only with the technical question whether the Court could review a "purely executive decision" of the Attorney General and did not pass upon the issue as to whether Harvard's plan involves a breach of trust.

It should be clearly understood, therefore, that this decision in no way determined the merits of the case. So far as the legality of Harvard's plan for the Arboretum is concerned, a judicial ruling on the merits is no less necessary than before.

Harvard's Position — Some Comments

In July 1954 Harvard published a widely circulated pamphlet by Dean McGeorge Bundy of the Faculty of Arts and Sciences entitled, "Harvard's View of the Controversy over the Arnold Arboretum". An analysis of the advantages claimed by Dean Bundy for what he calls the Arboretum's "expansion" to Cambridge shows the fallacy of his argument.

1. On the main question as to whether the removal of most of the Arboretum's herbarium and library to Cambridge can be in its "best interests", Dean Bundy states that "... many distinguished botanical institutions have their living collections in one place and their main research collections and books in another."

Nothing could be more misleading than this suggestion that the disintegration of the Arboretum is in harmony with an accepted practice. The fact is that the general tendency of horticultural-botanical institutions is to *integrate* in one locality the three elements necessary to a rounded institution — living collection, herbarium and library. The truth is that with rare exceptions such institutions are striving to do the precise opposite of what the Harvard plan calls for. In

⁸ Compare this claim of the Harvard Corporation to the celebrated Gordon McKay case of 1914-'17. In that case the Corporation had made an agreement with the Massachusetts Institute of Technology for the joint administration of funds received by Harvard under certain deeds of trust and the will of Gordon McKay. Doubts being raised as to the legality of the agreement, the Corporation, under advice of counsel, ex-

pressed confidence in the propriety of its action but ultimately filed a petition for instructions. Notwithstanding that this petition stated that the Corporation had no doubts as to the legality of the agreement, the Supreme Judicial Court of Massachusetts took jurisdiction of the case and unanimously decided that the Corporation and its counsel were in error and that the agreement was legally void as a breach of trust.

a judicial hearing this could be proved by a great weight of evidence.⁹

This suggestion that Harvard's plan for the separation of the Arboretum's research facilities from its living collection has support in current practice is not only misleading, but also reveals the false premises upon which the Harvard Corporation evidently proceeded. Since none of these gentlemen themselves had expert qualifications in this field, they must have relied on the opinion of others. If they were advised that the separation of the Arboretum's activities and facilities would not harm the Arboretum's work, it is evident that the underlying premise for their plan had a false basis.

2. Dean Bundy argues that, since the construction cost of the new building in Cambridge is being met by Harvard, the removal of most of the library and herbarium will effect a "great basic saving."

But while it is true that none of the actual construction cost has been charged to the Arboretum, it by no means follows that the plan costs the Arboretum nothing, even in dollars and cents.

The facts cannot be ignored that part of the Arboretum's already inadequate income is being used toward the maintenance of the new Cambridge building; and that this expense is in addition to continued maintenance expense at Jamaica Plain.

More important, however, are other considerations which refute the claim that this plan is not damaging to the Arboretum. Any such claim ignores the fact that the separation of the Arboretum's research facilities from its living collection, violates the basic principle of integration upon which the Arboretum was developed for seventy-five years. It also ignores the fact that this disintegration necessarily shifts nearly all serious research away from the Arboretum, and thereby costs the Arboretum its scientific prestige as a horticultural-botanical unit.

3. Dean Bundy justifies the removal to Cambridge as providing a solution of the problem of safer and better housing for the Arboretum's library and herbarium.

In so doing he fails even to mention the proposals discussed in 1952 for an addition to the present excellent fireproof wing at Jamaica Plain and the nearly unanimous report of the Arbore-

tum Visiting Committee of April 29, 1952 proposing an appeal for funds to safeguard the collections. There is no doubt that if there had been a wish to preserve the Arboretum as an integrated whole the housing problem could have been solved; and that if the Arboretum is reintegrated this problem could still be solved.

4. Dean Bundy maintains that the merger of the Arboretum's research library and herbarium with Harvard's own collections in Cambridge will provide a "research tool of a wholly new and superior quality."

This reflects a basic misconception about the function of the Arboretum and the requirements for fruitful scientific research in the horticultural-botanical field.

As so clearly conceived by Professor Sargent (p. 3), the library, the herbarium and the living collection of trees and shrubs are interdependent. When these elements are located together research scholars primarily interested in the "indoor" collections have the benefit of close association with the "outdoor" scientists and the living collection. But once these are separated so that the tools of the trade are in different places, the basis for this contact and collaboration is destroyed.

Instead of aiding research in this field, we contend that the precise opposite is true. We contend that the removal of most of the library and herbarium (thereby dividing the staff and making important research at the Arboretum virtually impossible) is a backward step contrary to the best interests of the Arboretum and consequently a breach of trust.

Argument on this underlying issue could go on indefinitely. But no one can *decide* it except the courts of Massachusetts. What we desire is the opportunity to call the witnesses, so that the court can determine the question after hearing the testimony and argument. But it is precisely this fair and usual procedure that Harvard has resisted.

5. Dean Bundy's explanation of Harvard's opposition to a judicial ruling as to the legality of its administration of the Arboretum trust is specious.

While claiming that fidelity to trusts "is the chief concern of the Harvard Corporation in the management of the Arnold Arboretum", he gives no valid reason for the Corporation's refusal to

North America which have libraries and herbaria. Mr. Wister reports that only one of these has both its library and herbarium in a separate place and states: "As far as the matter stands in North America, the Bundy statement is absolutely misleading."

⁹ For example, John C. Wister, President of the American Association of Botanical Gardens and Arboretums and Director of the Arthur Hoyt Scott Horticultural Foundation at Swarthmore College, has analyzed the above statement of Dean Bundy as applied to the approximately thirty-four botanical gardens and arboretums of

apply to the courts for judicial instructions in the face of substantial legal questions raised by distinguished counsel. Harvard's position appears to be that *because the Harvard Corporation believes its plan to be legal*, it has no obligation to obtain a judicial ruling. This assumption of infallibility, which turned out to be unwarranted in the McKay case, lacks justification. It has no basis either in law or in the accepted practice of responsible trustees.

6. Dean Bundy implies that the opponents of Harvard's plan have exercised undue "pressures" on the University. He seeks to make a virtue of the Corporation's obduracy by comparing it to Harvard's traditional independence in resisting pressure from government or business.

This is gratuitous and unfair. The question whether Harvard is fulfilling its legal obligations as trustee and its moral obligations to the benefactors of the Arboretum was first raised by the Arboretum Visiting Committee, appointed by the Board of Overseers. Many others have considered Harvard's position indefensible. Surely it is permissible for friends of Harvard to raise such questions of principle without being castigated as a pressure group.

What of the Future ?

The controversy has already gone on for over five years since members of the Arboretum Visiting Committee became disturbed at the end of 1949. It could have been terminated before now if Harvard had consented to a judicial hearing when serious doubts as to a possible breach of trust were raised in September 1950.

To many it seems intolerable that, when important questions of legal breach of trust have been raised by eminent lawyers, no way has been found to obtain a judicial ruling through the only means whereby these questions can be determined, i.e., through a hearing on the merits by the courts of Massachusetts.

It seems certain, therefore, that the effort to obtain a judicial hearing on the merits of the breach of trust question will continue. And, if ultimately successful, the trial and appeal of the case would necessarily require many months. It is probable, therefore, that the controversy will continue for a considerable period.

As for the Arboretum's future under the present Harvard plan, if we are right in our contention that the *disintegration* of the Arboretum must inevitably injure its scientific work and lower its prestige, it follows that until the *reintegration* of the Arboretum is accomplished its future is far from bright. The protestants against Harvard's plan find it impossible to see

how the Arboretum, with its principal research tools, and thus its scientific research focus shifted from Jamaica Plain to Cambridge, can maintain the leading position which it has held in the past.

What is the real explanation for Harvard's attitude? The Harvard Corporation's obduracy in brushing aside the objections of the Arboretum Visiting Committee and in resisting all efforts to obtain a judicial ruling has been variously termed "unbelievable", "incredible", "stiff-necked" and "autocracy frozen into obstinacy". For this attitude, various explanations have been suggested.

One theory is that the Corporation's attitude is controlled by the embarrassing experience of a former Corporation in the above-mentioned Gordon McKay trust litigation of 1915-17 (p.8). It is recalled that in the McKay case a plan of the Corporation was declared illegal by the courts, notwithstanding a prior opinion to the contrary by the Corporation's counsel and the Corporation's own strongly asserted confidence in the legality of its plan. This provides some basis for the view that the present Corporation is simply unwilling to risk a similar outcome in this Arboretum case. But while it is probable that the prior experience in the McKay case has been an important factor, it seems inadequate as a complete explanation. Various other elements may have influenced the Corporation.

One inherent factor is the almost unique status of the Corporation itself. This body of seven men (the President and Treasurer and five Fellows) appoint their own successors (subject only to the Overseers' "consent"), can serve for unlimited terms and are removable by no one but themselves. Subject only to the approval of the Overseers in certain matters such as appointments, the Corporation is therefore accountable to no constituency whatever — a situation which naturally tends to the ignoring of protests, whether justifiable or otherwise.

This status has immense advantages for Harvard when it is a question of resisting unreasonable pressures, such as the demands of political demagogues for the impairment of academic freedom. On the other hand, it has great disadvantages when the Corporation, as in this Arboretum case, has taken a misguided position even to the extent of saying in effect that it is "above the law" with regard to obtaining a judicial ruling as to the legality of its conduct as trustee.

Another element is the fact that the original plan of 1945-46 was conceived without any consciousness of the existence of any trust for the Arboretum and with evident disregard of any duty to protect its interests as an institution. Having once acted on that basis, there has been

an obvious tendency on the part of the Corporation to hold to the main features of the original plan, even when it had to be admitted that the basic assumptions on which it was framed were untenable.

Moreover, simple considerations of "face" have doubtless played their part. Undoubtedly the Corporation has been influenced by its reiterated statements as to the correctness of its position. Even when such statements are discredited, it is not always easy to retreat from a position thus "frozen".

The true explanation for the attitude of the Corporation in seeking to "steamroller" the protests of so many friends of Harvard seems to lie, therefore, not in any one of the factors mentioned but in a combination of them all and perhaps of still others.

Is there any likelihood of a voluntary change of attitude on Harvard's part? It does seem unbelievable that Harvard should indefinitely continue to resist a judicial hearing because if Harvard were successful, the question whether Harvard has committed a serious breach of trust would forever remain adjudicated.

By every rule of reason and every standard applicable to the conduct of responsible trustees, Harvard ought to welcome rather than avoid a judicial hearing. In view of the record, however, it would be rash to predict whether or not Harvard's attitude may change.

What more can be done? Certainly much more should be done to inform those concerned with the future of the Arnold Arboretum and with American horticulture and botany as to the essentials of this controversy.

Without minimizing the importance of the impairment of a leading horticultural-botanical institution, broader issues are at stake.

As a matter of policy should a great university, acting as trustee for such an institution, establish a precedent for disintegrating its facilities for the supposed benefit of other interests served by the trustee? As a matter of fair dealing with donors, should such a trustee disintegrate the institution when most of the gifts to it have been made on the assumption that it would continue to be developed as an integrated whole?

Most important of all, should such a trustee be permitted to avoid a judicial hearing when substantial doubts have been raised by experienced counsel as to the legality of its administration?

It is significant that as the facts on these main issues have become better known the membership of this Association has constantly increased.

It is desirable, therefore, to disseminate factual information on a wider scale than has here-

tofore been possible and to maintain an active organization. With these purposes it will be necessary to raise funds through a general subscription to cover the Association's reasonable expenses.

Despite considerable misrepresentation on the part of others, our Association has steadily grown both in numbers and conviction. What is indicated is a steady and persistent effort. With such an effort, there is a reasonable prospect that the wrong which we seek to remedy can ultimately be set right.

Summary

(1) Three main issues are raised: (a) that Harvard's plan for the Arboretum, being destructive of the Arboretum's usefulness and prestige, is a mistake of policy; (b) that the plan is a breach of faith toward donors, in that they made gifts in confidence that the Arboretum would be continued as an integrated institution; (c) that, in the opinion of eminent counsel, the present plan may well involve a legal breach of trust by Harvard as trustee for the Arboretum.

(2) Harvard's original plan for the Arboretum was conceived without consciousness of any special trust for the Arboretum and without recognition of any trust obligation to protect its interests as an institution. While the existence of such a trust was eventually acknowledged in the modified plan of January 1953, this modification left intact important features adverse to the Arboretum's interests and was a change in form rather than in substance.

(3) For over seventy years the Arboretum was developed as an integrated horticultural-botanical institution with the three essential elements — living collection, library and herbarium — in one locality at Jamaica Plain. The public usefulness and world-wide fame of the Arboretum rested upon this combination. Harvard's plan, whereby all the Arboretum's library and herbarium related to research have been removed to Cambridge, destroys this integration for the supposed benefit of other Harvard interests. It thereby injures the scientific usefulness, reputation and future of the Arboretum. The Harvard Corporation's purported "determination" that its plan does not injure the interests of the Arboretum is without sound basis.

(4) Harvard's effort to push through the plan despite all protests is apparently influenced by a decision, to aid other Harvard interests, made before the trust relationship toward the Arboretum was recognized.

(5) Harvard's refusal to agree to a judicial hearing, notwithstanding serious doubts as to

the legality of its plan, is contrary to the accepted practice of responsible trustees and is without justification.

(6) The pamphlet, "Harvard's View of the Controversy over the Arnold Arboretum" published in July 1954, is inaccurate and misleading.

(7) The recent decision of the Supreme Judicial Court of Massachusetts in no way affects the merits of this matter. It merely ruled that a refusal by the Attorney General of Massachusetts to permit the use of his name for a test suit was not reviewable by the courts.

The Association for the Arnold Arboretum, Inc. is a nonprofit Massachusetts corporation organized to protect and support the Arnold Arboretum. It is independent of Harvard and is opposed to Harvard's present plan for the Arboretum. It is not to be confused with the Harvard-sponsored "Friends of the Arnold Arboretum".

The Association furnishes a medium whereby all those interested may help to restore and develop a leading institution in the horticultural-botanical field.

The Association, which includes many tested and loyal friends of Harvard, in seeking to reintegrate the Arnold Arboretum, is seeking also to vindicate Harvard's reputation as a scrupulous guardian of trust funds.

Along with a steady increase of membership, conviction has grown as to the justice of the Association's position.

In conclusion, we emphasize that the public usefulness of the Arnold Arboretum should not be thought of as belonging to the past. On the contrary, with the growth of the country and of interest in horticulture and botany, its future field of usefulness as a *scientific* institution could be greater than ever.

If the Arboretum's research library and herbarium can be returned to Jamaica Plain for use in connection with the living collection, as they were intended to be; if the Arboretum can be freed from domination by other interests; and if it can get back the use of its entire income for its own purposes; the Arboretum will go on to an even more distinguished future.

Our Association will continue its efforts to these ends, and invites the support of all those interested in our purposes.

Executive Committee,
Association for the Arnold Arboretum, Inc.,
John T. Hemenway, Chairman.

April 1955

A DENIAL OF JUSTICE and A MATTER OF PRINCIPLE

A STATEMENT BY A SPECIAL COMMITTEE
OF THE
ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.*

MARCH 15, 1956

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.*

Incorporated in 1953 as a nonprofit Massachusetts corporation

50 STATE STREET • BOSTON 9, MASSACHUSETTS

JOHN T. HEMENWAY
President

FRANCIS BLAKE
Treasurer

THOMAS V. RANKIN
Secretary

DIRECTORS

JOHN S. AMES
North Easton, Mass.

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MRS. J. W. FARLEY
Needham, Mass.

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Geneva, N. Y.

MRS. HAROLD GREENE ARNOLD
Boston, Mass.

LAURENCE B. FLETCHER
Cohasset, Mass.

HERBERT T. STODDARD
Cohasset, Mass.

FRANCIS BLAKE
Dover, Mass.

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Lutherville, Md.

PETER CASCIO
West Hartford, Conn.

JOHN T. HEMENWAY
Milton, Mass.

MRS. JOHN C. VOSOFF
Boston, Mass.

GRENVILLE CLARK
Dublin, N. H.

WALTER HUNNEWELL
Wellesley, Mass.

MRS. WILLIAM J. WALTERS
New Brunswick, N. J.

MRS. FRANCIS B. CROWNINSHIELD
Boston, Mass.

SILAS B. MCKINLEY
St. Louis, Mo.

WILLIAM P. WHARTON
Groton, Mass.

HENRY F. du PONT
Winterthur, Del.

LEWIS PERRY
Boston, Mass.

JOHN C. WISTER
Swarthmore, Pa.

* The Association is an independent organization having no connection with Harvard University and is not to be confused with the Harvard-sponsored "Friends of the Arnold Arboretum". Organized to protect and support the Arnold Arboretum in the public interest, the Association is opposed to Harvard's present plan for the Arboretum.

A DENIAL OF JUSTICE AND A MATTER OF PRINCIPLE

At the annual meeting of members of the Association for the Arnold Arboretum, Inc., on December 1, 1955, the following resolution was unanimously adopted:

RESOLVED: That this annual meeting of the Association for the Arnold Arboretum, Inc. records that a denial of justice exists by reason of the prevention of a judicial hearing on the legality of Harvard's plan for the Arboretum, notwithstanding serious doubts expressed by eminent counsel; and that it is a matter of principle to seek relief from this denial of justice; and

FURTHER RESOLVED: That the Association should express this conviction and continue to seek a day in court through public statements and other appropriate means.

The undersigned Special Committee was appointed to prepare a statement setting forth the reasons why the existing situation concerning the Arnold Arboretum involves a denial of justice and why it is deemed a matter of principle to make a persistent effort to remedy this injustice. The Special Committee submits the following.

The Arnold Arboretum was founded in 1872 under a trust indenture between the trustees under the will of James Arnold and the President and Fellows of Harvard College, commonly known as the Corporation of Harvard University.

In accordance with this trust agreement, the Corporation dedicated for Arboretum purposes certain lands in West Roxbury, Massachusetts (now Jamaica Plain) that had been left to Harvard in trust by Benjamin Bussey. This property, with later additions, now includes some 265 acres. On it a great collection of living trees and shrubs has been assembled over the years.

By the trust agreement the Harvard Corporation agreed to hold the funds (originally about \$100,000) in trust for 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" in the climate of what is now Jamaica Plain. The agreement provided that the Arboretum was to be under the "care and management" of a professor, to be called

the Arnold Professor, who was to "teach the knowledge of trees" in Harvard University. It also provided that the fund was not to be used for "any other object however meritorious or kindred in its nature."

Over the years and under the leadership of the noted Charles S. Sargent, Director of the Arnold Arboretum for 55 years (1872-1927), the Arboretum was developed into the leading institution of its kind in the United States and acquired a world-wide reputation. A superb collection of trees and shrubs gathered from many parts of the world was assembled on the Arboretum's 265 acres in Jamaica Plain; a fine herbarium was there built up which by 1954 numbered nearly 700,000 specimens; an almost unique horticultural and botanical library was there assembled; and a substantial endowment was acquired. By 1954 this endowment (including a \$1,000,000 memorial fund subscribed in memory of Professor Sargent) had a market value of some \$5,000,000, with an income of \$200,000. For two generations, a steady stream of important scientific publications was produced by the Arboretum's staff; and the institution had the respect of horticultural-botanical authorities the world over.

Notwithstanding this development, the Harvard Corporation early in 1946 approved the Bailey Plan, under which the Arboretum would be disintegrated through the removal to Cambridge of the major part of its library and herbarium, thus separating its great living collections from its herbarium and library and shifting its focus and a substantial portion of its staff to Cambridge. Strong objection was made to this plan by the Visiting Committee on the Arnold Arboretum, appointed by the Board of Overseers of Harvard and composed of some 25 persons experienced in the field of horticulture-botany. The grounds of objection were that the proposed plan would be gravely detrimental to the Arboretum's work and prestige; that the plan was conceived primarily in the interest of strictly botanical work in Cambridge without proper regard to the Arboretum's interests as an integrated institution; and that counsel for the Visiting Committee had advised that the plan was very likely illegal as a breach of trust.

All these objections were overruled by the Harvard Corporation and although the plan was somewhat

modified in form its essentials were left unchanged. Moreover, the Corporation even refused, after repeated requests, to apply to the courts of Massachusetts for instructions as to whether the plan was legally valid, notwithstanding the serious doubts still raised by experienced counsel. And finally, after prolonged but futile efforts to reach an agreement, Harvard in 1954 made an accomplished fact of the plan by removing to Cambridge about six sevenths of the Arboretum's library and herbarium and by utilizing some of the Arboretum's endowment toward the maintenance of a new botanical building in Cambridge.

When Harvard in 1953 still declined to seek judicial instructions, interested persons applied to the Attorney General of Massachusetts for leave to bring a "relators" suit in his name to test the breach of trust issue. This procedure was made necessary by the Massachusetts law, which denies independent status to interested citizens or even donors to bring legal proceedings of this character. Harvard then went to the extreme length of opposing this application and presented an elaborate opposition argument in a letter to the Attorney General. The Petitioners and their counsel had no knowledge of that letter, which contained certain erroneous statements of law, until long afterwards. They therefore had no opportunity to answer it and Harvard was successful in persuading the Attorney General to deny the application. His decision was a clear case of administrative lawlessness since he purported to decide that no breach of trust was involved without conducting a hearing in any real sense and without hearing testimony from the numerous witnesses upon whose evidence the issue of breach of trust would necessarily turn.

The Petitioners thereupon sued directly in the Supreme Judicial Court of Massachusetts asking alternatively for a writ of mandamus or certiorari to review the Attorney General's refusal to permit a suit, stating that this refusal was contrary to all precedent and plainly arbitrary and erroneous. The Supreme Judicial Court, however, on February 11, 1955, dismissed this suit, *Ames v. Attorney General* (1955 Massachusetts Advance Sheets 111, 332 Mass. 246, 124 N.E. 2d 511). In this decision the court in no way passed upon the breach of trust question or upon the propriety of the refusal by the Attorney General. The court relied solely upon the ground that the Attorney General's action was a "purely executive decision" and not subject to review by the court.*

Since under the law of Massachusetts neither a donor nor an interested citizen has any standing to sue to establish a breach of trust concerning a public institution, the net result of the various steps in this controversy is that, in spite of serious doubts of the legality of Harvard's plan expressed after long study by eminent counsel, Harvard has so far been able to avoid any judicial hearing whatever. And despite the fact that the courts of Massachusetts can alone decide whether a breach of trust exists, and despite the fact that there is alleged a continuing breach of trust from month to month and from year to year, no present way has yet been found whereby those who wish to litigate the breach of trust issue can obtain "a day in court".

This unusual and perhaps unique result has come about, as above noted, through the extraordinary combination of three factors: (1) The refusal by the Harvard Corporation as trustee (improper and arbitrary, as we assert) voluntarily to ask court instructions, notwithstanding the opinion of experienced counsel that there are serious questions as to the legality of its plan that ought to be decided by the courts; (2) The refusal of the Attorney General of Massachusetts (arbitrary and erroneous, as we claim) to permit the use of his name for a test suit; (3) The decision of the Supreme Judicial Court of Massachusetts that it can do nothing, since the Attorney General's decision is "purely executive" and "not reviewable in a court of justice".

This situation, it seems to us, involves an injustice, because the Harvard Corporation's continued and obstinate refusal as trustee to seek judicial instructions was and is contrary to the established practice and duty of responsible trustees. It is unjust because the refusal of the trustee was compounded by an arbitrary and erroneous decision of the Attorney General, the propriety of which the highest court in Massachusetts has said it cannot even examine. Further it is unjust because the Attorney General's refusal to lend his name was instigated by Harvard's opposition.

As this situation has been comprehended, conviction has grown in the minds of many benefactors of the Arnold Arboretum, of many supporters of horticulture throughout the nation, and of many friends of Harvard University concerned for Harvard's repu-

* A memorandum, September 1955, by Messrs. Robert G. Dodge and J. W. Farley, leading lawyers of Boston, explains in detail what was and was not decided by the Supreme Judicial Court in this case.

tation as a reliable guardian of trust funds, that resistance to this injustice is a matter of principle. They feel that it is a matter of principle for the simple reason that resistance to plain injustice ought always to be a matter of principle for responsible citizens. This, they think, is a clear case where, if ever, that responsibility should be fulfilled.

We make it clear that we do not positively assert that a breach of trust is involved, because that is a matter which the courts alone can decide after full and careful hearing of testimony. What we do say is that there is serious doubt, as certified by eminent counsel, concerning the legality of Harvard's plan for the Arboretum and that an injustice exists by reason of our being deprived of a day in court to submit our claims. This is indeed a situation so intolerable that it should be apparent to all that an obligation exists to resist the injustice and to attempt to remedy it.

We are conscious that to remedy this may require a long time. We are conscious that many examples can be cited where serious injustices have gone without remedy despite all efforts. But we also know that other instances can be cited where even after many years an injustice which seemed almost beyond recall has finally been remedied through the efforts of those who, convinced that they were right, had the persistence to see it through.

The Association for the Arnold Arboretum was incorporated in 1953 as a nonprofit Massachusetts corporation. It has a membership of over 1150 persons from 41 states, the District of Columbia, Canada and England. Its members include many supporters of the Arnold Arboretum, devoted to the development of horticulture, who are dismayed at the disintegration of the Arnold Arboretum and the prospective loss of its position as a leading horticultural-botanical institution. Its membership also includes others who, without having any special interest in the Arboretum or horticulture, are loyal friends of Harvard University and are jealous of its reputation as a responsible trustee of educational funds and who are disturbed

by the serious impairment of that reputation which has already occurred in this case. Beyond this, the Association has some members whose primary interest is rather the broad question of principle as to whether a trustee of large educational funds can be permitted entirely to avoid a judicial hearing on a claim of breach of trust made by responsible persons under advice of distinguished counsel; these members see in this issue implications extending beyond the interests of the Arnold Arboretum, or of horticulture, or of Harvard University. Accordingly, we invite anyone interested in this matter for any of the above reasons to become a member of our Association and thus lend a hand in the effort to remedy the injustice we have described.

Our expenses will be met by an annual voluntary subscription among the members, the next of which will be in the autumn of 1956; but it should be clearly understood that membership involves no obligation, moral or otherwise, to subscribe at all.

If you are not already a member of the Association for the Arnold Arboretum you should find enclosed an enrollment card, which we hope you will sign and return with the \$2 enrollment fee.

We shall also welcome your comments. To anyone who wishes to make a careful study of the circumstances, we shall be glad to send two documents which together quite fully cover the subject: "A Review of the Arnold Arboretum Controversy" (April 1955), and the above-mentioned memorandum by counsel, Messrs. Robert G. Dodge and J. W. Farley (September 1955), dealing with the decision in *Ames v. Attorney General*.

Mrs. Oakes Ames
Mrs. Harold Greene Arnold
Francis Blake
Grenville Clark
John T. Hemenway
Lewis Perry
Thomas V. Rankin
SPECIAL COMMITTEE

COPY

Reply to a Letter on the Arboretum Dispute

February 17, 1955

Mr. Jerome D. Greene
54-A Garden Street
Cambridge, Massachusetts

Dear Mr. Greene:

Your letter of January 27, 1955, responding to my circular letter of January 3, 1955, has my attention. As in the case of your letter, the statements herein are my own; however, my letter has of course been submitted to and approved by the Executive Committee of the Association for the Arnold Arboretum.

Your response to my letter is appreciated and due weight is accorded it as coming from one who has loyally served upon the Governing Boards of Harvard.

However, your letter contains two statements which I am compelled to answer as directly and vigorously as I can: 1) You have misinterpreted the original Arnold Arboretum trust indenture of March 29, 1872, by suggesting that a purpose equal in importance to the establishment of the Arnold Arboretum itself was that of "teaching the knowledge of trees in the University." Thus you apparently seek to justify Harvard's removal of the major part of the Arboretum's library and herbarium to a new building, the Harvard University Herbarium, in Cambridge. 2) You have resorted to a grave charge, utterly unfounded in fact, when you say that this Association "has, under the plausible guise of a legal challenge mis-represented, defamed, and tried to coerce the University."

With reference to (1) above, you ask why the Harvard Corporation was selected as trustee of the Arnold Arboretum and named in the indenture of March 29, 1872. Your answer is: "To give the Arboretum the permanent advantage of the same experience and control the University had; and specifically to teach 'the knowledge of trees in the University.'" (*Italics omitted*).

No one questions that "the permanent advantage of the same experience and control" would help dictate the choice of a trustee, but it is gratuitous and misleading to suggest that the reason why the Corporation was chosen trustee was "to teach the knowledge of trees in the University."

Summarized in its simplest form, the trust indenture which established the Arnold Arboretum, March 29, 1872, requires the Harvard Corporation, as trustee, to devote income "*to the establishment and support of an Arboretum, to be called the Arnold Arboretum . . . and to the support of a Professor, to be called the Arnold Professor, who shall have the care and management of the said Arboretum . . . and who shall teach the knowledge of trees in the University. . .*" (Italics added).

This excerpt is from Article Third of the trust indenture. To avoid the problem of quotations out of context, Article Third in its entirety will be reproduced at the conclusion of this letter.

As the above excerpt makes plain, it was the Arnold Professor who was to be concerned (and then only part time) with teaching the knowledge of trees in the University. I submit that what you have said in this connection regarding motivation of the choice of a trustee is incorrect. Furthermore, the practical construction of the trust indenture during the period 1872 to 1953 disproves your statement for during that time no Arnold Professor taught the knowledge of trees in the University.

The above misinterpretation of the trust indenture of March 29, 1872 is compounded by your statement about those responsible for creating the trust under James Arnold's will: "In the exercise of their discretion they named as their objective a living museum of trees, shrubs, and herbaceous plants — precisely what the Arboretum has become — with the further injunction to 'teach the knowledge of trees in the University' and to 'give such other instruction therein as may be naturally, directly, and usefully connected therewith.' " (Italics omitted).

It is startling to hear that a major objective in creating the Arnold Arboretum was to set up a "museum". To be informed that the other major objective of the trust was to provide for teaching in the University is to be asked to disregard the terms of the trust document above and to ignore the practical construction placed upon it through a period of eighty years.

This will perhaps be clearer if one considers the annual income of the Arboretum trust and the allocation thereof. Consider the demands upon such income for the proper care and maintenance of the Arboretum, a world famous botanical-horticultural center with three parts, a collection of living plants, an herbarium, and a library. Now compute what a small proportion of the total income would be applicable, in any event, to the remuneration of the Arnold Professor for teaching the knowledge of trees in the University. As stated, through 1953 no Arnold Professor engaged in such teaching.

Does not this render ridiculous your sweeping statement: "Such is the mandate under which the President and Fellows have administered the Arboretum for more than eighty years. To have treated it as a separate and self-contained institution would indeed have done violence to the express terms of the trust."

Actual operation under the mandate of the trust indenture of 1872 may be easily understood by reading the brochure of the Sargent Fund campaign. As you may know, at Prof. Sargent's death in 1927 the Arboretum trust principal had been increased, largely through his efforts, to over a million dollars. The campaign to raise a fund in his memory added approximately another million to the Arboretum trust. Certainly the elaborate brochure soliciting contributions to this fund ought to furnish us with specifications of the Arboretum's purpose as interpreted after many years of vigorous development under Sargent.

How is the Arboretum described in this brochure? As a great scientific laboratory, a workshop for economic experiment, a renowned botanical-horticultural field station, a vital center of study for forestry experts, horticulturists, scientists, students from all over the world. Is there any reference here to teaching the knowledge of trees in the University? None. Nowhere is the Arnold Arboretum referred to in the brochure as a museum. If it was considered as other than a self-contained and integrated institution having library, herbarium, and living collections in one place, the donors who contributed to the Sargent Fund on the basis of this complete and carefully documented brochure would have been without knowledge of the fact.

My second objection to your letter has to do, as stated above, with the irresponsible assertion: "By spreading abroad the charge of a breach of trust . . . the Association for the Arnold Arboretum has, under the plausible guise of a legal challenge, mis-represented, defamed and tried to coerce the University." This is utterly false.

To suggest, as you seem to suggest, that honorable lawyers who have earnestly presented the issue of a possible breach of the Arboretum trust are participants in what is merely the "plausible guise of a legal challenge" seems to me to impugn without justification their professional integrity. The allegations of mis-representation, defamation and coercion are, I think, unworthy of one who presumes to argue the case for the Harvard Corporation. Were these same accusations levelled against the sturdy group of Harvard Alumni, who, in the McKay Case (1914-17), alerted their University to what the Supreme Judicial Court decided was a clear breach of trust (where the Corporation was, as now, autocratically impatient with its critics)?

In the McKay Case, as you know, the Court held that the breach of trust consisted in the Harvard Corporation, as trustee, having improperly delegated some of its functions to a sister institution. The breach of trust issue in the Arboretum dispute involves the question of the trustee's duty of loyalty to the trust object: has the trustee acted in the best interest of the trust object? Stated in stronger terms the issue may involve the question of whether or not the trustee has violated the duty of loyalty by acting with more regard to the benefit derived by the trustee than for the benefit derived by the trust object.

You refer to the views of an eminent jurist, and cite his views in a context that implies he has given serious consideration to the Arboretum controversy. Out of deference to this jurist, and in the interest of clarification, I wish to state, with his permission, that he has not made an examination as would be necessary to a judgment that would

settle the issues involved, and that he does not know what conclusions he would reach if he were called upon to make such a judgment.

A final comment, relative to your charge that the Association is intruding upon precincts of academic policy. Without discussing this in detail, it may suffice to refer again to the McKay Case, where undoubtedly similar complaints were made against those who persevered to sustain, ultimately, the reputation of a great university. As the McKay Case demonstrated, a question of breach of trust can only be finally settled by the courts and thus it transcends academic policy. Possibly it would be appropriate to recall, in the heat of the present controversy, that the freedom cherished for our American universities is but an aspect of the Constitution's guarantee of freedom of expression, protecting us all. This Association, by its resolution of December 9, 1954, has shown that it will not be silenced or subdued by criticism, and that it will, by every proper means within its power, persist in its efforts to obtain a day in court for the determination of the legal issues of the dispute concerning the Arnold Arboretum.

Sincerely yours,

/s/ Thomas V. Rankin

Executive Secretary

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

50 State Street,

Boston 9, Massachusetts

Article Third of Trust Indenture executed March 29, 1872 by and between George B. Emerson, John J. Dixwell, and Francis E. Parker, Trustees under the will of James Arnold, and the President and Fellows of Harvard College.

"Third, that the said party of the second part shall devote the remainder of the said nett income in every year, 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 labelled, 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. 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 Letter on the Arboretum Dispute

Mr. Thomas V. Rankin
Association for the Arnold Arboretum, Inc.
50 State Street
Boston 9, Mass.

Dear Mr. Rankin,

I duly received your circular letter of January 3 and am glad to comply with your request for my comment on any phase of the Arboretum controversy. Having been retired for over ten years from association with the Harvard Corporation and for several years from my subsequent membership in the Board of Overseers I have hesitated to take an active part in the controversy, though of course I have been keenly interested, especially because of my friendship with persons on both sides of the dispute.

In a letter to the Harvard Alumni Bulletin that you may possibly have seen, I called attention to one aspect of the subject that seemed to me relevant, while disclaiming any competence to deal with the legal questions involved. I did feel sure, however, that the centralization of resources in the broad field of botany, as to which Harvard's record had in the past been marred by the separatist tendency of its various divisions, was in the best interest of research and teaching. As long ago as 1913, as chairman of a committee of the Board of Overseers of which President Eliot, President Lowell, and Mr. Owen Wister were members I wrote a report on the subject, which was unanimously adopted by the Board. The report was not especially concerned with the Arboretum as it was not involved in the departmental attitudes with which the committee was then more directly concerned.

Since that time and especially within the last twenty years, the potential contributions of different branches of learning to each other have come to have a recognition theretofore lacking. The lack was not confined to the different parts of a single field like botany but appeared also in respect to disciplines that had been regarded as quite separate and independent. The concentration of botanical resources in Cambridge is only one of the more obvious and natural applications of the same principle.

The opposition to the Corporation's action in the present case seems to rest not so much on a disapproval of the policy to which I have referred, as on a denial of the Corporation's right to extend it to an institution regarded as separate and independent because existing under a special deed of trust. But who are the trustees? The President and Fellows of Harvard College and their successors forever. And why were they chosen as trustees? To give the Arboretum the permanent advantage of the same experience and control as the University had; and specifically, to teach "the knowledge of trees in the University."

The assumption that the removal of herbarium specimens and books pertinent to research and teaching means the neglect of other purposes of the Arboretum seems to me gratuitous. That removal need have no consequences inimical to maintaining and improving the collection of "trees, shrubs, and herbaceous plants." These functions and the great public living museum they have created constitute, along with research and teaching, the trust accepted by the President and Fellows. Its objects, re-enforced but not changed by the recent action of the Corporation, will have an undiminished claim on their attention and on the support of the public.

As the Arboretum trust was created not by the testator directly but by his own trustees under his will, the legal obligations of the President and Fellows are defined only by the latter trust. It may not be irrelevant, however, to point out that Mr. Arnold gave his trustees freedom to apply his bequest not merely to agriculture and horticulture, if they were so disposed, but also to "other philosophical or philanthropic purposes at their discretion." In other words, the trustees under the will were carrying out the wishes of a man of very liberal philanthropic intentions. In the exercise of their discretion they named as their objective a living museum of trees, shrubs, and herbaceous plants—precisely what the Arboretum has become—with the further injunction to "teach the knowledge of trees in the University" and to "give such other instruction therein as may be naturally, directly, and usefully connected therewith."

Such is the mandate under which the President and Fellows have administered the Arboretum for more than eighty years. To have treated it as a separate and self-contained institution would indeed have done violence to the express terms of the trust.

By spreading abroad the charge of a breach of trust, chiefly among persons greatly interested in horticulture, but ill-informed both as to the actual terms of the Arboretum trust, and the implications of the Corporation's action, the Association for the Arnold Arboretum has, un-

der the plausible guise of a legal challenge, mis-represented, defamed, and tried to coerce the University. By an unfounded claim that the Corporation have gone beyond the limits of the discretion permitted to a trustee the Association has intruded itself in a dispute that has to do, essentially, with academic policy. Honest differences of opinion are natural in such disputes, and their frank expression may be helpful or even necessary. But the responsibility for decision rests with the Governing Boards of the University in the light of Faculty opinion and of other expert advice, both pro and con.

The Association for the Arnold Arboretum has enlisted support by conveying the impression (1) that the Arboretum is to be "disintegrated"; and (2) that a breach of trust is involved. For the reasons I have stated, neither assumption seems to have the slightest justification. As you know, a jurist whose authority carries weight hardly surpassed in this country, has termed the action of your Association frivolous, adding that if he were responsible he would reject the demand for a judicial ruling.

A breach of trust being unquestionably a sin, a number of people have, with the highest motives, taken the alleged "sin" for granted on what they were made to believe was good authority. Like the parson quoted by Calvin Coolidge, they have been quite ready to record themselves as "agin it." One may hope that further consideration will show the inadequacy of such a statement of the issues involved.

Very truly yours,

JEROME D. GREENE
54-A Garden Street
Cambridge, Mass.

January 27, 1955

P.S. This letter has been written without the instigation or knowledge of anyone but the writer.

A REPORT

to the

MEMBERS

of the

ASSOCIATION FOR THE ARNOLD ARBORETUM

AUGUST 5, 1954

Digitized by Hunt Institute for Botanical Documentation

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

50 STATE STREET

BOSTON 9 • MASSACHUSETTS

TO THE MEMBERS OF THE ASSOCIATION:

This is a brief report as to the present status of the Arnold Arboretum controversy and as to the activities and plans of this Association.

The Association for the Arnold Arboretum was incorporated in July 1953 under Massachusetts law as a nonprofit organization to protect and advance the interests of the Arnold Arboretum as a horticultural-botanical institution. The occasion for its organization was the threat to the Arboretum's work and future under the plan of the Harvard Corporation voted January 19, 1953. This plan called for the removal of most of the Arboretum's remarkable library and herbarium from Jamaica Plain to Cambridge; and also for the use in Cambridge of some of the Arboretum's income, — already too low for the development of a dynamic institution.

It was and is believed that this plan would destroy the broad conception of Professor Charles S. Sargent who was the Arnold Professor and Director of the Arboretum for nearly fifty years until his death in 1927. Professor Sargent developed the Arboretum as an integrated whole with the three essentials — living specimens, library and herbarium — all in close proximity. Many authorities see this integration as an all-important necessity for a strong institution of this character. And they see in Harvard's plan the certain impairment and possible destruction of an institution with a distinguished past and with great opportunities for future service to our civilization.

Others see in the Harvard plan a breach of faith toward generous donors who have built up the Arboretum in confidence that its interests as an integrated institution would be protected.

Apart from these objections, there was and is a strictly legal question, i.e., whether the carrying out of the vote of January 19, 1953 would involve a breach of trust. On this question counsel of great experience (Messrs. Robert G. Dodge and J. W. Farley of Boston) who were retained by the official Harvard Visiting Committee to the Arboretum, have raised serious doubts as to the legal validity of the Harvard plan.

All these considerations led to the organization of this Association. But while an immediate objective is to protest and prevent, if possible, the carrying out of the Harvard plan, the Association has longer term

purposes. These are to restore such damage to the Arboretum as cannot be immediately prevented and to develop and support over the years the Arboretum's educational and scientific work for the public benefit.

To these ends the Association held a meeting at the Harvard Club in Boston on December 15, 1953 which was attended by 100 persons. This meeting approved the Association's objectives and adopted a resolution as follows:

RESOLVED, That there ought to be a judicial decision on the merits as to whether the carrying out of the January 19, 1953 vote of the Harvard Corporation with regard to the Arnold Arboretum, would involve a breach of trust, and further

RESOLVED, That this meeting endorses the efforts of those who are attempting to obtain a judicial decision on the merits.

In January-February 1954 a Board of 22 Directors was formed; and in March 1954 memberships were invited with annual dues of \$2. As of now the Association has 307 members.

At Directors' meetings on March 18 and June 14, 1954, policies of the Association were defined as follows: (1) To build up a larger membership; (2) To aid the pending lawsuit in the Supreme Judicial Court of Massachusetts in which 10 friends of the Arboretum and of Harvard are seeking leave to bring a test suit as to whether Harvard's plan involves a breach of trust; (3) To make contributions to the Arnold Arboretum for special aspects of its work at Jamaica Plain; (4) To maintain for the present an Executive Secretary and a modest office in Boston; and (5) To seek adequate funds for these purposes.

At its June 14 meeting, the Directors adopted a budget for the fiscal year, July 1, 1954 — July 1, 1955 of \$35,000. Some of this budget has been subscribed and, as to the balance, a general canvass is planned in November. However, membership implies no financial obligation beyond the \$2 dues.

Strange as it may seem, the Harvard Corporation continues obdurate in seeking to avoid a judicial test. Some people have been incredulous on hearing that Harvard, in the face of serious legal questions raised by eminent counsel, should try to avoid a judicial decision, instead of welcoming a court ruling on the merits. Yet it is indisputable that the Harvard Corporation as trustee for the Arboretum refused to apply

voluntarily to the court for instructions when the legal questions were raised. And it is also the fact that the Corporation followed up that refusal by opposing the application to the Attorney General of Massachusetts for permission to bring a test suit in his name. It was the Attorney General's denial of this permission which made necessary the petition now pending in the Supreme Judicial Court of Massachusetts for a review of the Attorney General's decision.

It should be clearly understood that the court's decision on that petition will not determine the main issue as to whether Harvard's plan for the Arboretum involves a breach of trust, since the petition relates only to the preliminary question as to whether the Attorney General wrongly refused permission for judicial proceedings on the merits. In short, the purpose of the present proceedings is merely to obtain permission for a later "day in court" whereby, on the basis of sworn testimony and a full hearing, a judicial ruling can be obtained as to whether or not the course of action the Harvard Corporation has approved is legal. It is expected that this petition will be argued this autumn and subsequent steps must necessarily depend upon the ruling of the Supreme Judicial Court.

In this controversy Harvard's apparent policy has been to try to "steamroller" the opposition of those who believe that the Harvard plan would gravely injure the Arboretum and would be a breach of faith as well as a legal breach of trust.

Presumably in accordance with this policy, the Harvard Corporation in June 1954 directed the actual removal to Cambridge of most of the Arboretum's library and herbarium notwithstanding that the propriety of that removal is one of the main points raised by counsel on the issue of breach of trust. The President of this Association has vigorously protested this action in a letter to President Pusey of Harvard. It

seems unfortunate and high handed that the Corporation went ahead with this removal despite the pendency of litigation and did not see fit to suspend this action until the Supreme Judicial Court has had an opportunity to speak. This removal does not, however, change the legal situation, since if the courts ultimately rule that Harvard's plan is illegal, such a step as this would be retraced and presumably not at the Arboretum's expense.

We cannot predict how the immediate controversy will eventuate. What we do know is that this contest ought to be made with vigor, and above all with persistence. For we have confidence that if a strong group of responsible people will sufficiently persist, a way will be found whereby the Massachusetts courts can eventually pass on the legal questions or some other way will be found to safeguard the interests of this famous institution.

You have presumably received a document entitled "Harvard's View of the Controversy Over the Arnold Arboretum". We believe this document to be highly misleading. The Association will reply to it and you will receive a copy of that reply.

A meeting of the members will be held in Boston in November at which a full report will be made. We hope for your attendance and meanwhile for your interest and support.

Sincerely yours,

JOHN T. HEMENWAY
Chairman, Executive Committee

THOMAS V. RANKIN
Executive Secretary

August 5, 1954

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

50 State Street,
BOSTON 9, MASS.

..... June 22 1954.

I enclose herewith a reply by Messrs. John S. Ames, Grenville Clark and Ellery Sedgwick to the letter of the Harvard Corporation in the December 12, 1953 issue of the Harvard Alumni Bulletin. This letter was recently submitted to the Bulletin which, however, declined to publish it.

Endicott Peabody,
Secretary.

THE ARNOLD ARBORETUM CONTROVERSY

A LETTER

from

JOHN S. AMES, GRENVILLE CLARK

AND ELLERY SEDGWICK

in reply to

THE HARVARD CORPORATION'S LETTER

in the

HARVARD ALUMNI BULLETIN OF DECEMBER 12, 1953

SENT TO THE BULLETIN IN MAY 1954

BUT PUBLICATION REFUSED

PRINTED ON BEHALF OF THE
ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

ROOM 808 • 50 STATE ST. • BOSTON, MASS.

The following letter of Messrs. Ames, Clark and Sedgwick, in reply to the Harvard Corporation's letter in the Harvard Alumni Bulletin of December 12, 1953, was sent to the Bulletin on May 18, 1954; but the Bulletin refused to publish it.

To the Editor of the BULLETIN:

Two letters relating to the so-called "Arnold Arboretum Controversy" appeared in the Bulletin of December 12, 1953. One of these, from the undersigned, outlined the grounds of complaint of those who believe that the Harvard Corporation's plan for the Arboretum is a mistake of policy, a violation of faith and very probably a legal breach of trust. We complained especially of the obdurate opposition of the Corporation to obtaining a judicial decision on the question of breach of trust, in the face of serious doubts raised by eminent counsel; and we charged that this opposition is prejudicial to the good name of Harvard as a scrupulous guardian of trust funds.

In the companion letter, which was more than twice as long, the Corporation sought to answer these allegations. Because of inaccuracy, distortion and important omissions we believe the Corporation's answer to be seriously misleading. The implications are important. We specify some of our reasons.

(1) The Corporation's letter states that "on June 27, 1945 seven professors of botany, including Dr. Karl Sax, then and now Director of the Arboretum, wrote to the Provost to express their 'unanimous approval' of the Bailey Plan." This statement is incorrect. Dr. Sax did not become Director until over a year later. More important is the fact, unmentioned by the Corporation, that after Dr. Sax became Director and watched the plan unfold, he became its firm opponent. By taking this position, in pursuance of his duty to protect the Arboretum's work and future, Dr. Sax has earned the respect of many friends of Harvard. The inference from the quoted statement that as the Arboretum's Director he was in accord with the plan is highly misleading, the precise contrary being the truth. Although when attention was called to this error of fact a correction was made, the correction has, as usual, failed to catch up with the original misstatement.

(2) The Corporation's letter describes its resolution of January 19, 1953 (containing the present plan for the Arboretum) as providing for the removal to Cambridge of "part" of the Arboretum's library and herbarium and defines the "primary issue" as being whether "certain books and dried specimens may be moved to Cambridge, or must be retained at Jamaica Plain."

Nothing could be more misleading than this effort to distort and minimize the actual issue. The

fact is, we are informed, that the "part" of the library which it is proposed to remove consists of at least four-fifths of all the books and pamphlets, while the "certain dried specimens" would probably comprise 600,000 of the 700,000 items. Stripping the Arboretum of four-fifths and six-sevenths respectively of its fine library and collections means the destruction of the Arboretum's integrated character and of Professor Sargent's cherished plan to have together in one place the three main elements necessary to a distinguished horticultural-botanical institution: living plants, library and herbarium.

It was this integrated development under Professors Sargent, Ames and Merrill for 75 years which brought national and international fame to the Arboretum. To destroy its structure would at the best gravely impair the prestige and public usefulness of the Arboretum, regardless of its effect upon botany in Cambridge. At the worst it would reduce the Arboretum to the position of an interesting public park.

By glossing this over, ignoring the question of breach of faith and trying to prevent a judicial hearing on the merits of the case the Corporation has triply sought to avoid issues that are basic.

(3) It is important to notice that the Corporation's letter attempts no real reply to our charge that the present plan involves a breach of faith and "a grave wrong" to the benefactors of the Arboretum. There is no doubt whatever that many gifts, large and small, were made to the Arboretum in the confident faith that its development as an horticultural as well as a botanical institution would be continued, and that its combined and integrated character would not be sacrificed to the interests of botany alone. What one of the Arboretum's large benefactors has said is typical: "I wouldn't have given a cent if I had dreamed that Harvard would treat the Arboretum in this way."

Whether or not a legal breach of trust would be involved (which the courts alone can decide) there can be no question that the carrying out of this plan would be widely regarded as a definite breach of faith toward donors. And many of these donors are living, vocal and positive witnesses of their original intention.

(4) The Corporation's letter states that its final plan (under its vote of January 19, 1953) "eliminated, in so far as the Arboretum is concerned, several important features of the Bailey Plan" to which objection had been made. This statement is also misleading.

It is true that certain concessions were made, but they were more in form than in substance. Perhaps the most damaging feature of all – the removal of most of the library and herbarium – was retained, and also that feature (not even mentioned in the Corporation's letter) whereby a substantial amount of the Arboretum's endowment income would be diverted from use at the Arboretum toward the maintenance of the new botanic building in Cambridge.

Likewise the Corporation ignores the important summary contained in the letter of December 22, 1952 to President Conant from Messrs. Robert G. Dodge '93 and J. W. Farley '99 as counsel for the Visiting Committee. Their letter gave notice that the retention of these particular features would raise doubts as to legality which should go to the courts. That letter is significant also as bearing upon the matter of delay in bringing the legal issues to a judicial determination. It cannot be too strongly stated that this is the responsibility of the Corporation alone. As early as March 1952 counsel for the Visiting Committee made it plain to the Corporation that the proper course was for the Corporation voluntarily to seek court instructions and this request was later repeated with emphasis. Had not the Corporation ignored or resisted all such requests the legal issues could have been determined long ago.

(5) On no other point is the Corporation's letter more specious than in its reference to the decision of the Attorney General's office as an excuse for avoiding a judicial ruling.

The Corporation must be aware that when doubts as to the legality of a trustee's administration have been raised by experienced counsel the proper and virtually universal course is for the trustee to apply to the court for instructions. We may well ask whether the Corporation has made awkward commitments to the botanists who conceived this plan for what has been called the "milking" of the Arboretum? Are considerations of "face" predominant, or other reasons not yet revealed? It would require a long inquiry to probe the motives leading to the decision to "steam-roller" this plan without a court ruling. The real reasons can only be surmised.

One thing seems clear, namely that in not only refusing voluntarily to seek a court ruling but in going further by seeking to block a test suit in the Attorney General's name, the Corporation went to unusual extremes. We cannot believe that if Harvard is successful in forever preventing a judicial decision the result could be other than detrimental to the University.

The fact now remains and must always remain that highly experienced counsel have after long study expressed doubts as to the legality of the present plan. In face of this opinion it is obvious that no "decision"

of the Attorney General's office (in no sense a judicial decision arrived at after sworn testimony and full argument) can ever satisfy benefactors of the Arboretum that no breach of trust exists. The question will never down: "If Harvard is so sure that no trust obligation has been breached why not have the courts decide the doubts still expressed by eminent lawyers?"

It is our belief and contention, for the above reasons, that the Corporation should welcome instead of oppose a judicial ruling. And it is also clear to us that when serious legal questions have been raised by persons interested in both the University and the Arboretum, with the advice of competent counsel, the fact that the Corporation itself is confident of its position affords no justification for opposing a court ruling.

The reasons why judicial instructions should be obtained become even stronger if the record of the trustee indicates carelessness in obtaining adequate information and delay or unwillingness in acting on that information when received.

Let us look at the record.

The origin of the present controversy was the Corporation's approval of the Bailey Plan on January 7, 1946. It is admitted – or at any rate it is clear – that the Corporation at that time was not informed as to the terms of the trust on which it held the Arboretum property. There is no indication that it, or any of the various committees or meetings which purported to pass on the matter, were adequately informed on the subject until full information was provided in the fall of 1950 by counsel for a group of members of the Visiting Committee to the Arnold Arboretum.

The approvals of the Bailey Plan before the fall of 1950 which the Corporation apparently cites as showing its careful and deliberate procedure, seem rather to indicate carelessness in acting without adequate legal information when making a plan affecting trust property.

What is even more difficult to understand is the Corporation's action or inaction for over two years after the terms of the trust endowment and the breach of trust question were brought to its attention.

For it was not until the resolution of January 19, 1953 that the Corporation admitted its trust obligation and purported to decide that the Bailey Plan should not apply to the Arboretum or its endowment, although the plan to move most of the library and herbarium and other features that had been questioned were retained.

Until that date, while not specifically denying that the Arboretum endowment was held in trust or "the legal consequence of the terms of the endowment", the Corporation admitted nothing, conceded nothing, opposed everything and employed able counsel of the firm of which Mr. Charles A. Coolidge (a member of the Corporation) is a partner, to controvert

as far as possible the consequences of the legal and moral situation which had been brought to the attention of the Corporation. Some of these consequences were finally admitted by the resolution of January 19, 1953, but the concessions were long delayed, far from spontaneous and far from sufficient to meet the legal and moral issues.

The confusion into which the whole matter had fallen prior to the belated action of the Corporation in declaring, by its vote of January 19, 1953, that the Bailey Plan as such would not be applied to the Arboretum, is best indicated by the Report of the Coordinating Committee on Biological Sciences of the Board of Overseers. The crucial clause of that Report is as follows:

"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."

This statement illustrates the confusion which existed regarding the whole situation. It would certainly be a startling concept if it were held permissible for a trustee to use trust property for the benefit of interests other than those of the beneficiary, particularly the overall interests of the trustee. Yet this was the concept advanced by the Coordinating Committee, apparently accepted and followed by the Corporation until it was modified in form, if not in practical effect, by the resolution of January 19, 1953.

The trust instrument under which the Arboretum was established in 1872 (after providing for the establishment of the Arboretum and the support of the Arnold Professor) states expressly that the trust fund "shall not be diminished by supplementing any other object, however meritorious or kindred in its nature". When it is realized that it apparently took the Corporation six years to discover and recognize that the Arboretum and its endowment are held under a special trust, we suggest that the record is such as to increase the desirability of obtaining judicial instructions on

the legal questions which have arisen and are still pending. This record also may indicate that the fact the Corporation has no serious doubts as to its own legal omniscience does not remove that doubt in the minds of others.

Once before, in 1914-'17, the Harvard Governing Boards adopted a plan for the administration of a trust the legality of which was questioned by friends of the University. This was the well known case of the Gordon McKay bequest for engineering. The Corporation and the Overseers adopted a plan for the joint administration of the bequest with the Massachusetts Institute of Technology; and the complete legality of the plan was vouched for by the University's counsel. Legal doubts were, however, raised by a group of alumni, among whom Nathan Matthews '75, LL.D. was prominent. The Corporation was entirely confident of its position, but ultimately went to court for instructions upon the ground that, however sure it might be of its position, it was nevertheless "incumbent" upon Harvard to obtain a court ruling when doubts had been expressed by other responsible persons. The result is described by Mr. Matthews in the Harvard Graduates' Magazine for March 1918. It was that the Supreme Judicial Court of Massachusetts promptly and unanimously held the Corporation and its counsel in error and ruled the plan void as involving a breach of trust.

A study of this noted decision is highly relevant to the present situation. It is not too late for the Corporation to follow the example of its predecessor of 1914-'17 and to recognize that in showing a willingness to abide by the judgment of our courts it will not exhibit weakness, but on the contrary will demonstrate those qualities of sensitive honor that should be characteristic of Harvard's administration. Failing this we may be sure that as the facts become better known the protests over the present effort to "steamroller" all opposition will increase in proportion to the success of the Corporation in avoiding a judicial test.

John S. Ames '01

Grenville Clark '03

Ellery Sedgwick '94

THE ARNOLD ARBORETUM CONTROVERSY

A LETTER

to the

HARVARD ALUMNI BULLETIN

from

JOHN S. AMES

•

GRENVILLE CLARK

Digitized by Hunt Institute for Botanical Documentation
ELLERY SEDGWICK

*(Published in the Harvard Alumni Bulletin, issue
of December 12, 1953.)*

PRINTED ON BEHALF OF THE

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

ROOM 808 • 50 STATE ST. • BOSTON, MASS.

To the Editor of the BULLETIN:

There has recently been filed with the Supreme Judicial Court of Massachusetts a lawsuit relating to the Arnold Arboretum which may be of consequence in Harvard's history. The ten petitioners, John S. Ames '01, Benjamin S. Blake '01, Godfrey L. Cabot '82, Grenville Clark '03, Mrs. Grenville Clark, Mrs. Francis B. Crowninshield, Henry F. duPont '03, Childs Frick, Mrs. Susan Delano McKelvey and Ellery Sedgwick '94, represent a not inconsiderable body of devoted friends of the Arboretum and the College. Counsel for the petitioners are Robert G. Dodge '93, J. W. Farley '99 and Endicott Peabody '42.

The relief sought is a review of a decision by an Assistant Attorney General of Massachusetts refusing permission for a test suit in the Attorney General's name to determine whether the plan set forth in a vote of the Harvard Corporation on January 19, 1953 would involve a breach of Harvard's obligation as trustee for the Arboretum. Having itself refused to apply to the courts for advice, the Corporation also opposed the petitioners' application to bring a test suit in the Attorney General's name, which is the usual and perhaps only method to obtain a judicial ruling in such a case.

While the petitioners have taken this action with great reluctance, they believe it absolutely essential: firstly, to prevent a grave wrong to the benefactors of the Arboretum; secondly, to safeguard the unique prestige and usefulness of the Arboretum itself; and finally, to vindicate the reputation of the University as a scrupulous guardian of its trusts.

It may seem strange that a group of experienced persons, who have long demonstrated their interest in Harvard, should feel called upon to make serious public complaint of the action of the Corporation in this regard. And yet the fact remains that a large group of Harvard supporters, many of them equipped with special knowledge, are fully convinced that at this very moment the Corporation, in pressing toward the objective of a more efficient Department of Botany, is preparing to violate the pledge it made when it accepted as trustee the great gift of the Arnold Arboretum.

An even more serious complaint is that in the face of important questions as to the validity of the Corporation's plan which are raised on the advice of

eminent counsel, the Corporation has sought to avoid any judicial determination whatever of these questions.

The Corporation's vote of January 19, 1953 concedes that the Arboretum's funds and other property are held by the Corporation under a special trust to be administered in the best interests of the Arboretum. Nevertheless, this same vote calls for the removal from the Arboretum at Jamaica Plain to the new Botanical Building in Cambridge of the major part "related to research" of the Arboretum's remarkable library and almost unique herbarium. Since the herbarium and library are almost wholly "related to research" that phrase would hardly restrict the proposed removal at all, so that in practice the plan would doubtless result in the removal from the Arboretum to Cambridge of all but a small part of the library and herbarium. The vote also calls for the use of some of the Arboretum's endowment for maintenance of the new building and contains other features the legal validity of which is questioned.

While the Corporation asserts that this plan would be in the Arboretum's interest, the petitioners claim that, according to the overwhelming opinion of impartial authorities, the removal and other features of the plan would be plainly detrimental to the Arboretum (whether or not it would benefit botany at Harvard) and would, consequently, constitute a breach of trust.

What the petitioners are now seeking is merely an opportunity to establish this claim by a judicial trial on the merits. The petition alleges that by its refusal to cooperate in obtaining a judicial ruling the Corporation has departed from the usual and proper practice of trustees.

In making their claim of breach of trust, the petitioners invoke the opinion of Professor Charles S. Sargent, the famous Director of the Arboretum for forty-eight years from 1879 - 1927. Defining the combination required to make the Arboretum a distinguished horticultural-botanical institution, Professor Sargent wrote in 1924: "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. * * * 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."

Apart from the detrimental effect of the Corporation's plan on the Arboretum's status as an integrated scientific institution, the plan reveals a lack of consideration for the distinctive character of the institution as dedicated primarily to the art and science of horticulture. It shows a similar lack of consideration for the expectations of the donors of the Arboretum's considerable endowment. There can be no question that many of these donors made their gifts in entire confidence that the Arboretum's development would continue as an integrated institution in accordance with Professor Sargent's conception. Consequently, by the carrying out of this plan, many benefactors would be aggrieved and the prospect of further gifts for endowment would be prejudiced. This grievance would naturally be aggravated if the plan were put through without a judicial test of the legal issues.

It is felt, therefore, that the carrying out of the plan would involve not only a legal breach of trust but also a breach of moral obligation.

The importance of a reorganization of the Botanical Department of the University is not questioned. But in its zeal for this end, the neglect by the Corporation of its fiduciary obligations to the Arboretum and its donors seems to us to make a painful story.

No specific obligation of trusteeship in respect of the Arboretum was acknowledged or apparently even considered by the Corporation until the Visiting Committee, under the advice of eminent counsel, obtained the admission that the Arboretum is an independently endowed institution whose property is held in special trust. That this is a trust of a definite and special character is no longer disputed. And yet the Corporation apparently still wishes to push through the removal of most of the Arboretum's library and herbarium and other features of its vote which are clearly adverse to the Arboretum's interests,

and furthermore proposes to do this without any judicial ruling as to whether the plan involves a breach of trust.

That there are very serious doubts concerning the legality of the Corporation's plan cannot be fairly denied, in view of the opinion of counsel of the highest reputation. In these circumstances the proper procedure, indeed we may say the only proper procedure for the Corporation as trustee, is to apply to the courts for advice. This is the course which a private trustee would regard as morally obligatory; and it was a sharp and unpleasant surprise to many friends of the University when the Corporation absolutely refused to apply to the courts, and then went even further to oppose the petitioners' application to bring a test suit in the Attorney General's name.

Never before in Harvard's history has the Corporation sought to avoid a judicial ruling as to the legality of its administration of trust funds where, as in this case, serious questions as to a possible breach of trust have been raised by responsible persons upon the advice of distinguished counsel.

This situation will be closely watched by friends of Harvard as well as by those especially interested in the Arboretum. For, in the opinion of many, more is at stake than the impairment of the Arboretum and more than a mistake of judgment or breach of moral obligation. In the refusal of the Corporation to consent to a judicial ruling as to the legality of the plan, there is also involved nothing less than the University's good name.

It is still open to the Corporation to cooperate in the submission of the legal issues for authoritative decision by the Massachusetts courts. With many others we still hope that the Corporation will listen to this earnest appeal that it shall cease to oppose a judicial test.

John S. Ames '01

Grenville Clark '03

Ellery Sedgwick '94

A STATEMENT BY GRENVILLE CLARK CONCERNING
THE ARNOLD ARBORETUM CONTROVERSY

Dublin, N. H.
December 3, 1953

This statement relates to the controversy over the Harvard Corporation's plan for the Arnold Arboretum under its vote of January 19, 1953, — a vote which vitally affects the future of the Arboretum.

One part of the January 19 vote revokes the Bailey Plan, adopted in 1946, in so far as it affects the Arboretum. And the vote furthermore recognizes the existence of a special trust as to the Arboretum's funds and other property, which must be administered by the Corporation in the interests of the Arboretum.

In other paragraphs, however, the vote retains the removal feature whereby the "main body" of the herbarium and the library "related to research" would be moved from Jamaica Plain to a new building in Cambridge and some of the Arboretum's income would be used for the maintenance of that building. Since the herbarium and library are almost wholly "related to research" that phrase in practice hardly restricts the proposed removal at all; and it could easily happen that the removal to Cambridge would include as much as five-sixths of the Arboretum's herbarium and nine-tenths of its library.

Moreover, the January 19 vote impairs the position of the Arnold Professor to whom, under the Indenture of 1872 creating the Arboretum, is given its "care and management." This results from provisions which make the Arnold Professor an administrative officer without academic tenure and provide that appointments to the Arboretum's staff can be initiated not only by the Arnold Professor but also, independently of him, by the President of the University.

The net result is to recognize *in form* two contentions of the Visiting Committee, — that the Bailey Plan as such shall not apply to the Arboretum and that there is a special trust in respect of which the Arboretum's interests should prevail. And yet *in substance* the January 19 vote retains very important parts

of the Bailey Plan that have been strongly opposed by the Visiting Committee as destructive of the Arboretum's interests, and the legal validity of which has been questioned by the Visiting Committee's counsel. [See the Visiting Committee's vote of April 29, 1952 and the letter of December 22, 1952 from Messrs. Robert G. Dodge and J. W. Farley, as counsel, to President Conant.]

Counsel's letter of December 22, 1952 said that if the controversy could not be adjusted along the lines therein mentioned (which excluded the removal feature) the legal issues should be submitted to the courts by the Corporation as trustee, through a trustee's petition for instructions. The Corporation ignored this and soon after the January 19 vote went ahead to let a contract for the Cambridge building. That building is largely completed and has apparently been planned to contain something like 600,000 of the nearly 700,000 specimens in the Arboretum's herbarium and something like 55,000 of the 60,000 books and pamphlets in its library.

In February, 1953 Messrs. Dodge and Farley formally asked whether the Corporation intended to submit the issues to court. The Corporation's reply was a flat refusal to do so.

A group of members of the Visiting Committee and others was then formed and through counsel made a further and comprehensive inquiry as to whether the carrying out of the January 19 vote would be in the Arboretum's interests or the contrary. Fifteen impartial and competent authorities having no connection with Harvard were interviewed. Their overwhelming opinion was that the carrying out of the January 19 vote, especially the plan to move most of the herbarium and library, would be adverse to the Arboretum's interests. Principal points made by them were: (a) That the Arboretum has been and should be a distinguished horticultural-botanical

scientific institution; (b) that such an institution needs to have close together in one place three necessary elements, namely, a fine collection of living specimens; an excellent herbarium of dried specimens; and an excellent library; (c) that the Arboretum has all three elements at Jamaica Plain and the effect of moving most of the herbarium and library to Cambridge would be to break down and disintegrate a well-integrated institution, injure its work and lower its prestige. Some said it would seriously impair the Arboretum's work and usefulness; some that it would virtually destroy the Arboretum as a scientific institution. Consequently the consensus was that the carrying out of the January 19 vote would plainly be against the Arboretum's interests, whatever good it might or might not do for botanical or other interests at Harvard.

After this careful inquiry the group felt that the Corporation's vote could not be accepted without challenge and especially that there ought to be an impartial judicial hearing at which the witnesses could be heard and the legal issues decided. Therefore, since the Corporation's refusal to go voluntarily to court still stood, the group asked counsel to apply to the Attorney General for leave as "relators" to bring a test suit. This action was forced by the above-mentioned refusal of the Corporation to go to court itself, contrary to the usual practice of trustees where questions are raised by responsible persons as to whether a trust is being properly administered.

The group which applied to the Attorney General consisted of Godfrey L. Cabot '82, Ellery Sedgwick '94, John S. Ames '01, Grenville Clark '03, Henry F. duPont '03, Childs Frick, Mrs. Grenville Clark, Mrs. Francis B. Crowninshield, Mrs. Louis A. Frothingham and Mrs. Susan Delano McKelvey. All of these except Messrs. Sedgwick and Clark are members of the Visiting Committee.

Application was made to the Attorney General in April-June, 1953 by letters of counsel and interviews with an Assistant Attorney General. The Corporation then went to the extreme length of opposing the application. Their evident purpose was to shut off any judicial hearing whatever, since it is uncertain whether there is any way to obtain a court test except through a suit by leave of the Attorney General.

No hearings in any proper sense were held by the Attorney General's office; nor were counsel told what

arguments were made for the Corporation against an application which ordinarily would be granted. The result, however, was the denial by an Assistant Attorney General of the group's application. The grounds of denial are considered arbitrary and erroneous by the group's counsel and it has, therefore, been decided to petition the Supreme Judicial Court of Massachusetts for an order requiring the Attorney General to reconsider. It is intended to file this suit by December 12, 1953.

It was also decided to write a letter to the Harvard Alumni Bulletin; and this letter will appear in the Bulletin of December 12, 1953.

Another feature of this effort to preserve the Arboretum is the development of the "Association for the Arnold Arboretum, Inc." which is a Massachusetts nonprofit corporation incorporated in July, 1953. It is intended to organize a strong Board of Directors of this Association and to invite membership by those interested in the Arboretum and horticulture. In due course, financial subscriptions will be invited for the Association's expenses. It is believed that many will wish to support the Association in its immediate purpose to prevent the disintegration of the Arboretum and its longer term purpose to restore and eventually to increase the Arboretum's prestige and usefulness.

The intention is to proceed systematically and persistently along these lines, i.e., litigation to seek an impartial determination of the legal issues; and accurate publicity so as properly to inform friends of the Arboretum and the general public. To this end it is important to have a well-organized group to watch over, protect and restore the work of the Arboretum in the public interest.

I cannot too strongly emphasize that the most serious aspect and the one which has caused the most indignation is the Corporation's effort to prevent any judicial test of the legal issues. It is the usual and, I would say, the invariable practice of responsible trustees to welcome rather than oppose a court hearing and decision where, as in this case, important questions have been raised as to whether the trustee's administration of the trust is improper, whether consciously or otherwise. It was therefore to be expected that the Corporation, as a matter of course, would have voluntarily filed a petition for instructions when it found that the legal validity of its vote was questioned

by responsible people upon the advice of eminent counsel. Nevertheless the Corporation flatly refused to do so; and this was aggravated by its further action in opposing the application to the Attorney General which, through the Corporation's refusal, had been forced upon those who sought to have the legal issues adjudicated.

The natural reaction has been one of strong indignation. What is involved is the right to a "day in court", a long-cherished right under our institutions. The strong feelings aroused by the Corporation's course are therefore merely the normal reaction of a group of Americans with whom it does not "sit well" to be deprived of an opportunity to test the question of breach of trust before an unprejudiced tribunal.

It simply will not hold water to claim, as it has been, that there are no substantial legal questions. That such questions do exist has been advised by counsel of great experience. This is, moreover, apparent on the face of the facts. For it is admitted that the special trust for the Arboretum must be administered in the Arboretum's interests; and it cannot be denied that in a judicial hearing impartial and impressive testimony would uphold the claim that the carrying out of the January 19 vote would be contrary to those interests.

The Corporation's course of action in attempting to avoid a judicial test has been described by persons long devoted to Harvard as "irresponsible", "arbitrarily impervious", "arrogant" and "indefensible"; and I confess that I can see no excuse for its effort to avoid a judicial ruling on the merits.

It may be asked what factors have led to the action of the Corporation in thus seeking to avoid a judicial hearing. The explanation is not simple, since this extraordinary and extreme course has clearly not been due to a single cause but to a combination of factors.

It would be too long a story to go into all that in detail. I would say, however, that the main factors have been: (1) The fact that the original Bailey Plan (including the removal of most of the Arboretum's herbarium and library to Cambridge and the use of Arboretum funds towards the maintenance of the Cambridge building) was a botanists' plan, conceived in the interest of botany and without regard to the horticultural function of the Arboretum; (2) that the Bailey Plan was conceived and originally approved without consciousness of the existence of a special

trust relation on the part of the Corporation in respect of the funds and other property of the Arboretum; (3) that commitments to the botanists in Cambridge were made by the Corporation years ago, and that these commitments involved the carrying out of basic features of the Bailey Plan as regards the Arboretum, — especially the removal feature and the making available in Cambridge of some of the Arboretum's money; (4) the fact that these commitments made it difficult for the Corporation to change its position when it was discovered and eventually admitted that the Corporation does hold the Arboretum's property upon a special trust, so that what resulted, along with a cancellation *in form* of the Bailey Plan as regards the Arboretum, was *in substance* a retention of basic features of that Plan which would permit the carrying out of the original commitments; (5) finally, and not least important, certain personal factors in the shape of a determined resolve by officials in Cambridge who had originally sponsored the Bailey Plan, to put through its essentials irrespective of opposition and, as it has now turned out, irrespective of the good name of Harvard. This resolve was worked up step by step until, as I see it, those in authority became oblivious of the implications for Harvard of a "steam-roller" policy.

It might be suggested that in these circumstances an effort should be made to hush up the situation, especially the facts as to the Corporation's effort to avoid a judicial hearing, lest the University's good name and interests be injured. But there are several reasons why such a course is not admissible. *Firstly*, it would be impossible to suppress the discussion, since too many people know the situation and too many are thoroughly indignant over the Corporation's attempt to avoid a judicial test. *Secondly*, because those who have given time and money to the Arboretum are fairly entitled to make an effort to prevent the disintegration of the Arboretum; and such an effort necessarily requires a ventilation of the facts. *Thirdly*, because it is not true that a full public disclosure and discussion would be contrary to the University's interests. To permit the Corporation to avoid a judicial hearing and ruling, without challenge of the propriety of that action, would set a precedent highly injurious to the University's good name, — injurious both to its financial interests and general reputation.

Considerable damage has already been done to Harvard's reputation by the Corporation's obdurate effort to avoid a court test. But I am sure that it would cause still more damage to allow the Corporation's action to pass without sharp challenge.

I know of no previous instance in Harvard's history where its authorities have sought to side-step a judicial ruling in respect of their administration of trust funds. I trust there will never be another such instance.

What can be done to alleviate this situation? First of all, it seems to me, a complete suspension, pending a court decision on the merits, of the plans to move most of the herbarium and library from Jamaica Plain, together with a recognition by the Corporation

that its proper course is to go voluntarily to court with a petition for instructions. This would not solve all the problems, but it would remove the most serious and damaging complaint, i.e., that Harvard has shown a shocking lack of sensitivity to its obligations as trustee.

Many of us hope that this will yet be done, for there is still time. If that is done so that the problem of the Arboretum and its relation to botany at Harvard can be calmly discussed in the light of the court's decision, we could be hopeful of a solution that would not only be fair to the Arboretum but also advantageous to botany and the University.

Grenville Clark

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COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.

SUFFOLK COUNTY.

OCTOBER SITTING, 1954.

[No. 11,441 Law.]

JOHN S. AMES & OTHERS

v.
ATTORNEY GENERAL.

(Petition for Writ of Mandamus.)

SAME *v.* SAME.

(Petition for Writ of Certiorari.)

BRIEF FOR THE PETITIONERS.

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BRIEF FOR THE PETITIONERS.

Outline of the Case.

These cases are before the court on reservation and report by Mr. Justice Lummus,—the mandamus petition being reserved on the petition as amended, the respondent's demurrer and his motion to dismiss, and the certiorari petition on the petition as amended, the respondent's demurrer and motion to dismiss and his return as extended.

An index will be found at the end of this brief.

The mandamus petition (R. 2) was amended by the addition of several paragraphs (R. 47). The certiorari petition (R. 54) was amended by the addition of a few words (R. 64).

The filing of these petitions constituted a step in the long controversy between friends and supporters of the Arnold Arboretum in Jamaica Plain on the one hand, and on the other hand the President and Fellows of Harvard College (hereinafter generally referred to as "the Corporation" or "the Harvard Corporation") as trustee of a public charitable trust created in 1872 under which the Corporation holds the Arboretum, together with its endowment and other property. The purpose of the petitions is to make possible a judicial determination of the question whether certain action proposed to be taken by the Corporation—primarily the removal to Cambridge of the main body of the Arboretum's library and herbarium and the work of taxonomic research heretofore carried on at Jamaica Plain—would be in the best interests of the Arboretum and consistent with the terms of the trust.

The Corporation having repeatedly refused urgent requests that it petition the court for instructions, the Attorney General was asked to permit the use of his name in an information to be brought with a view to obtaining a declaratory decree as to whether the proposed action would constitute a breach of trust. The Attorney General referred the matter to Assistant Attorney General Booras "to resolve upon a decision in the matter" (R. 44). Mr. Booras conferred separately with counsel for the proposed relators and with counsel for the Corporation. There was no hearing in the ordinary sense and no taking of testimony. Mr. Booras's written decision, adopted by the Attorney General, disallowed the application for leave to use his name. While such matters ordinarily fall within the

discretion of the Attorney General, the fundamental claim of the petitioners in this case may be stated as follows:

The Booras decision shows on its face that it was based (1) on a misunderstanding of the functions and duty of the Attorney General in a matter of this sort and (2) on erroneous views of the principles of law applicable to the present controversy. The facts as presented to Mr. Booras in behalf of the petitioners showed that they were prepared with a large amount of evidence that the action which the Corporation proposed to take would be highly damaging to the Arboretum and would constitute a breach of trust, and with evidence indicating that the Corporation was influenced in resolving upon the proposed action by its own interest in improving instruction and research in botany in the University in Cambridge, rather than by concern for the welfare of the Arboretum. The names of ten responsible persons who were willing to act as relators were given Mr. Booras; nine of these are among the present petitioners, the tenth now being incapacitated by illness. Issues of fact were presented which could be decided only after a judicial hearing.

Mr. Booras has not undertaken to make any findings on these controverted issues. He merely states that the petitioners have "cited many professional authorities" in support of their contention "that the transfer [of the major part of the library and herbarium] will not only be against the best interest of the Arboretum but that it would cripple the Arboretum as an institution," and that the Corporation takes the contrary position and is supported by "significant authorities" (R. 45-46). Mr. Booras does not even mention the issue as to the adverse interest of the trustee and its effect upon the proposed removal. Yet he ventures to declare that "There is no legal breach of trust," though naturally ignorant of the answers to the vital questions of fact which must be litigated and answered

before there can be any conclusion of law as to whether a breach of trust is or is not threatened.

The case was obviously one which called for permission to use the name of the Attorney General as presumably the only way to secure such a hearing. The decision denying this was not only based on errors of law, but was unreasonable and arbitrary and constituted a plain abuse of discretion.

The respondent apparently agrees that there is a right to judicial review on the ground of abuse of discretion (see paragraph 6 of the demurrer in the mandamus case, R. 51, and paragraph 9 of the return in the certiorari case, R. 61, added to the grounds of demurrer and motion to dismiss in that case).

The mandamus petition does not seek an order to the respondent to reverse his decision. It seeks an order to him to rehear the matter and decide it in accordance with proper principles of law, even though the application of those principles must naturally lead him to a contrary decision.

The certiorari petition was filed because of uncertainty on the part of the petitioners as to whether their remedy was a petition for mandamus or a petition for certiorari. The latter petition incorporates by reference all of the mandamus petition and the amendments thereto, except the prayers for relief.

In the mandamus case the respondent's motion to dismiss (R. 52) is based in substance on the claims (1) that the controversy is not justiciable and not within the jurisdiction of the court, (2) that the decision of the Attorney General was within his uncontrolled discretion and is not subject to judicial review, and (3) that the petitioners

have no standing to maintain the petition. The demurrer (R. 51) is based in substance on the grounds (1) that the matters alleged in the petition are insufficient in law to entitle the petitioners to relief, (2) that, in so far as the decision of the Attorney General may be reviewed, the review must be confined to the question of abuse of discretion, which it is claimed, is not shown by the facts alleged in the petition, and (3) that the petition does not state concisely and with substantial certainty substantive facts necessary to constitute a cause of action, but consists largely of immaterial and irrelevant matter which has no bearing on the issues.

In the certiorari case the motion to dismiss and the demurrer are consolidated and are based on grounds substantially the same as those set up in the mandamus case, with the additional grounds that the respondent's decision is not the act of a judicial or quasi-judicial tribunal, that no formal record of the proceedings before him is available, and that the petition sets forth no error of law apparent on the record (R. 57; with two additional grounds stated at the end of the return, R. 61).

For the purposes of the present hearing the allegations of fact contained in the respective petitions must, of course, be taken as true.

Simonds v. Parker, 1 Met. 508, 514 (motion to dismiss).

Worcester & Nashua Railroad v. Railroad Commissioners, 118 Mass. 561, 564 (demurrer to petition for certiorari).

Butler v. Directors of the Port of Boston, 222 Mass. 5, 7 (demurrer to petition for mandamus).

The contentions set up in the motion to dismiss the petition for mandamus go to the merits and, as they are incorporated by reference in the demurrer, will be treated as if alleged as grounds of demurrer in the first instance.

The Facts as stated in the Petition and the Amendments thereof.

A. THE PETITIONERS AND THE VISITING COMMITTEE.

The petitioners are persons who for many years have been actively interested in the Arboretum and have from time to time made financial contributions to it. All of them, except Messrs. Clark and Sedgwick, are members of the Committee appointed by the Board of Overseers of Harvard University to visit the Arboretum (hereinafter referred to as "the Visiting Committee"). It was the Visiting Committee* which first raised the question of an impending breach of trust involved in the approval by the Corporation of the so-called Bailey Plan, described below. From the printed statement of the Board of Overseers with regard to the functions of the Overseers' Visiting Committees it appears that such committees are "appointed to review the activities of the major academic and administrative subdivisions of the University" and that they "have constituted for many years an integral part of Harvard's educational system," also that "they are perhaps the chief agency through which the Board fulfills its responsibilities as trustee for the public in keeping in touch with the affairs of the many faculties and departments of the University" (Paragraph 2, R. 3).

*This is a large Committee. It appears that it had 26 members in April, 1952 (Paragraph 8, R. 13).

B. THE TRUST INSTRUMENT.

The trust now in question was created by an indenture dated March 29, 1872, of which a copy is annexed to the petition marked "A" (R. 25). The parties to the indenture were the trustees under the will of James Arnold and the Harvard Corporation.

The indenture begins with these recitals (R. 25-26):

(1) By the Arnold will certain property was devised and bequeathed to his trustees "in trust, to be by them applied for the promotion of Agriculture or Horticultural improvements or other Philosophical or Philanthropic purposes at their discretion, and to provide for the continuance of this trust hereafter to such persons, and on such conditions as they, or a majority of them, may deem proper, to carry out the intention of the donor."

(2) Benjamin Bussey, who died in 1842, by his will had devised to the Harvard Corporation a parcel of land in that part of Boston now known as Jamaica Plain* on which he had lived, comprising over 200 acres, in trust and confidence that they would "establish there a course of instruction in practical agriculture, in useful and ornamental gardening, in botany, and in such other branches of natural science, as may tend to promote a knowledge of practical agriculture and the various arts subservient thereto, and connected therewith, and cause such courses of lectures to be delivered there, at such seasons of the year, and under such regulations as they may think best adapted to promote the ends designed:—the institution so established to be called the 'Bussey Institution'."

*In the will this land is referred to as situated in Roxbury since the area now called Jamaica Plain was then included in that town. By virtue of St. 1851, c. 250, this area came within the newly-established town of West Roxbury. Shortly after the indenture of March 29, 1872, was executed West Roxbury was annexed to Boston (St. 1873, c. 314).

(3) The trustees "have agreed and determined, in the exercise of the discretion given them under the will of the said James Arnold, that the disposition of the property devised and bequeathed to them as aforesaid in the manner and for the purposes and upon the conditions hereinafter set forth 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, to carry out the intention of the donor."

The indenture then provides as follows (R. 26-28): First, the Arnold trustees convey all the property received and to be received by them under the Arnold will to the Harvard Corporation "to have and to hold the same * * * in trust, with full power of sale and reinvestment, upon the trust following, namely,—

"That the said party of the second part shall hold the same as a separate and distinct fund, and shall allow the whole nett income thereof, (after deducting the necessary expenses of managing the same, and also deducting, if they see fit one third part of such nett income in each year as is hereinafter provided,) to accumulate and add the same to the principal, until the said fund shall amount, at a just valuation, to One hundred and fifty thousand dollars, and until the land at West Roxbury hereinafter described shall come into the possession of the said party of the second part as an estate in possession free of all life tenancies, or other incumbrances.

"Second, When both said events shall have happened, that the said party of the second part shall accumulate five per centum of the said nett income, in every year, and add the same to the capital, as a part of the said permanent and separate trust fund.

"Third, That the said party of the second part shall devote the remainder of the said nett income in every year, 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 of which shall be raised or collected as fast as is practicable, and each specimen thereof shall be distinctly labelled, 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. 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.

“Fourth, Until the happening of both of the events named in the first clause, the said party of the second part may expend one third part of said nett income in every year, and no more, in such preparation of the land hereinafter named, and in such collecting or raising of specimens, and the necessary superintendence thereof, as will promote the general and ultimate purpose above stated, but in no other way.

“Fifth, 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.”

By the sixth paragraph of the indenture the Corporation acknowledged the receipt of the property and agreed “to

hold the same, and all future property so received, upon the trusts herein declared; and further, in consideration of said transfer and payment, they agree to dedicate exclusively to the purpose of said Arboretum, a parcel of land lying in West Roxbury [describing the land by metes and bounds]" (R. 28-29).

The land so dedicated is stated in the trust instrument to be "part of the land devised to the said President and Fellows of Harvard College by the said Benjamin Bussey, as before recited, by his will which is of record in the County of Norfolk" (R. 29). The dedication of this part of the Bussey land to the purposes of the Arboretum could have been justified only on the ground that the use to be made of it by the Arboretum was in accordance with the requirements of the Bussey will, which meant the establishment "*there*" of "instruction in practical agriculture, in useful and ornamental gardening, in botany, and in such other branches of natural science, as may tend to promote a knowledge of practical agriculture and the various arts subservient thereto, and connected therewith," and the giving of such lectures "*there*" as might be "best adapted to promote the ends designed" (R. 26).

In *Rotch v. Emerson*, 105 Mass. 431, it was determined that the testamentary provisions pursuant to which the Arnold indenture was entered into created a public charity.

C. THE GROWTH AND DEVELOPMENT OF THE ARBORETUM.

"In 1872 Charles Sprague Sargent was appointed director of the Arboretum, and in 1879, when the fund had increased to \$150,000, he was appointed Arnold Professor, a position which he held until his death in 1927. Under an agreement with the City of Boston in 1882 title to the land was vested in the city, which leased it to the President and Fellows 'forever' at a rental of \$1 per year. By this lease the land was to be

used for the purposes of the trust. With adequate space assured forever Professor Sargent devoted his efforts toward making the Arboretum preëminent in its field. A staff of able horticulturists was assembled. Field expeditions to various parts of the world brought back species of trees and woody plants theretofore unknown in the United States. In 1892 a brick headquarters and library building was erected on the Arboretum's property at Jamaica Plain with funds given for that purpose. An herbarium, later developed into a collection of nearly 700,000 dried specimens, was started in 1878, and in 1905 the headquarters building was much enlarged so as to house the herbarium." (R. 7.)

"Before Professor Sargent's death, and in later years, other friends of the Arboretum by gift and legacy have brought its total endowment to more than \$4,000,000 at book value and some \$5,000,000 at market value. These gifts were made directly to the Arboretum or to the Harvard Corporation for the 'use' or for the 'benefit' or 'purposes' of the Arboretum. Many of the gifts were made without specification of the use to be made of the money. Other donors or testators specified that the money should be used for particular purposes, all of these purposes being within the scope of the normal activities of an arboretum." (R. 8.)

Immediately after Professor Sargent's death in 1927 a great increase was made in the endowment of the Arboretum through a successful fund-raising campaign, which resulted in the creation of the Charles Sprague Sargent Memorial Fund of approximately \$1,000,000 for the endowment of the Arboretum. The solicitation material consisted primarily of an elaborate 37-page brochure (filed with the return to the certiorari petition as Exhibit 5, see R. 59), which laid its entire emphasis on the Arboretum as a self-contained and integrated organization, having its own purposes and staff and engaging in its own activity.

Stress was laid over and over again upon the importance of the research carried on at the Arboretum by its staff and visiting scientists and the inestimable value to the public of the results achieved by the research. Emphasis was placed on the value for purposes of scientific research of the collections in the herbarium, even then very large, and the library was described as "the most complete collection of printed matter that is anywhere assembled as bearing upon the world's woody plants" (R. 7-8). As the brochure stated (R. 8):

"The Arboretum serves as a storehouse of knowledge and a center of research. The collections in the Herbarium and the Arboretum Library are being constantly used by students, sometimes from Harvard and no less frequently by men from faraway parts of the world who come to pursue special studies and to prepare reports for books. * * * Many of the leading forestry experts have spent considerable periods of study at the Arboretum. [A long list of such experts is given.] The Arboretum is the workshop in which was prepared Professor Sargent's classic 'Silva of North America' in 14 folio volumes. Not only is the Arboretum a storehouse of scientific knowledge about trees and shrubs but it is a research laboratory for experiments which may have results of distinct commercial value."

Before the Bailey Plan, described below, was approved by the Corporation in 1946 "the Arnold Arboretum was a self-contained and integrated institution with a locus in Jamaica Plain and a world-wide reputation under its own name. The Arnold Professor (or Professor Ames as Supervisor)* who controlled its staff, was immediately

*In spite of the requirements of the indenture of trust there was no Arnold Professor after Sargent's death until the end of 1953, except during the period from 1936 to 1946. During the nine years after Sargent's death Professor Oakes Ames served as Supervisor of the Arboretum (R. 7).

responsible to the Corporation and communicated directly with the President as to budgets and other matters requiring consultation with the Corporation as trustee. On the Arboretum grounds the library and herbarium grew to outstanding positions in their respective fields under the direction of its scientists. For its first seventy-five years therefore, apart from such control as could appropriately be exercised by its trustee, the Arnold Arboretum was managed and controlled by its own staff. As an institution under its own name it progressed and gained widespread recognition and fame, a notable collection of dried specimens and a library of great value. Beyond this it acquired a very considerable endowment" (R. 9).

Notwithstanding the provision of the indenture of trust that the Arnold Professor shall teach the knowledge of trees in the University and give such other instruction therein as may be naturally directly and usefully connected therewith, the teaching of students has been a very minor factor in the work of the Arboretum.

"At no time has any Arnold Professor given any instruction in Cambridge. Graduate students from Cambridge have from time to time been given instruction at the Arboretum under the direction of members of the Arboretum staff and since 1928 certain staff members have given courses at the college to a limited extent." (R. 48.)

In the brochure, above referred to, used in the Memorial Fund Campaign, there is no reference to teaching in Cambridge by the Arnold Professor or by any other member of the staff of the Arboretum (R. 47).

From the time when the trust was established no gift to the Arboretum endowment has ever been made for the purpose of advancing the object of teaching in Cambridge, all

gifts having been made for purposes "within the scope of the normal activities of an arboretum" (R. 8, foot of page).

In his article on "The First Fifty Years of the Arnold Arboretum" Professor Sargent wrote:

"The Arnold Arboretum is not a School of Forestry or of Landscape Gardening. It is a station for the study of trees as individuals in their scientific relations, economic properties and cultural requirements and possibilities. On the information gathered in museums like the Arnold Arboretum successful silviculture and landscape gardening are dependent. * * *" (R. 17.)

As is alleged in paragraph 10 (a) of the petition (R. 49-50):

"There is nothing in the description of the Arboretum's functions published in any of the Harvard University catalogues which refers to any teaching in Cambridge by any member of the Arboretum staff. In the catalogue of 1886-7 the functions of the Arboretum are thus described:

'The Arnold Arboretum was founded for the purpose of scientific research and experiment in arboriculture, forestry and dendrology and as a museum of trees and shrubs suited to the climate of Massachusetts.

'Anyone properly qualified to pursue the study of practical arboriculture or forestry may be admitted to the Arboretum as a student. Such students will be permitted to take part in the work carried on in the Arboretum as well as to make use of its library. They will also receive from officers of the Arboretum such assistance and advice in the study of any branch of arboriculture or dendrology as can be rendered without interference with current work. * * * Application for admission may be made to the Director, with whom the fee for instruction may be agreed upon.'

"Essentially the same statement appears regularly in subsequent catalogues. The Harvard University Catalogue for 1952-53 contains the following statement with respect to the Arboretum:

"The Arnold Arboretum was founded in 1872 for the purpose of furthering scientific research in dendrology and arboriculture, and providing a site for a garden of trees and shrubs suited to the climate of Massachusetts. * * *

"The living and reference collections and the Library may be used by qualified students and visiting specialists, who also have the opportunity of freely consulting staff members regarding problems in which they are interested. Individuals qualified to pursue the study of arboriculture and dendrology may be admitted to the Arboretum as students. For those interested in practical horticulture a series of popular demonstrations is available during the late spring and early summer. Prospective students or investigators should communicate with the individual staff member under whom they desire to work.' "

That the maintenance of both a library and an herbarium is within the normal functions of an arboretum is clear. In the case of a great institution like the Arnold Arboretum a library and an herbarium are essential.

In his annual reports as Arnold Professor, Sargent made frequent references to the importance of the library and herbarium in the scientific work of the Arboretum. In his report for 1923-1924 he said:

"The experience of the last fifty years shows that such an institution [an arboretum] 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.

* * * 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." (R. 16-17.)

D. THE BAILEY PLAN.

In June, 1945, Professor Bailey of the Department of Biology of Harvard University submitted to the Dean of the Faculty of Arts and Sciences a report prepared by him entitled "Botany and Its Application at Harvard." This report, a printed document of 93 pages, embodied a proposal (hereinafter called "the Bailey Plan" or "the plan") that the nine independently endowed institutions in some way concerned with botany and then affiliated in one way or another with the University be in effect merged in the Department of Biology for the benefit of research and instruction at Harvard. One of these institutions was the Arboretum, the invested funds of which amount to approximately 50 per cent. of the aggregate funds of the nine institutions.

The plan was evidently prepared without legal advice and without any recognition of the fact that the funds and property of the Arboretum are held by the Corporation upon a special trust, such funds and property being dealt with throughout the plan as being held by Harvard as part of its disposable assets for the general purposes and interests of Harvard without regard to any special trust affecting such funds and property. On January 22, 1946, the Corporation voted to approve the Bailey Plan, apparently without investigation of the terms upon which the property of the Arboretum was held by the Corporation (R. 3-4).

Specifically, the plan included sweeping recommendations looking to the "integration" of the nine independently endowed establishments above referred to, including the Arboretum, into two so-called "areas" or "institutes",

the establishments so merged eventually to become mere subsidiary divisions of these "institutes", with a "Biological Council" having effective control of the funds and activities of the several establishments. In the respective petitions now before the court the purpose and effect of the plan are further stated as follows:—

"It was affirmed in the Bailey Report over and over again that the proposed organization would promote the future welfare of botany as a whole and would make more efficient the work of research and instruction in botany at Harvard. On the other hand, the Bailey Report showed no regard for or interest in horticulture, which was a prime purpose of the Arboretum, or any consciousness of the status of the Arboretum as an institution whose property was held under a special trust" (R. 9).

* * * * *

"The plan involved the 'integration' to a large extent of the income of the Arboretum with that of the other eight independently endowed agencies and of the Department of Biology (which includes botany), and the use of the combined income for research in general botany, various branches of which are not of interest to the Arboretum, and for other general botanical purposes. The Arboretum had much the largest income of any of the agencies to be integrated with it, and was indeed referred to in the Bailey Report as 'the goose that lays the golden eggs'. Consequently its funds were and are of particular interest to those desirous of advancing the cause of general botany at Harvard, irrespective of the special purposes and interests of the Arboretum." (R. 10.)

In a foreword to the Bailey Report the Dean of the Faculty of Arts and Sciences made the following statement:

"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." (R. 11.)

And the Coördinating Committee of the Overseers, to which the Corporation referred the question of breach of trust when first raised by the Visiting Committee (R. 4), described the Arboretum in its report of May, 1950, 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" (R. 11).

The foregoing statements indicate the views which were obviously entertained by the Corporation at the time of its adoption of the Bailey Plan.

E. PROCEEDINGS OF THE VISITING COMMITTEE AND ITS COUNSEL.

The implementation of the Bailey Plan proceeded slowly and there were substantial delays. When the effect of the plan upon the Arboretum began to be realized opposition developed and in 1949, when the implications of the plan as affecting the Arboretum became known to the Visiting Committee, it appeared to several members of the Committee that the plan would completely overturn the principles upon which the Arboretum had been administered and developed and would gravely injure its work and its usefulness to the public. Serious questions were

presented as to whether the plan involved a breach of trust, and as a result of the objections raised the Corporation referred the matter to the Coördinating Committee on the Biological Sciences of the Board of Overseers, which, in May, 1950, submitted the report referred to above. This report approved the plan with minor modifications.

A group of fourteen members of the Visiting Committee then retained Messrs. Herrick, Smith, Donald, Farley & Ketchum, who reported in September, 1950, that the carrying out of the Bailey Plan would in their opinion violate in many respects the trusts upon which the Arboretum funds and property are held by the Corporation. Soon after the receipt of this report the Committee at a largely attended meeting voted to recommend to the Corporation that it suspend the putting into effect of the plan in so far as it affects the Arboretum until the question of breach of trust should be more fully presented and considered (R. 4-5).

The Corporation then submitted the questions raised to its counsel, Messrs. Ropes, Gray, Best, Coolidge & Rugg, who, under date of May 1, 1951, rendered an extended opinion to the Corporation (filed with the return to the certiorari petition as Exhibit 7, R. 59-60), supporting the legality of the plan in large measure. The Visiting Committee then retained as counsel Messrs. Dodge and Farley and requested them to give further consideration to the matter. Pursuant to this request they gave the subject additional study over a period of months, and under date of March 1, 1952, submitted a report (filed with the return to the certiorari petition as Exhibit 1, R. 58) reaffirming the conclusions reached in the earlier report of Messrs. Herrick, Smith, Donald, Farley & Ketchum (R. 5). The points developed in this report are stated in substance in the record (R. 5-12). The report contains at pages 24-30 many quotations from the Bailey Report showing over and

over again that the plan was formulated for the sole purpose of furthering the interests of Harvard in general botany, these quotations being followed by a discussion, at pages 30-55, of the various ways in which putting the plan into effect would constitute a breach of trust.

The report concluded with an expression of the belief that, unless the difference of opinion could be resolved satisfactorily to all concerned, the trustee should seek the judgment of a court of competent jurisdiction (R. 12).

After receiving this report a meeting of the Visiting Committee was held on April 29, 1952, at which the twenty members who were present adopted by a large majority a resolution containing a statement of a comprehensive plan submitted as a solution of the controversy. This statement was approved by the six members of the Committee who were not present at the meeting and copies were sent to the Overseers and the Corporation (R. 13). The Visiting Committee's plan began as follows:

"As a first step in any constructive plan, the Committee believes it is essential that the Bailey Plan (including the present plan for the removal to Cambridge of the major part of the library and herbaria) be completely rescinded so far as the Arboretum is concerned. In the light of the recent carefully considered legal opinion of Messrs. R. G. Dodge and J. W. Farley, there is at the very least serious doubt as to the legality of the Bailey Plan as applied to the Arboretum. In these circumstances, whether or not one agrees with the Dodge-Farley opinion as against the Ropes, Gray opinion, it is inconceivable that any attempt would be made to apply the Bailey Plan to the Arboretum without at least a petition by the Corporation for a court decision."

At various times thereafter the importance of obtaining a judicial determination of the matters at issue was again urged upon the Corporation, but without avail (R. 13).

Later in 1952, for the first time, counsel for the Visiting Committee were granted a hearing before the Overseers' Coördinating Committee and another before a committee of the Corporation. Thereafter on December 22, 1952, they submitted to the Corporation through President Conant a suggested vote for the adjustment of the entire controversy (R. 13-14). A copy of their letter of that date to President Conant is annexed to the petition as Exhibit B (R. 30), and a copy of the proposed vote is filed with the certiorari return as part of Exhibit 4 (R. 59).

From the letter it appears that on November 7, 1952, the Coördinating Committee had adopted a resolution containing a proposed statement of policy with regard to the Arboretum which included a declaration that the Bailey Plan should not apply to the Arboretum, but in a later paragraph approved, if the Corporation found it to be in the interest of the Arboretum, the removal of the main body of the Arboretum's library and herbarium to Cambridge, which was one of the most objectionable features of the Bailey Plan. The letter of counsel for the Visiting Committee requested the Corporation to make certain changes in the resolution of the Coördinating Committee before adopting it, stating that such changes would enable them to advise the Visiting Committee that the resolution would then offer a reasonably satisfactory solution of the legal points which had been raised. The principal change suggested concerned the matter of the proposed removal of the main body of the library and herbarium, the Corporation being urged to declare "that in view of serious doubt in this regard the removal will not occur" (R. 31). Certain other changes in the resolution were suggested and are discussed below.

The most important suggestions of counsel for the Visiting Committee were not accepted by the Corporation, which finally adopted on January 19, 1953, the resolution

of which a copy is annexed to the petition marked "C" (R. 14, 34).

F. THE RESOLUTION ADOPTED BY THE CORPORATION ON
JANUARY 19, 1953.

In this resolution the Corporation for the first time officially recognized that it held the Arboretum property upon a special trust and that this trust must be administered in the Arboretum's interests.

Paragraph 1 of the resolution reads as follows:

"The plan contained in the Bailey Report of June 1945 shall not apply to the Arboretum or to the principal or income of its endowment. The Corporation recognizes that the property and endowment held for the purposes of the Arboretum are 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 resolution concluded, however, by reestablishing in paragraph 10 thereof one of the important features of the Bailey Plan, namely, the provision for the removal to Cambridge of "the main body of the library and herbarium of the Arboretum related to research." In this paragraph it is declared that "the Corporation determines that it is in the best interests of the Arboretum and will promote the purposes of its endowment" to effect the removal.

The suggested vote prepared by counsel for the Visiting Committee followed the proposed statement of policy recommended by the Coördinating Committee of the Overseers, and embodied changes in various paragraphs of that resolution, as indicated in the letter of December 22, 1952 (R. 30-31). Certain of the proposed changes, namely, those in paragraphs 2, 3, 4 (first sentence), 7, 8 and 10 of the Committee's draft were adopted in substance, and gener-

ally verbatim, in the resolution adopted by the Corporation, the suggested additional paragraph 10 being taken out of context to become paragraph 9 in the adopted resolution.

The Corporation not only failed to adopt the Committee's proposal with regard to the removal of the greater part of the library and herbarium, but failed in the following additional respects to follow the recommendations:

The Committee's plan urged the Corporation to declare that in the administration of the trust it would act "solely" with a view to the best interests of the Arboretum. The Corporation omitted the word "solely" in its draft.

In paragraph 4 of the resolution of the Corporation a second sentence is added, providing that "the incumbent of the Arnold Professorship shall also be appointed Professor of Dendrology."

With regard to paragraph 5 the recommendation was that appointments to the staff "may be initiated from time to time by the Arnold Professor or by the President and the Arnold Professor jointly." This was changed in the resolution as adopted so as to give the President the power to initiate appointments, presumably without consultation with or even against the opposition of the Arnold Professor.

G. THE PROPOSED ACTION WITH REGARD TO THE LIBRARY AND HERBARIUM.

Under the provisions of paragraph 10 of the resolution as adopted (R. 37) it is proposed "to remove to a central building in Cambridge 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"; while no part of the cost of the construction

and about a mile from the Arboretum. Here he began at his own expense the formation of a library and herbarium. In 1892, when the library had grown to about 6000 volumes, Horatio Hollis Hunnewell furnished the Arboretum with money for the construction of the brick building on the grounds of the Arboretum in Jamaica Plain. When the building was finished, late in that year, the library and herbarium having been presented by Professor Sargent to the Arboretum, were moved, together with the offices, to the new building (R. 48).

The library and herbarium were established as tools for the scientific research which has always been carried on at the Arboretum by its staff. Four members of the Arboretum staff are engaged in full-time research at the Arboretum and much of this work leads to scientific publications of the kind which have added so greatly to the reputation of the Arboretum. Both in quality and in number the publications of the Arboretum are reputed to equal or surpass those of the Harvard botany department and all other botanical agencies allied with Harvard combined (R. 48).

As the Bailey Report itself states, one of the three objects for which the resources of the Arboretum were being utilized at the time of the report was the "maintenance of a large herbarium and library as a basis for research in taxonomy." During the year preceding the date of that report it appears that the sums devoted to "Herbarium, Library and taxonomic research" amounted to \$51,411 out of total expenses of \$111,407 (R. 10).

The allegations of the petition with regard to the importance to the Arboretum of the retention of its library and herbarium in Jamaica Plain and with regard to the effect upon the Arboretum of the proposed removal may be summarized as follows:

"Since virtually all of the library and herbarium is 'related to research' the effect of the proposed removal would obviously be to transfer to Cambridge all the important work and research heretofore conducted at the Arboretum and to commingle it with the general botanical research of the University; and whether or not such removal would be to the benefit of botanical research in the University, it would be contrary to the best interests of the Arboretum and consequently inconsistent with and contrary to the duty of the Corporation as trustee." (R. 10-11.)

It is not clear what is meant by a "working library and herbarium" which it is proposed to leave in Jamaica Plain, but it is obvious that a library and herbarium deprived of material relating to research can be of little value for that purpose and that such removal would break down the Arboretum as an integrated scientific institution (R. 14).

In his annual reports as Arnold Professor, Sargent frequently remarked upon the importance of the library and herbarium in the scientific work of the Arboretum. Reference may be made, for example, to the quotations from his report of 1923-1924, which appear in the record (R. 17), and also to his article on "The First Fifty Years of the Arnold Arboretum" (R. 17-18).

The following allegations are made in the petition:

"To break up the integration of the Arboretum by the proposed removal can do nothing but damage to the Arboretum as a scientific institution. It would be disadvantageous to the usefulness of the Arboretum to the public, to its achievements in its general scientific field, to its contribution to horticulture and botany in its special field, to its work of scientific research, to its future financial support, and to its reputation and prestige which are essential for its greatest usefulness. * * * The net result would be gravely to impair the Arboretum's work; some say it would virtually destroy it." (R. 18-19.)

Various experts have been consulted in behalf of the petitioners, as is set forth in the following paragraph of the petition:

"10. Shortly after the passage of the aforesaid resolution of the Corporation of January 19, 1953, counsel for the present petitioners caused fifteen leading authorities throughout the United States, in no way connected with Harvard, to be interviewed with a view to ascertaining their opinion as to whether it would be in the best interests of the Arboretum to carry out the proposal for the removal to Cambridge of the main body of its library and herbarium related to research. The virtually unanimous opinion of these impartial authorities was that the removal, whether or not it would help botany at Harvard or elsewhere, would break down the present integrated character of the Arboretum and would be contrary to its interests, especially as a scientific institution. This opinion rests on the proposition that a distinguished horticultural-botanical institution like the Arboretum needs *to have together* in one location the three main elements requisite for a well-rounded institution of this character, namely: (a) an excellent horticultural-botanical library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs. The Arboretum now has all three of these. Its library has some 40,000 books and 15,000 pamphlets and is nearly, if not quite, unique. Its herbarium has nearly 700,000 specimens and is of great value. Its living collection, containing some 6,000 species and varieties, is probably the most complete and famous American collection of this sort. The conjunction of these three elements in one place is what has given the Arboretum a world-wide status and reputation, and this conjunction would be destroyed if the resolution of January 19, 1953, were carried out." (R. 16.)

The opinion of these experts confirms that of these petitioners, all of whom have had a long and close association with the Arboretum and a number of whom have had large

experience with horticulture and with botanical gardens. All unite in the strong conviction that the carrying out of the removal plan would very gravely damage the Arboretum and would be definitely contrary to its interests (R. 19).

Among the petitioners who are highly qualified to give opinions on the matter are John S. Ames, who is president of the Massachusetts Horticultural Society and is well known in the horticultural world; Henry F. duPont, who has himself one of the best American collections of plants and shrubs and is a director of the New York Botanical Garden and other horticultural-botanical organizations; Childs Frick, who has his own arboretum at Roslyn, New York, which he has personally supervised for many years, who has been in close touch with the Arnold Arboretum for a generation and has studied this issue with the utmost care; and Mrs. McKelvey, who is really a professional herself, is the author of excellent botanical books and has been a member of the Visiting Committee for many years (R. 41).

If it were permissible for the Corporation as trustee to set up the interests of students in Cambridge as against the interests of the Arboretum itself, the contention would be met by the following allegations in the petition (R. 48-49):

"We are advised that the only students registered at Cambridge who would normally use the herbarium and library are graduate students majoring in taxonomy and engaged in research work; that in the average year there are only approximately 3 to 5 such graduate students registered at Harvard; that the extensive collections of the Gray Herbarium in Cambridge, which include an herbarium of 1,350,000 specimens and a library of more than 40,000 books and pamphlets, are entirely adequate for most of the grad-

uate students working in taxonomy; and that Arboretum books and herbarium specimens are made freely available to the professional staff and graduate students in Cambridge by a courier service or at the Arboretum. We are further advised that undergraduate students taking courses in botany or majoring in that subject do not need and would not use the taxonomic collections of the Arboretum, and that there is no justification for any contention that the transfer of the Arboretum herbarium and library to Cambridge will appreciably facilitate either teaching or the advancement of knowledge in the field in which the Arboretum carries on its activities."

The idea that the greater part of the library and herbarium should be removed to Cambridge originated in the Bailey Plan at a time when the trust relationship between the Corporation and the Arboretum was not recognized, and the Arboretum was treated as an ordinary department of the college. As is alleged in the petition upon information and belief, "the Corporation became committed to the botanists at Harvard to carry out this part of the Bailey Plan and as early as 1946 placed itself in a position in this respect from which it could not easily retreat, and this commitment prevented it, after the trust relationship was discovered and recognized, from judging the interests of the Arboretum impartially" (R. 15).

H. THE HARM ALREADY INFLICTED UPON THE ARBORETUM.

Until the adoption of the resolution of January, 1953, it was not clear whether or not the Corporation would insist on putting the entire Bailey Plan into effect as regards the Arboretum, notwithstanding that this would have been a manifest breach of trust, as the Corporation has in effect conceded by its declaration in the resolution that the plan "shall not apply to the Arboretum." Notwithstanding

this declaration, the Corporation has, since January, 1953, persisted in its determination to make effective that part of the plan which relates to the library and herbarium, believed by the petitioners and other friends of the Arboretum to involve a question of the power and duty of the trustee which should be presented to the court for a decision before further action.

The many requests to the Corporation to obtain the instructions of the court have been ignored or refused (R. 20), and the Corporation has fought hard, and thus far successfully, to prevent any suit in the name of the Attorney General.

All of this has thrown a cloud over the Arboretum, has caused distrust on the part of the public with regard to its future and has discouraged gifts to it, such as have been so generously made in the past.

As is alleged in the petition (R. 19):

"The Arboretum has many friends not only in Massachusetts, but elsewhere. It has taken the lead in the development of horticulture in this country. It is probably the most distinguished horticultural-botanical institution in North America. It is a credit to Boston and Massachusetts. It has a great field of future usefulness and its future can be as distinguished as its past. It is, however, dependent on continued support, moral and financial, of a considerable number of people of both large and small means. Confidence has been widely shaken as to whether money given to the Arboretum would be used for the purposes for which the Arboretum primarily exists or whether its funds and property would be diverted to other purposes which, however worthy, are not the purposes of the Arboretum. There is little or no prospect that substantial gifts can be obtained unless and until this situation is cleared up.

"This lack of confidence has been accentuated by the refusal of the Harvard Corporation to seek the court's instructions in accordance with the common practice of trustees where a question is raised by re-

sponsible persons as to whether the trust is being carried out."

As is stated in the letter of December 22, 1952, to President Conant (R. 34), the long delay and uncertainty have been damaging to the Arboretum, partly because in the circumstances it has been impossible to seek large gifts or legacies.

Reference may also be made to the statement of Grenville Clark (Exhibit D, R. 38), who is one of the petitioners. He was a member of the Harvard Corporation at the time the Bailey Plan was approved in 1946 and until November 27, 1950. Ever since the Visiting Committee in 1949-1950 raised serious questions about the application of the Bailey Plan to the Arboretum he has thoroughly studied the matter and is convinced that a breach of trust is threatened, and that there should plainly be a judicial determination of the question (R. 39).

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I. THE APPLICATION TO THE ATTORNEY GENERAL AND THE
RESULT.

In view of the mass of expert opinion to the effect that the proposed removal of the library and herbarium would be extremely damaging to the Arboretum, and the stubborn refusal of the Corporation to ask the court for instructions, counsel for the petitioners believed that this was plainly a situation in which, according to all the precedents, the Attorney General should permit the use of his name in an information to be brought with a view to obtaining a declaratory decree as to whether the trust was in prospect of abuse.

Accordingly, counsel in April, 1953, informed the respondent that, as the representatives of certain persons

who were interested in a case involving a public charity and feared that a breach of trust was imminent, they requested the use of his name in an information to be brought. The respondent notified counsel that they should take the matter up with Assistant Attorney General Booras, and they did so (R. 20).

After a telephone talk with Mr. Booras, counsel sent him a copy of their report of March 1, 1952, to the Visiting Committee, referred to above, and by two letters to him outlined the nature of the controversy and requested an opportunity to talk with him (R. 20).

The two letters referred to were written by Robert G. Dodge on April 24 and April 28, 1953, and are filed with the extended return of the respondent in the certiorari case as Exhibits 12 and 13. The letter of April 24th contained the following statements:

"The Bailey Plan was prepared by botanists at Harvard with a view to merging, in effect, various institutions associated in one way or another with Harvard into the Botany Department and to utilize the funds of all for the general benefit of botany at the College.

"As the result of a controversy which has been going on for many years over the right of the Harvard Corporation as trustee of the Arboretum to put this plan into effect, the Corporation has recently voted that the Bailey Plan shall not apply to the Arboretum. The Corporation, however, went on to reestablish one feature of the plan and to vote to remove the major part of the library and herbarium of the Arboretum to Cambridge.

"Mr. Farley and I are representing a group of individuals, who have been strong supporters of the Arboretum for a long time and have generously contributed to its funds. They believe that the Corporation should not put this removal into effect without a court decision and we are anxious to have a bill filed for a declaratory decree."

The letter of April 28th reads as follows:

"Referring again to the controversy between the Harvard Corporation and the large number of persons who are deeply interested in the Arnold Arboretum, I write to say that Mr. Farley and I have in mind, of course, that, as the Arboretum and its funds are held by the Harvard Corporation on a public charitable trust, the question whether the proposed removal to Cambridge of the greater part of the library and herbarium involves a breach of trust can be tested in court only on an information filed by the Attorney General. We are hoping that Mr. Fingold will be willing to have a suit for a declaratory judgment brought in his name at the relation of various individuals whose names will be furnished. This will not involve the Commonwealth in any expense and, as our court has pointed out, the relators will be liable for costs if it should turn out that the information was not well founded.

"There are many cases in our reports involving public charities in which the Attorney General has filed an information at the relation of individuals and the cases have been handled by counsel for the relators with the consent of the Attorney General.

"See for example

Attorney General v. Old South Society, 13 Allen 474.

Attorney General v. Butler, 123 Mass. 304.

Attorney General v. Parker, 126 Mass. 216.

Attorney General v. Bedard, 218 Mass. 378.

Attorney General v. Armstrong, 231 Mass. 196.

Attorney General v. City of Lowell, 246 Mass. 312.

"See also the opinion of Shaw, C.J., in *Parker v. May*, 5 Cush. 336.

"As bearing on the merits of the proposed proceeding I may add that we have had one of our associates interview distinguished horticulturists in various parts of the country, who have expressed to him their opinion that the removal of the library and herbarium will be very damaging to the Arboretum and will seri-

ously affect the ability of its staff to carry on the work which has brought the Arboretum such a high reputation everywhere.

"I should appreciate it very much if you will let me know when we can come up to see you."

An opportunity to talk with Mr. Booras was afforded counsel on April 30th and at that interview the case was discussed at considerable length and arguments in support of their contentions were made by counsel, who gave Mr. Booras the names of ten responsible persons who were willing to act as relators. (As appears from the letter of May 15th filed with the return to the certiorari petition as Exhibit 14 the proposed relators are the present petitioners with the exception that Benjamin S. Blake is one of the petitioners in the place of Mrs. Louis A. Frothingham, for reasons stated in paragraph 13 of the petition, R. 21.)

"It was further pointed out that, in deciding whether to permit the use of his name the Attorney General was not called upon to decide the merits of the controversy, but that, according to long established usage, permission should be granted if it appeared (1) that the matter was of public importance and that responsible citizens, acting in good faith and with no object other than to secure the performance of a charitable trust in accordance with the intent of the donors, were prepared to assume the expenses of the proceeding and in particular to make themselves liable for costs, and (2) that, whatever might be the Attorney General's personal views as to how the issues of fact and law ought to be decided, these issues were clearly a fit subject of judicial inquiry. Counsel called Mr. Booras' attention to certain opinions of former Attorney General Knowlton, in which these principles were in substance stated." (R. 21.)

In addition to the report of March 1, 1952, it appears from the respondent's return to the certiorari petition (R.

58-59) that the petitioners also gave Mr. Booras copies of the documents annexed to the mandamus petition as Exhibits B and D, a five-page memorandum of law filed with the return as Exhibit 2, a letter from Messrs. Dodge and Farley of May 5, 1952, to the Visiting Committee, with a copy of the minutes of the Committee meeting of April 29th (Exhibit 3), and a copy of the vote suggested by counsel for adoption by the Corporation, referred to in paragraph 9 of the mandamus petition (Exhibit 4). The return as extended (R. 63-64) also lists the correspondence between counsel for the petitioners and Mr. Booras (Exhibits 12-20).

In the letter to Mr. Booras of May 15th Mr. Dodge wrote:

"I am assuming that the representatives of Harvard have not persuaded the Attorney General to disallow the use of his name and we are now preparing a draft of an information in the nature of a bill for a declaratory decree."

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In reply to this letter Mr. Booras wrote on May 18th (Exhibit 15):

"I must submit that your action is somewhat premature because the Attorney General, after having heard all parties, has not yet made a decision in the matter."

On May 21st* Mr. Dodge wrote Mr. Booras a letter (Exhibit 16) in which he said:

"I have just returned from Washington and find your letter of the 18th. If the Attorney General has any doubt about the propriety of permitting the use of his name, I think that Mr. Farley and I, representing the friends of the Arboretum who are the moving

*Through a printer's error the date appears in the record as May 2 (R. 21).

parties in the matter, should have an opportunity to reply to any arguments which may have been made by those representing the College in order to prevent the use of the only possible method of submitting the question to the court.

"Mr. Farley and I are not responsible for the suggested suit. We are merely counsel for the group of proposed relators, who represent that part of the public who are admirers of the Arboretum and desire to see its interests protected against action which they believe would constitute a breach of trust."

To this letter Mr. Booras replied on May 22d (Exhibit 17) by a letter reading as follows:

"I have yours of the twenty-first wherein you request an opportunity to reply to the arguments presented by the representatives of Harvard University. Your letter really anticipated me as I intended to call you and Mr. Farley for the same purpose.

"I shall be glad to see you and Mr. Farley and suggest that you please call me the first of the week in order to arrange for an appointment.

"I might mention that aside from the general arguments as to the wisdom of transferring the library and herbarium, I should very much desire to have you and Mr. Farley address yourselves chiefly to the question as to how the proposed transfer constitutes a legal breach of trust on the part of the University."

Counsel for the petitioners then had their second and last conference with Mr. Booras on June 9th, when Grenville Clark, one of the petitioners, was present with them. The matter was again reviewed, but Mr. Booras gave no intimation as to what arguments had been made on behalf of the Corporation or what further information if any he needed. At no time was there any hearing in the legal sense. No evidence was offered or taken at any time. Mr. Clark made a statement in accord with the memorandum

prepared by him (Exhibit D). Mr. Booras was fully informed as to the mass of expert opinion which had been gathered to the effect that the carrying out of the removal would be very damaging to the Arboretum and destructive of its interests, and was advised that many questions of fact as well as of law were involved.

With regard to the representations made in behalf of the Corporation the return to the certiorari petition states that counsel for the Corporation conferred twice with Mr. Booras and furnished him with many documents (R. 59-60). All of these, except one, were filed with the original return as exhibits. The omitted document was a letter dated June 10, 1953, filed with the extension of the return as Exhibit 11. Counsel for the petitioners had previously known nothing of this letter; as soon as it was filed they caused it to be incorporated by reference in their mandamus petition (R. 50). It evidently had great effect on the Booras decision, a copy of which is annexed to the petition as Exhibit E (R. 44) and which is alleged in the petition to be repugnant to the principles on which the respondent is required to act and to be based on errors of law and unwarranted conclusions of fact.

Counsel for the petitioners had no further communication with the respondent or with Mr. Booras after the interview with the latter on June 9th until July 3d, when they received a copy of his decision denying the application (R. 22).

Argument.

I. IN A CASE INVOLVING A PUBLIC CHARITY, WHERE A QUESTION AS TO WHETHER IMPENDING ACTION BY THE TRUSTEES WOULD INVOLVE A BREACH OF TRUST IS PRESENTED BY RESPONSIBLE PERSONS INTERESTED IN THE TRUST, AND WHERE QUESTIONS OF FACT OR LAW OR BOTH ARE INVOLVED WHICH ARE SUBSTANTIAL AND FIT SUBJECTS FOR JUDICIAL INQUIRY, IT IS THE DUTY OF THE ATTORNEY GENERAL TO PERMIT THE USE OF HIS NAME IF RESPONSIBLE PERSONS ARE WILLING TO ACT AS RELATORS AND ASSUME THE EXPENSES, TOGETHER WITH COSTS IF ASSESSED.

Where, as in the present case, there is no remedy except by a suit in the name of the Attorney General, and where the issue of breach of trust is dependent on the determination of controverted issues of fact on which there is a mass of evidence on both sides, and there has not been a decision as to the facts, an Attorney General who denies the use of his name on the ground that there is in law no breach of trust violates his duty, and his refusal to permit the matter to be litigated is arbitrary and a plain abuse of discretion.

If the issue of fact on which the question of breach turns is comparatively simple and involves but little testimony, the Attorney General may properly hear the witnesses himself. If it then appears to him that the evidence that there is no breach of trust is so overwhelming that in his opinion no court would find that there was such a breach, he may properly deny the use of his name. But that is far indeed from the present case.

So, too, the discretion of the Attorney General must not merely be exercised in good faith, but must be exercised in accordance with a proper appreciation of his own duty and of the rules of law applicable to the questions in-

involved, and he must not follow unsound advice given him by the trustee. On these points see parts IV and V of this brief.

In Massachusetts the duty of the Attorney General with respect to charitable trusts is defined by a statute which has been in effect for more than a century and is now contained in G.L. (Ter. Ed.) c. 12, § 8, reading as follows:

“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.”

He is thus under a mandatory duty to prevent breaches of trust with respect to charities.

In *Brierley v. Walsh*, 299 Mass. 292, which was not a public charity case, but a suit in equity brought by an individual to try title to public office, it was held that the bill disclosed no ground for relief in equity but that an information in the nature of quo warranto by the Attorney General was the proper proceeding. At page 295 Rugg, C.J., said:

“The plaintiff cannot as of right institute proceedings in the nature of quo warranto. In the circumstances here disclosed that can be done only by the Attorney General. G. L. (Ter. Ed.) c. 249, § 12. His action can be invoked. Whether he shall seek relief by that procedure rests in his sound discretion. It cannot be presumed that he would fail to act if a petition in appropriate form and having the appearance of merit were presented to him.”

This statement is, of course, just as applicable to a public charity case as to any other class of cases where a suit can be brought only in the name of the Attorney General.

The best statement of the duty of the Attorney General in all these classes of cases appears to be that of former

Attorney General Knowlton in II Op. Atty. Gen. 635*, where he said, in dealing with an application made to him for the filing of an information against one Kiley, alleging that he had been unlawfully appointed to a certain office and held the office in violation of law (at page 636):

"It is not necessary that the Attorney General should be satisfied that the information which he is called upon to sign can be maintained. If the questions raised by it are doubtful, and the matter is one of public importance, it is his duty to sign the information, even though he may be of opinion that it cannot be maintained for the reason that the questions involved cannot otherwise be determined."

This is quoted by Attorney General Malone in III Op. Atty. Gen. at page 592.

Apart from the cases deciding that the Attorney General alone can institute proceedings for an alleged breach of trust in charity cases, there appears to be little in the decisions of our court which deals with the duty of the Attorney General as to instituting proceedings.

In *Parker v. May*, 5 Cush. 336, Shaw, C.J., said (p. 337) that a suit to enforce a charitable trust must be brought by the public prosecutor, "whose duty it is to see that the public interests sustain no detriment, and to proceed in the prosecution or stay proceedings, as a just regard to these interests may require."

In *Attorney General v. Parker*, 126 Mass. 216, the court said (p. 222) with reference to an information brought by

*Although the pages in this volume containing the opinions upon applications for leave to file informations in the name of the Attorney General have at the top of the page the name "Herbert Parker, Attorney General," Mr. Parker, who held the office during the latter part of the period covered by this volume, did not assume the office until the middle of January, 1902, and therefore all the opinions upon these applications down to page 648 are the opinions of Attorney General Knowlton.

the Attorney General on the relation of a group of individuals for the purpose of remedying an alleged diversion of certain funds held on a charitable trust:

"The proceeding is an information purely. As it does not immediately affect the rights of the Commonwealth, the prosecuting officer depends on the relation of persons whose names are inserted in the information as relators, and, as the suit is carried on under their direction, they are regarded as answerable to the court for the propriety of the suit and for the conduct of it."

In *Town of Brookline v. Barnes*, 327 Mass. 201, where the court approved a *cy pres* plan in a public charity case against the opposition of the Attorney General, it is said in the opinion at pages 207-208, in dealing with the contention that the plan approved by the Attorney General was entitled to be upheld unless illegal:

"That is not the law. The function of the Attorney General is 'simply to present the question to a court of justice, not to control or direct its judicial action.' *Jackson v. Phillips*, 14 Allen, 539, 580."

It is clear that it has not been the practice of our Attorneys General in the past, when applications have been made to them by prospective relators for leave to file in their names informations as to alleged breaches of trust in charitable cases, to undertake themselves to decide upon the merits of the cases where there are controverted issues of fact. Where there has been a substantial conflict, and the application is made by responsible parties and the questions raised seem proper for judicial determination, they have granted the use of the name. All of this is indicated by a consideration of the very considerable number of public charity cases in which the Attorney General has

filed an information with relators and the information has been dismissed, even on grounds which it would appear might well have been foreseen. Such cases are:

Parker v. May, 5 Cush. 336.*

Attorney General v. Trinity Church, 9 Allen, 422.

Attorney General v. Union Society of Worcester, 116 Mass. 167.

Attorney General v. Butler, 123 Mass. 304.

Attorney General v. Parker, 126 Mass. 216.

Attorney General v. Greenfield Library Association, 135 Mass. 563.**

Attorney General v. Clark, 167 Mass. 201.***

In two of the cases, *Attorney General v. Butler* and *Attorney General v. Greenfield Library Association*, there was so little merit in the information that costs were assessed against the relators. In none of the cases was the Attorney General criticized for permitting the use of his name.

The attitude of past Attorneys General in deciding applications for the filing of informations is plainly illustrated by their reported opinions in cases involving such applications. These cases are reported in I Op. Atty. Gen. beginning at page 609, II Op. Atty. Gen. beginning at page 631, and III Op. Atty. Gen. beginning at page 588. No

*In this case the information was filed by the Attorney of the Commonwealth for the County of Suffolk, during a period when there was no Attorney General.

**In this case a demurrer was sustained for want of necessary parties.

***In this case a demurrer was sustained on the ground that the trust in question lacked the quality of a public charity.

opinions on cases of this sort appear in any later volumes, or in the reports of the Attorney General.

In the first three volumes 23 cases are reported, all of the opinions except the last three being by Attorney General Knowlton.

The only one of these cases which relates to a charitable trust is the one in volume III, p. 588, where there was no question of breach of trust, but only a technical question as to the right of the visitors of the charity to review the action of the trustees. The other cases are of various kinds, including applications for the institution of proceedings attacking the validity of elections to public offices, to annul the charters of corporations, to abate public nuisances, etc. An examination of these cases, in all of which the Attorney General refused to file an information or allow the use of his name, indicates that the conclusion of the Attorney General was obviously right.

None of the cases resembles in the remotest way the present case. In most of the cases a mere question of statutory construction is involved. In none of them does there appear to have been any material dispute concerning the facts. In all the cases hearings were given in accordance with the practice of the office, as stated in I Op. Atty. Gen. 609 and 633, and in every case counsel for both the petitioners (or relators) and the respondent participated, except in three cases where only counsel for the petitioner appeared.

In several of his decisions Attorney General Knowlton expressed views indicating that he regularly proceeded in accordance with his statement as to the duties of the Attorney General which is quoted above. The following is an example of this:

"Upon the whole, therefore, I am clearly of opinion that the relators have not stated such a case in law as entitled them to the relief applied for.

"If, however, the interests of the public might be affected injuriously by the continuance of the respondents in office, and it appeared that injustice were being done or even might possibly result thereby, I should hesitate to assume the function of determining the questions of law raised by the relators. It might in such case, notwithstanding my present views of the law, be my duty, if it were seriously claimed, as in this case, that the law were the other way, to give the relators the opportunity of having their rights determined by the court.

"But this is not such a case. It has no merits." (I Op. Atty. Gen. at pages 616-617.)

See also I Op. Atty. Gen., at pages 623-624 and 648-649, and II Op. Atty. Gen., at page 633.

There appear to be but few court decisions anywhere which deal with the functions of the Attorney General with reference to requests for the filing of informations.

In *State, ex rel. Town of Stuntz, v. City of Chisholm*, 196 Minn. 285, the town of Stuntz had applied for leave to file an information in the nature of quo warranto to test the validity of proceedings to incorporate the village of Chisholm into a city and to include within its limits an area theretofore contained within the limits of the town of Stuntz. The Attorney General moved to quash the information and the court denied the motion, stating that the issue was whether the refusal of the Attorney General to file an information in the nature of quo warranto, or even consent to its filing, barred a municipal corporation from access to the courts in a case where another municipality was absorbing a substantial part of its domain. The court held that the town had a special interest and allowed the information to be filed in the name of the state.

At pages 289-290 the court said:

"In substance, then, the argument that the attorney general has the arbitrary power, by his refusal to pro-

ceed, or even to consent to the proceeding, to bar a relator from access to the courts is to assert that, in some unexplained fashion, he has retained the absolute and royal prerogative of the ancient English kings. To state the proposition is to refute it. Imposing as is the dignity and great as is the power of the attorney general's office, its incumbent is not among the constitutional grantees of judicial power. * * * As a matter of procedural duty, courts will not refuse leave to the attorney general to file any information wherein he is *ex officio* the relator. But they cannot, without *pro tanto* abdicating both judicial power and duty in his favor, allow him to decide finally that an information shall not even be entertained by the appropriate court."

In *Lamoreaux v. Ellis*, 89 Mich. 146, the court dealt with an application made for a writ of mandamus to compel the Attorney General to bring suit in the nature of quo warranto to determine the right to public office of a certain sheriff. The Attorney General took the position that the public only was concerned in the matter and that he, as an agent and official of the public, could not be required against his better judgment to file a quo warranto to oust an incumbent from public office, that at the most it was within his discretion, and that he could not be compelled to file suit unless he had abused his discretion. While the court denied relief to the relator it did so only because he had not shown any facts affording reasonable ground for the belief that the court would decide against the sheriff. The court said at page 151:

"The courts ought not to consent to any holding which will put the power arbitrarily and without remedy or redress into the hands of any one, two or three men to prevent a candidate for office from establishing his election to any office, or any citizen from inquiry in good faith into the rights of any person to hold an office. This would certainly be the result of the position taken by the Attorney General."

And on page 152:

"If the relator in this case is a proper party to act as relator in a quo warranto proceeding to try the title of McQueen to the office of sheriff * * * then it follows that he has a right to insist upon the filing of such information, if he has made in good faith a proper showing to warrant such filing."

In *Cheetham v. McCormick*, 178 Pa. 186, the court had before it a petition for mandamus requiring the Attorney General to institute proceedings under a statute regulating the issue of securities by railroad companies. This statute made it the duty of the Attorney General to institute proper proceedings in court to enforce the act, on the complaint of a stockholder in any railroad company or of any two reputable citizens resident in the region traversed by the line that the company is about to issue securities contrary to the provisions of the act. The Attorney General set up as a defense that his refusal to proceed was the exercise of an official discretion and was not reviewable. With reference to this point the court observed that an inquiry into the facts might satisfy the Attorney General that the complainants had been misled or really had no information, but were acting from improper motives, or might convince him that to proceed would be unwise, would invite certain defeat and would fasten a bill of costs unnecessarily on the Commonwealth; in such situation, the court indicated, he might properly decline to bring suit. The court, however, went on to say (at p. 193):

"If then the complainants have any proofs to submit in support of their complaint they should present them. If they can show a prima facie case in support of the facts alleged they have met the only objection the attorney general can interpose and it will then become his duty to proceed. The question of public benefit, and that of public policy, have been settled by

the action of the legislature. Have the complainants a *prima facie* case is the question which the legislature has not conclusively settled, and which is therefore open for consideration by him. If after they have presented for his consideration facts that justify their complaint he still refuses to proceed, it may well be urged that he is not exercising the sound discretion of a public officer, but the arbitrary will of one who refuses to discharge a public duty because he has the physical power to do so."

The court accordingly remitted the case to give the petitioners an opportunity to present the facts to the Attorney General, stating that the investigation by him would be *ex parte* "and carried so far only as to show that a *prima facie* case in support of the complaint exists."

In *The Queen v. Commissioners of Internal Revenue*, 12 Q.B.D. 461, the petitioners sought a writ of mandamus to require the Commissioners of Internal Revenue to return a sum charged by way of probate duty which had proved to be excessive. The petition was opposed on the ground that the remedy was a petition of right. The court sustained this objection on the ground that a writ of mandamus is granted only when there is no other means of obtaining justice. Lord Justice Bowen said at page 479:

"A petition of right when the Crown is willing to grant its fiat is as good a means of getting justice against the Crown as any that could be conceived. All the procedure, or almost all the procedure can be applied to a proceeding by way of a petition of right that is available to the subject in an ordinary action against another subject; and there is no distinction at all in the case of a debt claimed against the Crown, so far as facility of procedure is concerned, between a petition of right and an ordinary action by one subject against another, except this, that the fiat of the Crown must be obtained before the Crown is harassed by a suit; but everybody knows that that fiat is granted as a matter, I will not say, of right, but as a matter of

invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous. Therefore, in this particular instance, where there is a bona fide case to be tried, there was not a shadow of reason for pretending from the first that there was the least danger that the fiat would not be granted."

The following are hypothetical cases in which the Attorney General's statement of grounds for refusing to allow the use of his name would constitute a failure to perform his duty, would be arbitrary and an abuse of discretion, and would, therefore, be subject to reversal upon judicial review.

1. This is not a public charity, therefore I deny the application [there being in reality a public charity].

2. I have been advised by the trustee that his action will not involve a breach of trust and therefore I deny the application without any hearing.

3. Although the trustee has an adverse interest of his own in the proposed action, I am not satisfied beyond a reasonable doubt that the court would find a breach of trust and I therefore deny the application.

4. The question of breach of trust depends upon the determination of questions of fact. I cannot and do not undertake to determine these questions, but I rule as a matter of law that there is no breach of trust.

5. I have no authority to ask the court to give instructions to a trustee or to enter a declaratory decree and therefore disallow the use of my name. (See part V of this brief, p. 103.)

6. I have no authority to ask for instructions to a trustee unless the trustee is himself in doubt as to the question at issue, and I therefore disallow the use of my name. (See part V of this brief, p. 107.)

7. Even though the persons applying for the use of my name can produce many professional authorities who would testify that the decision of the trustees would be against the best interests of the trust, nevertheless the trustees will contest this. Accordingly, I shall not permit the use of my name, because it will open the door to unreasonable and vexatious litigation.

8. This case is presented to me by substantial parties who offer to act as relators. It is claimed that the trustee has an interest of his own which has influenced him in planning the proposed action, but I do not consider this. There are other questions of fact as to whether the action will constitute a breach of trust, and I am advised that various witnesses will testify on both sides of these questions. I have neither seen nor heard any of the witnesses, and do not make any findings on these points. I rule as a matter of law, as requested by the trustee, that no breach of trust is threatened, and I deny the application.

The applicability to the present case of most of the foregoing "hypothetical" cases will be manifest when the points later made in this brief are considered.

II. THE ATTORNEY GENERAL'S REFUSAL TO PERMIT THE USE OF HIS NAME IS SUBJECT TO JUDICIAL REVIEW WHERE, AS HERE, HE HAS PROCEEDED ON INCORRECT LEGAL PRINCIPLES WITH REGARD TO HIS PROPER FUNCTION AND AS TO THE LAW OF TRUSTS AND HAS ARRIVED AT A DECISION WHICH IS ARBITRARY AND AN ABUSE OF DISCRETION; IF IT BE DETERMINED THAT THE ATTORNEY GENERAL WAS ACTING IN AN EXECUTIVE OR ADMINISTRATIVE CAPACITY, MANDAMUS IS A PROPER REMEDY.

It is submitted that, if the function of the Attorney General in a case like this is to be classified as executive or administrative, and if he refuses the use of his name be-

cause of mistaken views as to his duty and as to the applicable law, and thereby arrives at a decision which is arbitrary and an abuse of discretion, mandamus is the proper remedy, not to require him to grant use of his name, but to require him to hear the matter properly and come to a new decision based upon proper views as to his duties and upon the application of correct principles of law.

In the case at bar the respondent's decision is based on many errors and is arbitrary and an abuse of discretion, as pointed out in part IV of this brief; the errors having resulted from his having yielded to highly unsound arguments submitted to him by counsel for the Harvard Corporation, and dealt with in part V.

It may well be asserted that no Attorney General has ever declined the use of his name in a charitable trust case so proper for submission to a court as the present case.

The facts set out in part III of this brief would, if established, show a plain breach of trust. Mr. Booras' decision was full of errors of law and fact, as pointed out in part IV of this brief. Being informed (R. 39-41), and recognizing expressly in his decision, that there is available a large amount of evidence from impartial outside experts that the proposed action of the Corporation would be extremely damaging to the Arboretum, without seeing a witness or having any basis for passing on the weight of the evidence, he ventured to assert that "There is no legal breach of trust." He makes no reference to the adverse interest of the trustee in advancing the cause of general botany at the college. In reaching his conclusion he followed blindly the letter of June 10, 1953 (Exhibit 11), above referred to, which was written to him by counsel for the Corporation and which, it is submitted, teems with bad law, unjustifiable statements of alleged fact and misleading advice, as is pointed out in part V of this brief.

The Attorney General's discretion in such matters cannot be in every case non-justiciable, beyond the jurisdiction of the court, and free from judicial review, as alleged in the respondent's motion to dismiss and demurrer in the mandamus case (R. 51, 52) and in the demurrer and motion to dismiss in the certiorari case (R. 57).

Mr. Booras assumed that he was justified, without seeing any of the witnesses or taking any testimony or conducting a hearing in the usual sense, or even undertaking to make any finding on the material issues of fact, in passing finally on the merits of the case, although those are necessarily dependent in large part on the determination of issues of fact. In the present case the decision is not only arbitrary and unconscionable, but is a plain abuse of discretion.

There has indeed been *no* exercise of the discretion vested in the Attorney General, if the proper scope of that discretion be recognized.

The respondent appears to concede that his discretion may be reviewed if there is evidence of an abuse of discretion on his part (see ground 6 of demurrer in mandamus case, R. 51, and ground 9 of motion to dismiss and demurrer in certiorari case, R. 61).

In this section of the brief we deal only with the petition for mandamus, submitting that a proper remedy is thus available. We deal with the alternative petition for certiorari in part VI.

The Law.

It is submitted that, if the function of the Attorney General in a case like this is executive or administrative merely, and he refuses the use of his name because of mistaken views as to his duty and as to the applicable law,

he may be required by mandamus to rehear the matter and come to a new decision based upon the application of correct principles.

The few precedents bearing directly on the duties of an Attorney General in cases of public charities like this are considered in part I of this brief. This paucity of direct authority suggests that such officials have ordinarily recognized their duties where a question worthy of submission to a court is presented by responsible parties interested in the trust and where no other method of securing a judicial determination is possible. There are, however, many cases involving other administrative officers who have discretionary powers.

Among these cases *French v. Jones*, 191 Mass. 522, is a leading authority. In that case the superintendent of streets of a city refused to grant to the owner of the tracks of a street railway, who was under no duty to use them for the operation of street cars, a license to take up the rails. An ordinance of the city provided that no person unless authorized by law could dig up any part of any street without a license in writing from the superintendent. At the request of the owner, who petitioned for mandamus, the trial court found that "the refusal of the permit by the respondent did not result from the exercise of his judgment or discretion as to the proper care of the streets, or from the adverse determination of any question connected with the care of the streets or the protection of public travel, but from a desire to keep the rails in the streets in the hope that some person or corporation would operate street cars over them." The court decided the case in favor of the petitioner. In the course of the opinion Sheldon, J., said at pages 529-530:

"The office of superintendent of streets in Waltham is created by the charter of that city, St. 1893, c. 361,

§ 36, which provides that he 'shall have the powers of a surveyor of highways and all the powers of road commissioners not herein otherwise conferred.' He is charged with the duty of seeing that the streets are kept safe and convenient for travel; and he is to exercise his best judgment and discretion for the performance of this duty. He is vested with the power of determining in any particular case whether or not a license shall be issued to authorize the digging up of any part of a street or the erection thereon of any staging for building, the placing thereon of any building materials, or the temporary use of any portion of the street for the erection or repair of buildings abutting thereon. Many occasions may arise when either public or private interests or both would be seriously affected by his issuing or refusing to issue such a license; and it is for him to consider in each case the nature and magnitude of the interests involved, the extent and probable duration of any interference with public travel and the effect which may be produced upon the structure or paving of the way, and to determine whether or not, in view of all the circumstances and in the proper exercise of his discretion as a public officer charged with the care of the streets, the license asked for ought to be granted. This he has not done in the case at bar, but has refused to issue the license prayed for merely from a hope and desire which ought not to have influenced his decision. He has not heard and determined the petitioner's application in the manner in which he ought to have heard and determined it; and we have no doubt that a mandamus properly may issue to compel him to do so. *Osborn v. Selectmen of Lenox*, 2 Allen, 207. *Dodge v. County Commissioners*, 3 Met. 380. *Nourse v. Merriam*, 8 Cush. 11. It was his duty to hear and consider this application without regard to other considerations than those which we have stated, and not to base his action upon any such desire as has guided him. *People v. Supervisors of Delaware County*, 45 N. Y. 196. *State v. St. Louis*, 145 Mo. 551. He has a right to refuse to grant the license asked for if in the proper exercise of his judgment and official discretion he decides that it ought not to be granted; but he has not the right to refuse it merely for a reason which lies outside the scope of his duty. Similar questions have

often arisen in other jurisdictions; and, so far as we are aware, this doctrine always has been maintained" (citing 16 cases).

The court further held that the petitioner was not entitled to a mandamus commanding the superintendent to issue the license prayed for, but ordered the writ to issue "to hear and determine the petitioner's application without regard to any hope or desire that some person or corporation will operate street cars over the tracks in question, but exercising in the manner hereinbefore stated his sound discretion as an officer charged with the care of the streets, in view of the fact that the petitioner is the owner of the property in question and is not under any duty to use it for the operation of street cars" (pp. 532-533).

In *Attorney General v. Suffolk County Apportionment Commissioners*, 224 Mass. 598, the court had before it a petition for a writ of mandamus addressed to the Apportionment Commissioners declaring an apportionment made by them to be void as not in conformity with the Constitution and ordering them to proceed to make a reapportionment. It appeared that there was a great disproportion in the number of voters in the different districts in spite of the fact that the Constitution requires equality as nearly as may be. The court said, per Rugg, C.J., at pages 609-610:

"Mandamus affords the appropriate form of relief. It is the remedy to which resort usually is had to set aside the illegal performance of duty and to compel the performance of duty according to law, by public officers entrusted with discretionary, administrative or political functions when it is their duty to act."

In *Liggett Drug Co., Inc., v. License Commissioners of North Adams*, 296 Mass. 41, Rugg, C.J., said at page 44:

"Each of the petitioners invokes the writ of mandamus to compel the respondents as public officers to issue to it a license as a common victualler. The function of that writ in such circumstances is to compel a board of public officers to perform their official duty according to law. It does not direct what decision shall be made, especially where the element of discretion is involved. Since the respondents have already considered the application of each petitioner and have denied it, each petitioner, in order to prevail, must show that as matter of law it is entitled to such license, or that in refusing to grant the license the respondents have proceeded upon grounds erroneous in law or have otherwise violated legal rights of the petitioner."

In *Malden v. Flynn*, 318 Mass. 276, it was held that a continuing violation of law by one who transported garbage through the streets of a city, after his application for a permit had been denied by the Board of Health, could not be enjoined at the instance of the city, since the violation was a crime for which a penalty is provided and for which no remedy in equity is given. *Ronan, J.*, said at page 281:

"The defendant was entitled to have his application for a permit considered fairly and impartially by the board and might have maintained a petition for mandamus if the board refused to consider it, * * * even though he could not thereby secure an adjudication that the board in the exercise of its judgment and discretion should have come to the conclusion that the protection and preservation of the public health required the granting of his application. * * * The denial of an application for a permit by an administrative board solely upon the mistaken ground that it was bound by one of its rules or regulations forbidding the granting of all such permits is an abuse of discretion which has wrongfully deprived the applicant of any possible chance of satisfying the board that his application should be granted."

In *Inhabitants of Milton v. Auditor of the Commonwealth*, 244 Mass. 93, 96, it was ordered that a writ of mandamus issue to compel the auditor and other state officers to examine and approve, if found to be correct, certain itemized accounts and vouchers submitted to them by the petitioner. Rugg, C.J., said at page 96:

"Although this may involve the exercise of sound judgment and discretion in some particulars, it is the function of the writ of mandamus to compel public officers to apply their faculties to the performance of required duties without directing the particular action to be taken."

The law is summarized in 34 Am. Jur., Mandamus, § 69, where it is said (p. 859):

"If, in the attempted performance of discretionary acts, the official abuses the discretion, so as to amount to a failure to do the act as the law requires, or if by a mistaken view of the law, there has been in fact no actual exercise in good faith of the judgment or discretion vested in the officer, mandamus is a proper remedy. * * * An official may not act arbitrarily and unwarrantably or in disregard of evidence clearly and unmistakably pointing to a contrary result, and yet deny the right to resort to mandamus to compel proper action on his part."

The following cases support these propositions:

People v. Gilchrist, 114 Misc. 651; affirmed 196 App. Div. 964 and 232 N.Y. 598.

People v. State Racing Commission, 190 N.Y. 31.

Marland v. Hoffman, 184 Okla. 591.

Huidekoper v. Hadley (C.C.A. 8), 177 Fed. 1.

State Board of Dental Examiners v. People, 123 Ill. 227.

*Bryant v. Board of Education of Colquitt
County*, 156 Ga. 688.

In the first of these cases the court emphasized the fact that, while the respondent had unquestionably acted in good faith, his ruling had been based on false information. In the second and third cases it was held that, if the respondents had acted under a mistaken view of the law, there had been no valid exercise of discretion. Many authorities to the same effect are collected (at p. 859) in a note to passage quoted above from 34 Am. Jur.

It is submitted that the controversy in the present case is justiciable, is within the jurisdiction of the court and is subject to judicial review, and that the facts alleged in the petition amply show that the decision of the respondent is arbitrary and an abuse of discretion. The contentions made in paragraphs 1, 2, 4 and 6 of the motion to dismiss and the demurrer in the mandamus case, R. 51, 52, as well as those embodied in paragraphs 3 and 4 of the motion to dismiss and demurrer in the certiorari case, R. 57, are, therefore, untenable.

III. THE AVAILABLE EVIDENCE, THE NATURE OF WHICH WAS
POINTED OUT BY MR. BOORAS TO THE PETITIONERS, WOULD,
IF BELIEVED BY THE COURT, ESTABLISH A BREACH OF TRUST.

(a) *The Allegations of the Petition.*

If the allegations of the petition are maintained at a trial, and the court finds the facts in accordance with the testimony which is stated in the petition to be available to the petitioners, the following facts will be established:

1. The question of the removal to Cambridge of the
"main body of the library and herbarium of the Arboretum

related to research"* is one in which the Corporation has an adverse interest because of its desire to advance the cause of general botany in Cambridge.

2. The removal is contrary to the best interests of the Arboretum (R. 11), "would gravely injure it" and be "destructive" of its interests (R. 41).

3. The removal "would take from the place in which they should be kept the principal tools in the Arboretum's scientific work and would be inconsistent with the existence of the Arboretum as a unified and integrated institution in accordance with the terms of its endowment and the intent of donors to its funds" (R. 11).

4. The cost of operating the new building in Cambridge "would be largely charged upon the income of Arboretum funds" (R. 10). The removal "would involve the Arboretum in an indefinite amount of additional expense, as it would not only be called upon to pay a considerable share of the expense of maintaining the new building, but would also have to continue to employ a staff for the care and management of such part of the library and herbarium as is to be left behind" (R. 11).

5. The removal "would break down the Arboretum as an integrated scientific institution" (R. 14, 16).

"A distinguished horticultural-botanical institution like the Arboretum needs to have together in one location the three main elements requisite for a well-rounded institution of this character", namely, a library, an herbarium and a collection of living trees and shrubs. (R. 16.)

"The conjunction of these three elements in one place is what has given the Arboretum a world-wide status and reputation and this conjunction would be destroyed if the resolution of January 19, 1953, were carried out." (R. 16.)

"To break up the integration of the Arboretum by the proposed removal can do nothing but damage to

*Hereinafter referred to as "the removal".

the Arboretum as a scientific institution. It would be disadvantageous to the usefulness of the Arboretum to the public, to its achievements in its general scientific field, to its contribution to horticulture and botany in its special field, to its work of scientific research, to its future financial support, and to its reputation and prestige which are essential for its greatest usefulness. The result of dividing the facilities would be to divide the time of the Arnold Professor and his staff between Jamaica Plain and Cambridge. It would require some or all of them to shuttle back and forth to a disconcerting and wasteful extent. The net result would be gravely to impair the Arboretum's work; some say it would virtually destroy it." (R. 18-19.)

6. The removal was an important feature of the Bailey Plan, which was adopted without recognition of the fact that the Arboretum was held in trust, but with the purpose of benefiting the work of general botany at the college, and on the theory that the Arboretum was owned outright by Harvard, was one of its disposable assets and was "a tool to be used in the development of botany as a whole and in the overall interests of the University" (R. 4, 9, 11).

7. As early as 1946 the Corporation "became committed to the botanists at Harvard to carry out" the removal, and "placed itself in a position in this respect from which it could not easily retreat, and this commitment prevented it, after the trust relation was discovered and recognized, from judging the interests of the Arboretum impartially" (R. 15).

8. The provision of the indenture of 1872 as to teaching "in the University" was, until the approval by the Corporation of the Bailey Plan, uniformly construed by the Arnold Professor and the Corporation as being fully complied with by teaching at the Arboretum (see part V of this brief, pp. 96-99).

9. The endowment fund of the Arboretum, which has been made up entirely from the gifts of many individuals over the years, does not contain one dollar which has been given for the purpose of aiding in teaching at the college, but every dollar has been given for the purpose of aiding in the maintenance and growth of the Arboretum along the lines of its development by Professor Sargent.

(b) *The Corporation's Duty is that of a Trustee under an express Trust.*

There is a fundamental difference between gifts to a charitable corporation outright, either for its general purposes or for special purposes within its corporate powers, and gifts to such a corporation upon an express trust. In the former case the corporation becomes the beneficial owner of the property. In the latter case the corporation holds it like any other trustee for the sole purpose of carrying out the intention of the donors as set forth in the trust instrument. As trustee of the Arboretum, therefore, Harvard is subject to all the duties and obligations of an ordinary trustee.

The distinction is stated in *Animal Rescue League of Boston v. Assessors of Bourne*, 310 Mass. 330, at pages 333-334:

"A person may make a conveyance or a devise to a charitable corporation either without any restrictions upon its use or for some designated purpose within the chartered powers of the corporation, and in either case the corporation becomes the exclusive owner of the property. Its subsequent use of the property, however, would be confined in the first case to the purposes for which it was organized and in the second to the particular purpose for which the property was given. It is in this broad sense that it has been sometimes said that such a corporation holds its property in trust for

its corporate purposes [citing cases]. *On the other hand, one may make a conveyance or devise in trust to a charitable corporation and, if accepted, the latter would be bound to use the property for the purpose in accordance with the terms of the trust.* But there is a difference between an absolute transfer and one in trust to a charitable institution. In the former, the property becomes an asset of the corporation to be used in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes, while in the latter, *the property is held by the corporation not as its own but in its capacity as a trustee and as an instrumentality of the settlor or testator in carrying out his directions in its use of the property.*" (Emphasis supplied.)

See also *Chase v. Dickey*, 212 Mass. 555, 561-562.

Once the directions and intent of the creators of the trust are ascertained, the trust must be administered according to that intent. Latter day considerations of expediency or policy cannot be substituted for the intent of the donors. See *President & Fellows of Harvard College v. Attorney General*, 228 Mass. 396, 407-408; *Trustees of Andover Theological Seminary v. Visitors of the Theological Institution in Phillips Academy in Andover*, 253 Mass. 256, 285. It makes no difference that the terms of the trust are set forth in what the Bailey Report, with apparent impatience, called "more or less rigidly worded bequests and indentures" (Exhibit 1, p. 27).

Furthermore, an educational or other charitable corporation may accept funds in trust for the establishment of a new institution within the scope of its charter powers, and the performance of a trust so created will be enforced by the court.

In *Trustees of Andover Theological Seminary v. Visitors of the Theological Institution in Phillips Academy in Andover*, 253 Mass. 256, the court was dealing with a theo-

logical seminary founded, as the Arboretum was, by gifts in trust to an existing educational corporation, Phillips Academy. In discussing the nature of this institution within an institution, Chief Justice Rugg said (pp. 268-269):

"Those who made the first gifts for the establishment of the Theological Institution in Phillips Academy were its founders in the technical sense [citing English cases]. Although the trustees of Phillips Academy had been incorporated and had received donations for the establishment of the academy for general education more than twenty-five years before, yet there was no theological institution or department until the donations of those who executed as expressive of the terms of their gifts the three instruments already described and called the constitution, the associate statutes and the additional statutes. *There was no incompatibility in making those gifts to an existing educational corporation and at the same time becoming, in the strictly legal meaning, founders of the new department, institution or school to be established within and as a corporate part of the preestablished academy.* The institution which they were endowing was in its aim and curriculum entirely distinct and separate from the existing academy." (Emphasis supplied.)

In that case the court enjoined the further execution of a plan for closer affiliation with the Harvard Divinity School. After referring to the Theological Institution as "a public charitable trust" (p. 285), the court said that the tendency of the plan "as a practical matter is toward the complete disappearance of Andover with all its distinctive characteristics and its merger in the new theological school of Harvard" (p. 292) and that the provisions "in substance and effect place such a dominating power in Harvard as to disable the trustees and visitors of Andover in

the exercise of their own free, untrammelled judgment from executing the will of its founders" (p. 294).

By accepting the Arnold trust the Harvard Corporation became bound to establish and maintain the Arboretum as an institution having its own distinct purposes as ends in themselves, its own name, its own management and its own separate location—an institution affiliated with Harvard, it is true, but in no sense an agency or integral part thereof.

(c) *The Trustee's Duty of Loyalty.*

The Harvard Corporation as trustee of the Arboretum cannot discharge its duties merely by keeping within the limits of the powers conferred upon it under the indenture. Like any trustee it has an affirmative duty to promote the trust purposes actively and diligently. *A fortiori* it cannot properly administer the trust to advance its own interests, i.e., to advance botany at Harvard as opposed to the botanical and horticultural interests of the Arboretum.

It is a fundamental principle of the law of trusts that any transaction wherein the trustee may derive personal advantage from his dealings with trust property is regarded with suspicion. See *Colburn v. Hodgdon*, 241 Mass. 183, 191.

This rule is, of course, a corollary of the trustee's duty of loyalty. The trustee must administer the trust solely with a view to the best possible accomplishment of the trust. See the statements of this court in *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 140:

"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."

And in *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 the court" (citing 11 Massachusetts cases).

See also *Bowen v. Richardson*, 133 Mass. 293, 296; *Ball v. Hopkins*, 268 Mass. 260, 266; *Anderson v. Bean*, 272 Mass. 432, 447-448; *Attorney General v. Flynn*, [1954] Mass. Adv. Sh. 473, 487.

Where there is a possible conflict of interest, the burden of proof is on the trustee to uphold the propriety of his action. See *Witherington v. Nickerson*, 256 Mass. 351, 356:

"The general rule is that one acting in a fiduciary capacity for another has the burden of proving that a transaction with himself was advantageous for the person for whom he was acting."

See also Restatement of Trusts, § 170; 2 Scott on Trusts, § 170.

The rule of loyalty is fully applicable to charitable trusts. Restatement of Trusts, § 379. 3 Scott on Trusts, § 379.

Notwithstanding these rules of law, counsel for Harvard twice urged on the Assistant Attorney General the propriety of the proposed removal of the library and herbarium on the grounds of strengthening "education in the University" and "more efficiently utilizing Harvard's botanical resources" (Exhibit 11, p. 11 and p. 7; see discussion in part V of this brief, at page 114, *infra*).

(d) *The Removal of the Library and Herbarium to Cambridge would gravely impair the Work of the Arboretum.*

The library and herbarium of the Arboretum were established to aid in "the correct determination of the living collections" and as tools for the scientific research which has always been carried on at the Arboretum by its staff. They are held in trust as resources of a unified institution, and each plays its part in serving the purposes for which the institution was founded and has been endowed.

The Arboretum herbarium contains nearly 700,000 specimens of trees, shrubs and woody vines. Its collection is particularly strong in specimens from North America, Europe, Japan, Korea, China and other parts of Asia. Loans of material are made to and from the leading arboreta of this country and Europe.

The Arboretum library is one of the distinguished botanical libraries of the world. It is one of the few botanical libraries with a published catalogue, which has become one of the standard bibliographies of botany. Unlike most libraries, a taxonomic library, such as the Arboretum's, depends to a great extent on the oldest book on any particular subject since the first description of a plant establishes its name.

Both the library and herbarium are used constantly for research and for identification and comparison. Plant identification and herbarium research require both herbarium and library resources in juxtaposition as a unit. Without a library it is not possible to do critical work in the herbarium. Without the herbarium much of the significance of the books is lost and there are no herbarium botanists to index and appraise current literature (R. 16-19).

The Arboretum library and herbarium are designed for research, not teaching. This is acknowledged by the state-

ments appearing in the Harvard University Catalogue from the early days of the Arboretum through 1952-1953 (R. 49-50). Together the library and herbarium make possible authoritative identification of plants. They serve as a source of scholarly information concerning the trees and shrubs of the world and constitute the tools for research on their kinds, distinguishing features, uses and geographic distribution.

The reputation of the Arboretum as a source of accurate and authoritative information has been based, over the years, on the continued efficient use of both the library and the herbarium.

The Harvard Corporation by its vote of January 19, 1953, now proposes to move to a central building in Cambridge "the main body of the library and herbarium of the Arboretum related to research." It proposes to retain in Jamaica Plain "such books and specimens as may be required to provide there a working library and herbarium."

This removal of the library and herbarium would gravely impair, if not destroy, the usefulness of the Arboretum as a distinguished botanical and horticultural institution (R. 10-11, 14, 18-19).

It is the intent of the Corporation to merge and intermingle the Arboretum books and herbarium specimens with the various botanical libraries and herbaria of which Harvard is the beneficial owner, which are also to be housed in the new building in Cambridge (R. 47).

There will be no one room or shelves or cabinets to which one can point and say: "These are Arboretum books" or "These are Arboretum specimens." Any shelf of books in this new building may include half a dozen Arboretum books sprinkled in with botanical books from the various Harvard collections. The only means of identifying Arboretum books or herbarium specimens will be by means of a book plate in the book or a stamped legend on the herba-

rium specimen and by an appropriate legend on the various cards in the central card catalogue.

Although the vote of the Corporation states that the books and specimens shall remain under the care and management of the Arnold Professor, these books and specimens will no longer be part of an identifiable Arboretum library or herbarium. Nor as a practical matter can they remain under the effective care and supervision of the Arnold Professor as required by the indenture.

Once physically merged with the books and specimens of the Harvard botany collections the Arboretum books and specimens will be under the effective control of the Institute (or Area) of General Morphology, established as a result of the Bailey Plan and under the supervision of the Biological Council of Harvard University. The purposes for which the new combined library and herbarium would exist and be conducted would be the general purposes of Harvard's Institute (or Area) of General Morphology (R. 9-10).

The combined library and herbarium will presumably be staffed by a unified and reduced staff of librarians, curators and taxonomists. It is not clear what voice, if any, the Arboretum would have in determining who was to be appointed or in what work he was to engage, what programs were to be undertaken, what books and periodicals purchased, what herbarium specimens acquired.

The central purpose of the unification is, of course, to permit the use of resources and personnel in a combined program under the aegis of Harvard botanists. It would be inconsistent with this purpose to allow the program or a part of it to be regulated by the Arboretum for its own purposes.

The removal cannot be justified by the suggestion that the Arboretum building is overcrowded and that the Arboretum collections must be rehoused. Harvard as trustee

has not explored the possibility of a new wing at Jamaica Plain; instead of merely rehousing the collections in Cambridge it is swallowing them up in collections of which Harvard is the beneficial owner.

Nor can the removal be justified by the suggestion that superior facilities are available in Cambridge. The Arboretum library and herbarium, which are the tools of the Arboretum scientists, are the equal of anything available in Cambridge and have been the source of publications which both in quality and number equal or surpass those of the Harvard botanists (R. 48).

What will be the immediate effects of this removal on the work of the Arboretum as it has been carried on for seventy-five years?

(1) The removal will mean that the Arboretum research staff and personnel, except for the few men directly concerned with horticulture and with the maintenance of the living collections, will be working in Cambridge in the new central building, which will be under the jurisdiction of Harvard's Institute (or Area) of General Morphology and the Biological Council.

The removal will thus end in large measure the Arboretum's control over the books and specimens and personnel it has hitherto employed in taxonomic work. Once in Cambridge, Arboretum scientists would inevitably lose their identity and become Harvard scientists. The work to be carried on in the new central building will be planned from the point of view of Harvard's interests, not the Arboretum's interests.

(2) The removal will require additional expenditure of Arboretum funds without commensurate benefit to the Arboretum.

The cost to the Arboretum of its share of the maintenance and operation of the new central building in Cambridge is as yet a matter of conjecture. The minimum estimate is \$10,000 a year. In addition, according to the Corporation vote, the Arboretum will be required to bear the cost of the care and maintenance of its books and specimens. How this cost will be apportioned in view of the contemplated merger of the collections has not been indicated by Harvard. Presumably the Arboretum will be called upon to pay the salaries of many of the librarians and curators.

These costs will be in addition to the cost of maintenance and operation of the existing building in Jamaica Plain. Furthermore, the Arboretum will be required to maintain that part of its library and herbarium that remains in Jamaica Plain and to employ a librarian and curator to care for these collections.*

These cost estimates involve questions of fact which can be determined only by the taking of testimony. On the basis of present information it may be assumed that the cost to the Arboretum of duplicate facilities in Cambridge and Jamaica Plain would be greater than the cost to the Arboretum of maintaining all its collections in Jamaica Plain.

(3) The removal would have a harmful effect on the living collections.

*It is true that the present fireproof space in Jamaica Plain has been outgrown and that additional modern facilities are desirable if the collections are to remain there. The Arboretum has an available building fund of \$91,223 and a "credit balance" with the University which amounted on June 30, 1952, to \$63,495; the needed balance of, say, \$50,000 would undoubtedly be subscribed by the many friends of the Arboretum (R. 42). The cost of operation of such new facilities, if they were accepted by the Corporation, is again a matter of conjecture.

The implication of the proposed removal is that the living collections, and horticulture, have little or no relation to or dependence on the library and herbarium. Nothing could be further from the truth.

If the research collections are moved to Cambridge, the technical botanists will also move to Cambridge. Botanical activities will then be centered in Cambridge, and only horticulture will remain in Jamaica Plain. The horticulturists will no longer have botanical information readily accessible, and will have to turn to Cambridge for all but the simple identifications. With only a few standard reference books in the library the horticulturists stationed in Jamaica Plain will be little better off than those in charge of the Public Garden or Franklin Park.

Without close taxonomic guidance a living arboretum collection tends to degenerate into a park. The gardener lacks the knowledge that makes a botanical garden a scientific institution.

The Arboretum has achieved its world-wide reputation as a combination of botany and horticulture. Its living collections have had the benefit of the scientific disciplines of the botanists. The herbarium personnel through their professional contacts have obtained seeds and specimens from all parts of the world which would otherwise be unavailable.

We are informed that substantially all outstanding arboreta in this country or abroad have both a library and an herbarium maintained in close connection with the living collections. The testimony of experts indicates that a distinguished arboretum needs to have together in one location the three main elements discussed above, namely: (a) an excellent library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs (R. 16-19).

(4) The removal of the library and herbarium is entirely inconsistent with the existence of the Arboretum as an institution in accordance with the terms of its endowment.

The Arboretum was founded and managed for seventy-five years as an institution which combined horticulture and taxonomic botany, the latter depending on the "indoor" collections, the library and herbarium. The members of its staff who have been responsible for its reputation have been botanists. The variety and eminence of its publications have been due to the excellence of its library and herbarium.

Its endowment has grown from the original grant of less than \$150,000 from the Arnold trustees to more than \$4,000,000 at book value (some \$5,000,000 at market, R. 8) by virtue of gifts and legacies from persons who believed in the combination of botany and horticulture which the Arboretum represented. If these donors had been interested in the advancement of botany in Cambridge, they would have given their money to Harvard. They did not, and to the botanists in Cambridge the Arboretum became, in Professor Bailey's words, "the goose that lays the golden eggs" (R. 10).

The removal of the library and herbarium to Cambridge means that the botanists will move to Cambridge. In many cases their only connection with the Arboretum will be the fact that they are paid with Arboretum funds. Once in Cambridge, working with combined collections in a building managed by Harvard's Biological Council, the Arboretum botanists will as a practical matter find it extremely difficult to give their primary allegiance to the Arboretum.

(5) The removal of the library and herbarium to Cambridge was conceived, and first approved by the Corporation, without recognition of the trust and in the belief that

the removal would benefit Harvard's botanical activities in Cambridge.

The present proposal to move the library and herbarium to Cambridge was first put forward in the Bailey Plan, which was devised in the belief that Arboretum property was part of the general assets of Harvard, to be dealt with by the Corporation as the beneficial owner thereof, and was designed to integrate the work of the Arboretum and other independently endowed botanical agencies with the Department of Biology in the general interests of Harvard. As noted above, the Arboretum was of particular interest in this respect because of the size of its endowment (the "golden eggs") (R. 9-10).

By voting to approve the Bailey Plan in January, 1946, without recognition of the fact that the Arboretum was held in trust, the Harvard Corporation thus unwittingly disregarded the first duty of a trustee, the duty of loyalty, by acting in their own interests, *i.e.*, the interests of Harvard, and not in the interests of the Arboretum.

The May, 1950, report of the Coordinating Committee on the Biological Sciences of the Harvard Board of Overseers, which approved, with minor modifications, the Bailey Plan as it affected the Arboretum, said that the proper concept of the Arboretum was "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" (R. 11).

From January, 1946, when the Bailey Plan was approved, until January, 1953, when the Corporation at last acknowledged the existence of the Arboretum trust and revoked the Bailey Plan as it applied to the Arboretum, plans for the combined library and herbarium building in Cambridge were advanced on the theory that the unified collections would be of benefit to Harvard's botanical activities.

But in the vote of January, 1953, in which Harvard for the first time acknowledged that it held the Arboretum property and endowment as trustee, the Corporation stated its determination "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 main body of the library and herbarium of the Arboretum related to research."

The Corporation thus found to be "in the best interests of the Arboretum" a plan which had been conceived by Professor Bailey in the belief that the removal would strengthen Harvard botany, not Arboretum botany, and which had been endorsed by the Coördinating Committee of the Board of Overseers in the belief that the Arboretum was "a tool to be used * * * in the overall interests of the University."

In these circumstances there may well be an inference that the Corporation discarded the form of the Bailey Plan but not its substance. This inference is strengthened by the statements of counsel for Harvard *after* the January, 1953, vote, in his letter to the Assistant Attorney General, that the removal of the library and herbarium could be justified on the grounds of strengthening "education in the University" and "more efficiently utilizing Harvard's botanical resources." (Exhibit 11, p. 11 and p. 7.)

(e) *Whatever beneficial Interest Harvard may have in the Arboretum Trust cannot justify Action by the Trustee which is detrimental to the Arboretum.*

Harvard may have a beneficial interest in the Arboretum trust by virtue of the provision in the indenture of 1872 that the Arnold Professor "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."

But the fact that the trustee may have a beneficial interest in the trust does not justify action by the trustee which is detrimental to or inconsistent with the purposes of the trust.

With respect to the provision above quoted, from the beginning and continuously until the formulation of the Bailey Plan, a definite construction was placed on the words "in the University" by the Arnold Professor and by the Corporation itself. These words have always been construed by all parties in interest as requiring no more than teaching at the Arboretum. This point is developed in part V of this brief at pp. 96-99, below.

(f) *The Harvard Corporation Vote of January 19, 1953, may involve Breaches of Trust in other Respects.*

As set forth in the petition, there are other respects in which the provisions of the Corporation's vote of January 19, 1953, may be inconsistent with the obligations of the Corporation as trustee for the Arboretum.

The compromise plan proposed by the Arboretum Visiting Committee on April 29, 1952, and the proposed vote sent to President Conant on December 22, 1952 (Exhibit B), both urged the Corporation to declare that in the administration of the trust it would act "solely with a view to the best interests of the Arboretum." In the first paragraph of the resolution adopted by the Corporation on January 19, 1953, the word "solely" was omitted (R. 15).

This suggests that the Corporation proposes to administer the Arboretum partly to advance its own interest in

general botany, so long as its action can be determined *by it* to be in the best interests of the Arboretum, although such a conclusion by a trustee with an adverse interest is looked upon with suspicion by the courts.

In a broad way an action may be in the interest of the Arboretum and yet it may be something that a trustee with no adverse interest would not think of undertaking at the time in view of more pressing requirements in other directions. If A. is trustee under a will for himself and his brothers B. and C. he cannot act with a view to advancing his own interests as distinguished from those of B. and C., but must act at all times with a view to the interests of his brothers, toward whom, it is submitted, his duty is the same as it would be if he were not a beneficiary.

Furthermore, paragraph 5 of the Corporation's vote of January 19, 1953, provides that recommendations for appointments to the staff of the Arboretum may be initiated not only by the Arnold Professor but also, independently of him and potentially without his approval or even knowledge, by the President of the University (R. 15-16).

This provision is of doubtful validity in that it is inconsistent with the provision in the indenture whereby the Arnold Professor is to have the "care and management" of the Arboretum. This provision, if acted upon by the President, would seriously impair the status and authority of the Arnold Professor and would undermine his position.

The Arboretum is held by Harvard as trustee. A gift in trust must be administered according to the terms of the trust unless it is impossible so to do. There is no impossibility in this case, and the trustee cannot permit present-day considerations of expediency or policy to be substituted for the intent of the donors.

Although each generation of university scientists may have their own ideas of academic administration, and may put them into effect with property of which Harvard is the beneficial owner, such ideas change with each generation. Present-day concepts of utility are outmoded tomorrow. Another generation of Harvard botanists may prefer to have the "indoor" collections at Forest Hills. The virtue of a trust is that it insulates the trust property from the vagaries of academic fashion.

Once dismembered, it would be impossible to restore the Arboretum to the academic standing it now enjoys. The Arboretum would be permanently destroyed as an institution. But progress does not require the dismemberment of the Arboretum. Coöperation with botanical activities at Harvard, if it should be determined to be in the best interests of the Arboretum, may be arranged under the terms of the Arboretum trust. Duplication of research and collections may be eliminated and coöperative work undertaken by agreement, provided it is within the Arboretum purposes and for the best interests of the Arboretum.*

This is a case where the proposed action of the trustee would promote the trustee's personal interests. In such a case the proposed action must be regarded with suspicion, and the burden of proof is on the trustee to uphold its propriety. It is submitted that the allegations of the petition set forth a prima facie case of breach of trust.

*Such coöperation, however, is proper only if it is carried on under the direction of the Arboretum staff and only if and to the extent it is of benefit to the Arboretum.

IV. THE BOORAS DECISION IS SHOWN ON ITS FACE TO BE BASED ON ERRONEOUS VIEWS AS TO THE DUTY OF THE ATTORNEY GENERAL AND MISTAKES AS TO THE RULES OF LAW WHICH SHOULD GOVERN HIS CONDUCT. HIS CONCLUSION THAT "THERE IS NO LEGAL BREACH OF TRUST" IS WHOLLY UNWARRANTED AND COULD NOT BE ARRIVED AT WITHOUT THE PRIOR DETERMINATION OF VARIOUS DISPUTED ISSUES OF FACT WHICH HE WAS IN NO POSITION TO DETERMINE, AND WITHOUT THE APPLICATION OF THE PROPER RULES OF LAW. THE DECISION IS UNREASONABLE AND ARBITRARY AND IS, IF THE WORDS MEAN ANYTHING MORE, AN ABUSE OF DISCRETION.

Mr. Booras gave the parties no hearing in the ordinary sense of that term. Counsel for the petitioners had two interviews with him and some correspondence. The arguments and statements made to him are summarized above, pages 31 and following. Among the papers submitted to him was a memorandum of June 9, 1953, by the petitioner Grenville Clark, a copy of which is attached to the mandamus petition as Exhibit D (R. 38; and see R. 58). He was also given a copy of the report of March 1, 1952 (R. 20, Ex. 1). Mr. Booras was fully informed as to the mass of expert opinion which had been assembled to the effect that the removal of the main body of the library and herbarium related to research, whether or not it would help botany at Harvard, would break down the present integrated character of the Arboretum and would be contrary to its interests especially as a scientific institution. No tribunal of any kind could possibly, without hearing the evidence, rule, as did Mr. Booras, that "there is no legal breach of trust" (R. 46).

Mr. Booras's attention was called to the fact that the Harvard Corporation has a dual interest in the matter. As trustee it must deal with the property of the Arboretum in the sole interest of the Arboretum. It has, however, a personal interest in developing its work in general

botany in Cambridge, which may well influence its conduct in a manner adverse to the interests of the Arboretum. A memorandum of law (Ex. 2) was submitted to Mr. Booras bearing on this question and indicating that in any controversy the burden of proof would be on the Corporation to establish that the contemplated action with regard to the library and herbarium would not constitute a breach of trust.

Mr. Booras was also reminded that the question whether the proposed action involved a breach of trust could be tested in court only on an information filed by the Attorney General (Ex. 13), and that the proposed information would ask for a declaratory decree* (R. 20; and see Ex. 13).

On May 21, 1953, counsel wrote Mr. Booras (Ex. 16) stating that as counsel for the moving parties in the matter they should have an opportunity to reply to any arguments which might have been made by the representatives of the Corporation in their effort to prevent the use of the Attorney General's name (R. 21). Mr. Booras replied by letter of May 22d (Ex. 17), in which he said:

"I have yours of the 21st wherein you request an opportunity to reply to the arguments presented by the representatives of Harvard University. Your letter really anticipated me as I intended to call you and Mr. Farley for the same purpose."

The conference of June 9th followed, at which the matter was again reviewed, but Mr. Booras "gave no intimation as to what arguments had been made on behalf of the Corporation or what further information, if any, he needed" (R. 21). It is now evident that Mr. Booras's conclusions

*Mr. Booras is wrong in the description of the proposed information which he gives in the first paragraph of his decision (R. 44).

were based in large part on the letter of June 10th (Ex. 11), sent him by counsel for the Corporation, which letter is considered below; it is alleged in the amended petition to misstate the law in important particulars (R. 50), and contains other unsound arguments.

As alleged in the petition (R. 22-24), the Booras decision is repugnant, in various respects, to the principles upon which the respondent was required to act.

(a) Mr. Booras was in Error in ruling that there was no Breach of Trust when such a Ruling could not properly be made without a Determination of the disputed Questions of Fact.

It was pointed out to Mr. Booras that in deciding whether to permit the use of his name the Attorney General was not called upon to decide the merits of the controversy, but that, according to long-established usage, permission should be granted if it appeared that the matter was of public importance and that responsible citizens interested in the Arboretum, with no object other than to secure the performance of a charitable trust in accordance with the intent of the donors, were prepared to assume the expenses of the proceeding; also that, whatever might be the Attorney General's personal view as to how the issues of fact and law ought to be decided, these issues were clearly a fit subject of judicial inquiry (R. 21).

In his decision, nevertheless, Mr. Booras undertook to pass finally upon the law and upon some of the facts. He did not, however, make any final decision on the vital issue whether the proposed transfer would be against the best interests of the Arboretum, but contented himself with the statement that the proposed relators "have cited many professional authorities in support of [their] contention"

that the transfer would not only be against the interests of the Arboretum, but would cripple the Arboretum as an institution, and that, "on the other hand, the University maintains that the transfer will be solely for the best interest of the Arboretum and will more greatly [*sic*] promote the purposes and aims of the trust" and that "equally significant professional authorities approve and highly recommend the action" (R. 45-46).

Without a decision, after a hearing, on this question of fact in issue between the parties no tribunal could determine whether a breach of trust is involved. Yet Mr. Booras ventures to assert: "There is no legal breach of trust" (R. 46). In this conclusion he followed the argument submitted to him by counsel for the Corporation in the letter of June 10, 1953 (see part V of this brief).

Apart from the basic question as to whether the removal of the library and herbarium will be seriously damaging to the Arboretum, it seems evident that findings must be made with respect to some, at least, of the following subsidiary questions of fact before there can be any ruling of law on the merits:

(i) As to the existence and effect of the adverse interest of the Corporation.

(ii) As to whether the purposes of the Arboretum will be best served by the transfer to Cambridge of the major part of the library and herbarium related to research, as asserted in paragraph 10 of the resolution of January 19, 1953 (R. 37).

(iii) As to whether the material, if removed to Cambridge, will be more useful to scientists and scholars interested in the fields which the Arboretum embraces, as alleged in the Shaw letter (Exhibit 11, p. 10).

(iv) As to whether the Corporation committed itself to the Biology Department in 1946, so that it is not in a posi-

tion to deal fairly and impartially with the question of the removal (R. 15).

(v) As to what will be the amount of the additional expense with which the Arboretum will probably be charged as a result of the removal (part III of this brief, at pp. 68-69, above).

(vi) As to whether the Arboretum is entitled to be treated as a self-contained and integrated institution or is a tool of the University.

(vii) As to whether a distinguished horticultural-botanical institution like the Arboretum needs to have together in one location its library, its herbarium and its collection of living trees and shrubs (R. 16).

(viii) As to the existence and effect of the practical construction placed by both parties on the words "teaching in the University" (part V, at pp. 96-99, below).

(b) *Mr. Booras was in Error in interpreting certain Provisions of the Arboretum Trust.*

In the decision this statement is made (R. 45):

"Thus Harvard as trustee was not only vested with the responsibility of control, management and development of an Arboretum, but also with that of teaching 'the knowledge of trees in the University' and with the giving of 'such other instruction therein as may be naturally, directly and usefully connected therewith.' In short, the trust had a double aim: establishment of an Arboretum and instruction at the University."

Under the terms of the trust Harvard is *not* vested with the control and management of the Arboretum. The original fund was transferred to the Corporation on an express trust for the establishment and support of an arboretum and to the support of a professor to be called the "Arnold

Professor," and all such gifts to or for the Arboretum are held on the terms of this trust. The care and management of the Arboretum are not vested in Harvard, but in the Arnold Professor "subject to the same control by [the Corporation] to which the professors in the Bussey Institution are now subject." This clause is a limitation on the control of the Corporation over the Arnold Professor, and such control is far less than that to which ordinary professors in the University are subject, as is pointed out later (in part V, pp. 99-101) dealing with the letter of June 10, 1953, from counsel for the Corporation to Mr. Booras.

As indicating the extent of the control intended to be conferred on the Arnold Professor, it is provided by the express terms of the trust (R. 28) that the Corporation may not remove any of the trees, shrubs or plants in the Arboretum without the consent of the Arnold Professor.

As to teaching in the University, and the "double aim" of the trust, the teaching of students has been from the beginning a very minor factor in the work of the Arboretum, and the requirement of the trust in this regard has always been treated by all parties in interest as satisfied by the limited teaching which has been done at the Arboretum. The alleged importance of teaching was much emphasized in the letter of June 10, 1953, which Mr. Booras received from counsel for the Corporation, and is fully dealt with in the comments on that letter in part V of this brief (at pp. 95-97).

(c) Mr. Booras had no Basis for his Conclusion as to the Adequacy of the working Library and Herbarium to be left in Jamaica Plain.

Mr. Booras says (R. 45) that the Corporation has decided to retain at Jamaica Plain "such books and speci-

mens as may be required there for a working library and herbarium" and he concludes that "there will continue to be a library and herbarium at Jamaica Plain adequate for Arboretum activities there; and there will also be an arboretum library and herbarium in Cambridge where many Arboretum activities, such as 'teaching in the University' and research in the horticultural-botanical science, will be conducted."

No one can foresee what the "working library and herbarium to be left behind" will consist of. The material for research is to go and therefore the material which is left cannot be "adequate for Arboretum activities there," as those activities have been conducted from the beginning to the present time. The library and herbarium of the Arboretum were established as tools for the scientific research which has always been carried on at the Arboretum by its staff (R. 48).

Mr. Booras was informed that its library today is nearly, if not quite, unique, and that its herbarium of 600,000 specimens "is of great value," and that the conjunction in one place of the library, herbarium and the living collection "is what has given the Arboretum a world-wide status and reputation." And Mr. Booras was advised of the large amount of expert opinion which can be produced to the effect that the proposed removal can "do nothing but damage to the Arboretum as a scientific institution" (R. 40).

The following language in the Harvard catalogue of 1886-1887 thus describes the functions of the Arboretum:

"The Arnold Arboretum was founded for the purpose of scientific research and experiment in arboriculture, forestry and dendrology and as a museum of trees and shrubs suited to the climate of Massachusetts."

And essentially the same statement appears regularly in subsequent catalogues down to that for 1952-1953 (R. 49-50).

Obviously an important issue of fact is presented as to whether the removal to Cambridge of the material essential to the conduct of a most important activity of the Arboretum, one for which indeed the material has been assembled through the years, and the commingling of this material with various other botanical libraries and herbaria in the new buildings in Cambridge, thus putting an end completely to scientific research at the Arboretum, would or would not be contrary to the interests of the Arboretum.

Without a determination of the fact with reference to this issue neither Mr. Booras nor anybody else could properly reach a conclusion that the library and herbarium to be left at Jamaica Plain would be adequate for Arboretum activities there and that teaching and research might properly be transferred to Cambridge.

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(d) *Mr. Booras was in Error as to the "Practical Construction" of the Indenture by Harvard.*

Mr. Booras further says (R. 45):

"Indeed, neither express directives are found in the trust indenture for a library and herbarium at the Arboretum nor restraints as to their location or relocation when established. Even if any doubt existed in the matter, the practical construction and decision of the University, which has been administering the endowment through so many years, is to be given great weight and consideration."

As to the first sentence in this statement it is true that there are neither express directives nor express restraints as to the matters referred to, but no one will deny that

there was implied power under the trust indenture to establish a library and herbarium, and that their location or relocation when established must be such as will best carry out the purposes of the Arboretum.

Just what Mr. Booras had in mind in referring to the "practical construction" of the University is very far from clear. Ever since the trust was put into effect the "practical construction" of the requirements as to the location of the library and herbarium, participated in by all parties, has been to locate them at the headquarters of the Arboretum—for a few early years at the house in Brookline where Professor Sargent maintained the offices of the Arboretum, and for the past sixty and more years on the grounds of the Arboretum in Jamaica Plain (R. 48).

The doctrine of "practical construction" is relevant only when a particular construction of the document in question has been consistently acted upon throughout an extended period. It can have no application to a course never before attempted by a trustee.

Allen v. Commissioner of Corporations & Taxation, 272 Mass. 502, 509.

Davies Warehouse Co. v. Bowles, 331 U.S. 144, 156.

Walling v. Swift & Co. (C.C.A. 7) 131 Fed. (2d) 249, 252.

If Mr. Booras means that it is the "decision" of the University as to the removal which is to be given great weight, it may be that he conceives the present situation to be similar to that in *Holmes v. Welch*, 314 Mass. 106, which was called to his attention in the letter of June 10, 1953, from counsel for the Corporation and to which he subsequently refers (R. 46). Before commenting on that case it

is enough to suggest here that it is contrary to elementary principles of trust law to claim that great weight is to be given to the decision of a trustee who has an adverse interest in the subject matter of the decision, which interest is advanced by the proposed action. The interest of Harvard in research and instruction in general botany at the college was the entire motivating force of the Bailey Plan and is believed today to be the real basis for the decision, first announced in the Bailey Plan, to move the library and herbarium (see R. 15).

Here again an issue of fact is obviously presented.

(e) *Mr. Booras's Interpretation of the Decision in Holmes v. Welch, 314 Mass. 106, is plainly wrong.*

Mr. Booras goes on to say (R. 46):

"The decision of a trustee 'cannot be overridden by the courts unless the trustees decide arbitrarily, capriciously or in bad faith.' *Holmes v. Welch*, 314 Mass. 106. There is not the remotest evidence here that Harvard has reached its decision in any manner other than honestly, faithfully and for what it considers to be the best interests of the Arboretum."

The case of *Holmes v. Welch*, which deals with the action of trustees in a matter expressly committed to their discretion, has no bearing on the question presented in the present case. In the *Holmes* case the court dealt with a petition in the Probate Court by the greater part of the heirs of one Clark, which alleged that a fund was given by the will of Clark to trustees to construct a community house for the benefit of the people of Winchendon and to establish an endowment for its maintenance. It was alleged that the trust fund exceeded \$800,000, which was more

than sufficient for the purpose designated, and that the trustees had not, after demand, formed a decision as to the amount of principal which was necessary, or else had made a determination to accumulate a larger sum than they now have, which determination was not made in the exercise of reasonable discretion and judgment. The prayers, among other things, were that the court determine the amount necessary to carry out the provisions of the will, that the trustees be removed and others appointed in their stead and that the surplus be paid over to the petitioners. The will contained this provision:

"If in the opinion of said Trustees the fund is insufficient to properly carry out the above provisions, they are to have full power to hold the fund until it shall accumulate sufficiently to so carry out the above provisions, so as to have a building adapted to the times when it is built."

The court affirmed the decree of the Probate Court sustaining demurrers to the petition, stating that "the decision of the trustees to accumulate the fund cannot be over-ridden by the courts unless the trustees decide arbitrarily, capriciously or in bad faith," also that "the court cannot substitute its own discretion and judgment for those of the trustees" and that "there is no allegation that the trustees have decided arbitrarily, capriciously or in bad faith" (pp. 112, 113).

In that case the express terms of the trust committed the matter to the discretion of the trustees, who had no adverse interest. In the present case, as alleged in the petition (R. 23):

"The object of the trust as defined in the trust indenture is primarily the establishment and support of an Arboretum on a particular site in West Roxbury and admits of the carrying on of research as an activ-

ity of the institution thus localized, no discretion with respect to the transfer of any such activity being vested in the trustee. Moreover, the interest of the Corporation as trustee in the present case is essentially adverse in that the Corporation has many other interests to protect and forward, so that, far from there being any presumption in favor of the course taken or proposed by the trustee as regards the Arboretum, that course can be sustained only by showing beyond all reasonable doubt that it will promote the objects of the trust, i.e., the best interests of the Arboretum alone."

In the event of a trial of a suit for a declaratory decree the Corporation would have the burden of showing, at least by a fair preponderance of the evidence, that the proposed action would promote the interests of the Arboretum. On this point "there is at least a sharp conflict of expert opinion * * * and the Corporation is manifestly in no position to make an impartial and final decision as between these opinions" (R. 23). The fact that, acting in good faith, it "considers" the removal to be in the best interests of the Arboretum is not final.

(f) *Mr. Booras's Characterization of the proposed Information as calculated to "open the door to unreasonable and vexatious litigations" has no Justification.*

In the last paragraph of his opinion Mr. Booras says (R. 46):

"To permit the use of the name of the Attorney General in cases like the present, where it is clear to him the trustee is acting in good faith and within the bounds of reasonable judgment and sound discretion, simply because others, equally in good faith, differ with the decision of the trustee, would open the door to unreasonable and vexatious litigations."

It is hard to see what is meant by the assertion that to permit the use of the Attorney General's name in the present case, in a bill for a declaratory decree, "would open the door to unreasonable and vexatious litigations." It would open the door merely to the only possible method of obtaining a judicial decision on the matters in controversy. It would no more lead to unreasonable and vexatious litigation than would a bill for instructions, which the Corporation was so often urgently requested to file.

The conclusion of Mr. Booras that "There is no legal breach of trust" is a ruling of law which could not properly be made by him or by any other tribunal without a determination of the issues of fact as to which the parties are in controversy. The ruling is based on the various mistakes made by Mr. Booras in his decision and upon the notion evidently entertained by him, as a result of these mistakes, that any action taken by the Harvard Corporation as trustee of the Arboretum under an express trust must be sustained, regardless of the mass of evidence which is available as to the effect of the proposed action upon the Arboretum.

While it is stated in the return to the certiorari petition that the Attorney General considered fully all material reported to him by Mr. Booras and the issues of law relevant to the controversy and that he personally arrived at the conclusion not to permit the use of his name, it may be questioned what this really means in view of Mr. Booras's statement in the second sentence of his decision (R. 44) that he "was assigned by the Attorney General to hear all parties in the dispute and resolve upon a decision in the matter."

See *Morgan v. United States*, 298 U.S. 468, 481.

V. MR. BOORAS'S DECISION WAS INFLUENCED BY UNSOUND ARGUMENTS ADDRESSED TO HIM BY COUNSEL FOR THE HARVARD CORPORATION IN THE LETTER OF JUNE 10, 1953 (EX. 11).

It appears from the return to the certiorari petition that counsel for the Corporation conferred twice with Mr. Booras and furnished him with many documents (R. 59-60), all of which, except one, were filed with the original return as exhibits. The omitted document is passed over lightly in the original return, the only reference to it being a statement that Mr. Booras received from counsel for the Corporation "a letter setting forth their views." This letter, dated June 10, 1953, *i.e.* the day after the last conference of the petitioners' counsel with Mr. Booras, is filed with the extension of the return as Exhibit 11. Naturally the counsel for the petitioners had not seen it or known of it up to that time. When it was filed they promptly included in their motion to amend the mandamus petition a paragraph incorporating this letter by reference (R. 50).

In the amendment to the mandamus petition (R. 50) the letter is alleged to misstate the law in various respects. In addition it contains many unsound arguments. The letter is 14 pages long and it evidently had great effect on the Booras decision, which followed it closely.

The following quotations from the letter are those to which the petitioners particularly take exception as containing what, it is submitted, are erroneous statements of law and improper arguments. The pages of the letter at which the statements appear are noted.

(a) *Mr. Shaw misstates the Issue presented to the Attorney General.*

The letter wrongly states the question before Mr. Booras as follows:

"I understand that your principal question is whether this transfer will constitute in law a breach of trust." (P. 1.)

"It is inevitable that the press and the public will draw inferences harmful to Harvard from a petition by the Attorney General of the Commonwealth, whether it alleges and seeks to enjoin a breach of trust, or seeks instructions or a declaratory judgment. I urge that you should take no action in this case unless you are persuaded that it is clear that a breach of trust is, in law, about to be committed. I respectfully urge that the circumstances do not justify that conclusion." (P. 14.)

The question before Mr. Booras was not, however, whether the transfer will constitute in law a breach of trust, and he could not properly deny the application of the petitioners on the ground that he was not persuaded that it was clear that a breach of trust was imminent. He could not possibly pass on this question of law without the determination of many questions of fact which could only be resolved after the taking of a mass of testimony. The only question for him was, of course, whether responsible persons had presented to him a case worthy of submission to a court, and had requested the use of his name as the only means of obtaining a judicial decision.

It is too bad if "inferences harmful to Harvard" would be drawn from the mere filing by the Attorney General of a petition for a declaratory judgment, but the Harvard Corporation, august body that it is, should not feel that its dignity is ruffled if after it has assumed the trusteeship of an express trust, the law applicable to other trustees is applied to its administration of that trust.

It may be noted that, if the filing of a petition in the name of the Attorney General would have an adverse effect, the Corporation would have only itself to thank. If it were not for the stubborn refusal of the Corporation to

test the question in the normal way, no proceeding in the name of the Attorney General would be in order.

As a matter of fact, much more serious inferences harmful to Harvard have already been drawn by a great many people, because of the wide-spread shaking of confidence in the Corporation arising from "the doubt as to whether money given to the Arboretum will be used for the purposes for which the Arboretum primarily exists or whether its funds and property will be diverted to other purposes, which, however worthy, are not purposes of the Arboretum," and because this lack of confidence "has been accentuated by the refusal of the Harvard Corporation voluntarily to seek the Court's instructions in accordance with the almost invariable practice of a responsible trustee, where a question is raised by responsible people as to whether the trust is being carried out" (R. 43).

(b) *Mr. Shaw's Argument in support of the Right of the Harvard Corporation to move the Library and Herbarium is fallacious.*

"Nothing in the Indenture either expressly or by implication purports to specify or restrict the location of the library or herbarium. In fact both were first maintained, not in Jamaica Plain, but in Brookline. And the mere fact that for many years they have been located in Jamaica Plain does not operate to restrict their location to that place." (P. 3.)

It is to be borne in mind at all times that it is not only the library and herbarium which are to be removed if the plan is carried through, but also the work of research related to the objectives of the Arboretum, which is to be merged in the general botanical research carried on in Cambridge.

It is true that the location of library and herbarium are not "expressly" specified or restricted in the indenture,

but there is ample ground for the argument that the location is "by implication" restricted to Jamaica Plain.

As to the original location in Brookline, which was, in fact, only about a mile from the Arboretum, the facts alleged in the petition are stated in the record (R. 48), showing that the library and herbarium have always been maintained in the same place with the offices of the Arboretum. The Brookline period was in the early days of the Arboretum when the library and the herbarium were small and before the headquarters building had been built at the Arboretum. For sixty years they have been localized in Jamaica Plain, with the collection of living trees and shrubs, and during this period the Arboretum has become a distinguished horticultural-botanical institution; and there is much available evidence that an institution like this needs to have together in one location the library, the herbarium and the collection of living trees and shrubs (R. 16).

In support of the statement that "the mere fact that for many years they have been located in Jamaica Plain does not operate to restrict their location to that place," and that therefore they may properly be removed, Mr. Shaw, in the letter of June 10, 1953, relies on the decision in *Saunders v. President and Fellows of Harvard College*, 318 Mass. 447, in which he says that "the Court approved a much more radical move than is proposed here."

It is submitted that that case has no bearing whatever on the issues in the present case. It involved a petition by an executor for instructions as to whether a legacy "to the Huntington Memorial Hospital, 695 Huntington Avenue, Boston," should be applied to the use of the hospital after a change in its location effected after the testatrix's death, or should be paid to the residuary legatees on the ground that the hospital had ceased to exist. The Huntington Memorial Hospital had been built, many years

before the will was made, by a department of Harvard. After the death of the testatrix, but before the will had been allowed the Harvard Corporation in order to cut down the expense of the hospital had made an agreement with the Massachusetts General Hospital in accordance with which it removed the hospital to a section of the Massachusetts General Hospital's plant, described as "Huntington Memorial Hospital," where the University's department carried on the same activities, with the same staff of physicians and laboratory assistants, as at the Huntington Avenue address. The court naturally affirmed the decision of the Probate Court that the Huntington Memorial Hospital had not ceased to exist and that the legacy should be paid to the President and Fellows to be used for the work of the hospital.

The court was not called upon to approve or disapprove the removal, and the case involved no question of breach of trust.

Digitized by Hunt Institute for Botanical Documentation
 (c) *Mr. Shaw draws unwarranted inferences from the Provision as to Teaching "in the University."*

"The principal provision of the Indenture under which the maintenance of the library and herbarium is implicitly authorized is that expressing the purpose of the Arboretum 'to teach the knowledge of trees *in the University* * * * [and] give such other instruction *therein* as may be naturally, directly, and usefully connected therewith'. We think that there can be no doubt that the parties to the Indenture intended teaching 'in the University' to mean primarily teaching in Cambridge, which was then and is now the principal seat of the University and the center of its teaching activities in the fields of knowledge relating to the purposes of the Arboretum." (Pp. 4-5; emphasis supplied.)

Nothing could be further from the facts than the suggestion that, when Professor Sargent started the library and

herbarium and when during his half century of service as Arnold Professor he increased them so very largely, he gave any consideration whatever to teaching in Cambridge.

The library and herbarium "were established as tools for the scientific research which has always been carried on at the Arboretum by its staff" (R. 48). And in the Harvard catalogues for an indefinite period of years, down to the latest edition (1952-1953), it has always been stated in substance that "The Arnold Arboretum was founded in 1872 for the purpose of furthering scientific research in dendrology and arboriculture, and providing a site for a garden of trees and shrubs suited to the climate of Massachusetts" (R. 49-50).

The importance to the scientific work of a great arboretum like the Arnold of having in one location the library, the herbarium and the living collections was stressed by Professor Sargent and by the experts recently consulted (R. 16-18). It is plain that the creation and maintenance of the library and herbarium were impliedly authorized by the very nature of the Arboretum as a scientific institution; and there is no ground for the belated suggestion that these collections must look to the provision for teaching as their primary authorization.

The teaching of students has naturally been from the beginning a minor factor in the work of the Arboretum. As alleged in the petition (R. 48-49), no Arnold Professor has ever given instruction in Cambridge,* but graduate students from the college have from time to time been given instruction at the Arboretum by members of its staff. There are only three to five students at Cambridge

*The vote of the Harvard Corporation on January 19, 1953, declared his duties to be "largely administrative" (R. 35).

who in the average year would normally use the herbarium and library at Jamaica Plain, and for most of these students the Gray herbarium at Cambridge (R. 48-49), which is twice as large as the specialized herbarium at the Arboretum, and the ample library of the Gray are entirely adequate. Undergraduate students in botany would not use the collections of the Arboretum, and there is no justification for the contention that the transfer of the material to Cambridge would appreciably facilitate teaching (R. 49).

As to Mr. Shaw's statement "there can be no doubt that the parties to the Indenture intended teaching 'in the University' to mean primarily teaching in Cambridge," this is contrary to the practical construction based upon these words from the beginning by all parties in interest. Professor Sargent and his successors always treated the requirement of teaching in the University as being satisfied by teaching at the Arboretum. The Corporation took the same view, as is shown by the fact that in the annual Harvard catalogue, where the functions of the Arboretum are described, there is no reference to any teaching in Cambridge by any member of the Arboretum staff, but uniformly, down to the present time, the catalogues have stated in substance that qualified students "may be admitted to the *Arboretum* where they may participate in the work, use the library, and receive advice and assistance from members of the staff" (R. 49, 50).

Such incidental teaching as has been given in the college in recent years by members of the Arboretum staff has been a matter merely of coöperation with the University and has not been given because of any assumed requirement of the indenture. The indenture indeed makes no reference to the staff.

So far as instruction is given in subjects which are required by the Bussey will to be given at the Bussey Insti-

tution (see the Indenture, R. 26), the instruction must be given "*there*," that is, at the Arboretum, as pointed out above (p. 7), and the same construction has always been put, by all parties in interest, upon the requirement in the indenture of 1872 that there be teaching "in the University."

As noted above, the Corporation cannot rely on the doctrine of "practical construction" to justify a course of action never before attempted. On the other hand long usage in the administration of a charitable trust, just like long usage with respect to the application of a statute, is an important factor in determining the construction of the trust instrument.

Inhabitants of Hadley v. Trustees of Hopkins Academy, 14 Pick. 240, 267.
Comstock v. Dewey, 323 Mass. 583, 587.

The rule is the same as that applicable to written instruments in general.

In *Winchester v. Glazier*, 152 Mass. 316, 323, the court said, in language which it has often quoted since:

"It is a general rule for the construction of written instruments, including deeds, contracts, statutes, and constitutions, that when the language is open to doubt, and parties whose interests are diverse have from the outset adopted and acted upon a particular construction, such construction will be of great weight with the court, and will usually be adopted by it."

The construction put upon the trust instrument by Professor Sargent, accepted as it was by the Corporation, is naturally of great importance. He was the real founder of the Arboretum and was the person largely responsible, during his half century of service, for its great develop-

ment and for the fame which it acquired. At his death he left it a great institution of the kind described in the brochure used in obtaining subscriptions to the fund of one million dollars raised in his memory. The brochure (*Certiorari Return*, Ex. 5) shows that the fund was raised, as an addition to the endowment of the Arboretum, for the purpose of carrying on Professor Sargent's work, and not for the purpose of aiding in teaching at the college, to which no reference whatever is made (R. 47). The general purpose for which the addition to the endowment was sought is thus stated in the brochure:

"It remains for those who knew and honored the leader who has died, for those who would encourage research and the collection of exact knowledge in the field in which he labored, and for those who would foster the important arts of arboriculture and gardening in our country to see to it that the *Arboretum shall go on uninterrupted* to a full realization of the vision Professor Sargent saw steadily and whole."* (P. 4.)

And again:

"In the amassing of this Memorial Fund the participation of the friends and admirers of Professor Sargent is invited, of those who are interested in the *preservation and continued growth of a great institution*, of believers in the value of research and of the quest of scientific knowledge, and of all lovers of trees and shrubs, of parks and gardens, and of natural beauty as an important cultural element in life." (Pp. 28-29.)

Every dollar which has been added to the Arboretum endowment since the original trust was created, or has been given to Harvard for its benefit, has been given for the use of the Arboretum in its ordinary activities. Not

*Italics in this and the following paragraphs supplied.

a dollar has been given for the benefit of general work in botany at Cambridge or for teaching there.

(d) *Mr. Shaw misinterprets the Provisions of the Indenture with Respect to the "Care and Management" of the Arboretum.*

"The responsibility for deciding whether the purposes of the Arboretum will best be served by the inclusion of part of the Arboretum library and herbarium in the central botanical building rests with the Corporation, which, by the terms of the Indenture, is the trustee of the Arboretum endowment and has ultimate 'control' of the 'care and management of the Arboretum'. It is implicit in the Indenture that the Corporation has been vested with discretion in the exercise of its control." (P. 8.)

The responsibility of deciding does *not* rest finally with the Corporation, if its decision involves dealing with the Arboretum in a manner contrary to its interests and very harmful to it, as alleged in the petition. The trustee having an adverse interest could not be the final judge, even if it were true that it had ultimate "control" of the "care and management of the Arboretum."

But the Corporation is *not* vested with the care and control of the Arboretum, but merely with the care and investment of the funds placed in its hands as trustee and the disbursement of them and of the income in strict accordance with the terms of the trust. The care and management of the Arboretum was expressly vested in the Arnold Professor, and the extent of his control is indicated by the provision of the indenture that the President and Fellows could not take from the Arboretum without his consent any trees, shrubs or herbaceous plants. The only limitation upon the Arnold Professor's control was in the provision that in the care and management of the Arboretum he should be "subject to the same control by the said

President and Fellows to which the professors in the Bussey Institution are now subject." This was a limitation upon the control which made it far less than that exercised by the Corporation over a professor in any ordinary department of the University.

The Bussey Institution, which in 1872 had just been opened, was, like the Arboretum, held upon an express trust. The provisions of the Bussey will set forth the terms of the trust in detail and show that the design was to create "a great institution." Control over the professors was restricted in various ways, as was pointed out in detail in the Dodge-Farley Report of March 1, 1952, to the Visiting Committee (Certiorari Return, Ex. 1), a copy of which was given Mr. Booras. That report dealt with the matter at pages 14-17. As stated there, the Bussey will left a large tract of land to the Corporation upon the trust and confidence that it would establish an institution to be called the "Bussey Institution" and provide there certain courses of instruction, and it was specified that a building should be erected on the land "suitable in all respects for said institution." The following paragraphs are taken from the report:

"At the time the Arnold indenture was signed, the Bussey Institution had just got under way. The stone building, which Mr. Bussey in his will had ordered erected for the accommodation of the 'officers and pupils of said institution,' had been completed, green-houses had been erected, a faculty appointed, a curriculum established, and students enrolled.* The parties to the Arnold indenture thus had before them the example of a new, self-contained institution, attached to Harvard University but separate from the college, having its own distinct identity, its own personnel,

*The Harvard University Catalogue for 1871-72 describes the Bussey Institution in a separate section, as a 'School of Agriculture and Horticulture,' with a Dean and fourteen instructors, a regular course of study, a separate student body, and separate entrance examinations.

and its own 'great objects' as ends in themselves, and established under an express trust.

"The control to which professors in the Bussey Institution were subject was necessarily limited by the terms of the Bussey trust, which, like the Arnold indenture, was manifestly designed to create a self-contained entity with distinct and separate purposes of its own. Its professors were doubtless to be appointed by the Harvard governing boards by the same procedure as professors in the college, and the salaries were doubtless to be fixed with the approval of the Corporation. In these respects we agree with the R-G opinion (pp. 39-40). The control, however, which could be exercised over the Bussey professors was restricted in various ways. The subjects which they were required to teach were prescribed by the will, certain courses of instruction were required to be given *at the Institution*, and any instruction given at the college was restricted to subjects subservient to and connected with the *great objects of said Institution*. And, as the property and funds were held in trust, the professors could not be controlled in any way which would involve a failure on the part of the President and Fellows to manage the Institution solely in its own interest.

"The indenture of 1872 refers to the control to which the Bussey professors 'are *now* subject.' It cannot be supposed that, in the very year in which the Bussey Institution was opened, its professors were being 'controlled' by the Corporation in a manner inconsistent with the trust, nor does it appear that such was in fact the case.*

*"It seems that in later years the Corporation has completely failed in performing its obligations under the Bussey Trust. The Bailey Report states (p. 5):

"'With the loss of its degree-granting function and the transfer of a majority of its staff to the Biological Laboratories the Bussey Institution lost its individuality in research and teaching, and since 1936 has become a holding agency, whose funds are utilized to further various inter-institutional activities.'

"It may be noted that in describing the Bussey Institution the Bailey Report (pp. 4-5) fails to mention the fact that the Institution is held in trust."

There is nothing in the indenture establishing the Arboretum which gives the Corporation a discretionary power to participate in the care and management. During Professor Sargent's half century as Arnold Professor it was he, and not the Harvard Corporation, who brought the Arboretum from its simple beginnings to a position of world-wide fame. He exercised the care and control, directed all the activities, and made it what it was at the time of his death, a famous institution in its own right. He determined its policies. If he had been Arnold Professor during the past five years, it is fair to surmise that the current difficulties would never have arisen.

It may be noted that the appointment of Dr. Howard on October 12, 1953, was not an appointment according to the specifications contained in the indenture as "Arnold Professor," but was an appointment as "Arnold Professor of Botany" and "Professor of Dendrology" (R. 7). This would obviously appear to be a step toward absorbing the Arboretum in the Department of Biology, of which botany is a part.

(c) Mr. Shaw belittles the Significance of the Proposed Removal.

"[The Corporation] proposes merely to transfer a part of the Arboretum library and herbarium to the center of research and teaching in Cambridge, where they will be more useful, because more readily available, to scientists and scholars interested in the fields which the Arboretum, as a scientific institution, embraces." (P. 10.)

And the *Saunders* case, which has nothing to do with the situation, is again cited.

This statement merely raises one of the controverted issues of fact upon which Mr. Booras could not properly come to a decision.

(f) *Mr. Shaw does not give adequate Recognition to the Fact that the Arboretum is held by the Corporation as Trustee.*

"We think that if the University is to function efficiently, the Corporation and the Overseers must necessarily have discretion in the exercise of their control over its affairs and those of its several departments or branches, of which it is clear that the Arboretum is one." (P. 10.)

The Arboretum is not a "department" of the University in any ordinary sense of the term. It is not like the Law School nor the Department of Biology, which are fully subject to control by the governing boards and are owned by the University. The Arboretum is the subject of an express trust, and the Corporation as trustee is subject in all respects to the law of trusts. If the Corporation is to function legally, it must recognize its legal obligations even though the result is not what some persons regard as "efficient."

If, as pointed out above, conveyance or devise to a charitable corporation is in trust, "the property is held by the corporation not as its own but in its capacity as a trustee and as an instrumentality of the settlor or testator in carrying out his directions in its use of the property."

Animal Rescue League of Boston v. Assessors of Bourne, 310 Mass. 330, 334.

(g) *Mr. Shaw errs in suggesting that a Petition by the Attorney General for a Declaratory Judgment would be a novel Proceeding and might well be dismissed on jurisdictional Grounds.*

"The purpose of vesting in the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is said to be the protection of the trustee from 'unreasonable and vexatious litigation' by any

member of the public who may deem himself qualified to begin such a suit. * * * It would be inconsistent with this purpose to protect the trustee of a charitable trust if the Attorney General were, in any case, to file simply a petition for instructions or a declaratory judgment because he had concluded that there were not sufficient grounds to warrant affirmative action in the nature of a petition alleging a breach of trust and praying for an injunction. And it would be a novel proceeding for the Attorney General, rather than the trustee, to ask for instructions or for declaratory relief. * * *

"Not only is a petition for instructions or for a declaratory judgment as to the legality of the transfer a novel and inappropriate proceeding for the Attorney General to institute, but we think that our Court might well dismiss the petition on jurisdictional grounds." (Pp. 12-13.)

This plainly had its effect with Mr. Booras, but it is submitted that it is thoroughly unsound.

If one of the purposes of vesting in the Attorney General the exclusive power to begin proceedings to enforce charitable trusts is as stated above, there is no possible inconsistency between this purpose and the filing of a petition for instructions or for a declaratory judgment. The filing of such a petition does not subject the trustee to "unreasonable and vexatious litigation" by any member of the public.

As to the statement that it would be a novelty for the Attorney General rather than the trustee to ask for instructions or for declaratory relief and that the court might well dismiss such a petition on jurisdictional grounds, two recent cases are directly in point.

In *The National Shawmut Bank of Boston v. Morey*, 320 Mass. 492, the trustees under a will brought a petition for a declaratory judgment on the question whether a gift to heirs was vested or contingent. Certain of the respondents in their answers raised a second question as to the dispo-

sition which should have been made of a certain percentage of the income. The court declined to pass on the first question as the time for distribution was in the future. The question raised by the respondents was, however, decided by the court, Qua, J., saying with respect to the claim (p. 501):

"These are matters of immediate importance as to which the court could properly give instructions to the trustees * * *. Apparently under our law any party financially interested in the trust could request that the trustees be instructed in regard to these matters. [Citing authorities] And it was proper to make the request in the form of a counterclaim."

In *Trustees of Dartmouth College v. City of Quincy*, [1954] Mass. Adv. Sh. 243, it was held that Dartmouth College could maintain a petition for a declaratory decree as to the rights and obligations of the city in its administration as trustee of a certain charitable trust, in which the college had a contingent future interest. The court held that the city was indebted to the fund on account of improper withdrawals from capital.

See also *Sylvester v. Newton*, 321 Mass. 416.

Bogert on Trusts, Vol. 3, § 559, states:

"It is elementary that either the trustee or any other party having a financial interest in the trust may obtain from an appropriate court a construction of the trust instrument, and consequently advice as to the exact extent of the powers and duties of the trustee, where there is doubt on the subject."

In the case of a charitable trust, where no one has a financial interest, the Attorney General clearly has the right to ask for instructions to the trustee or for a de-

claratory judgment. The making of declaratory decrees with respect to the administration of charitable funds at the instance of the Attorney General had, indeed, become a settled feature of Chancery practice many years ago. *Attorney General v. Calvert*, 23 Beav. 248 (decided in 1857), may be cited by way of illustration. The opening paragraph of the report reads as follows:

"This information was filed against the trustees of the Hadleigh Charities, and its principal object was to obtain a declaration that persons dissenting from the Church of England, being in other respects fit and proper objects, were entitled to participate in the charities, and also that dissenters from the Church of England were eligible to the offices of feoffees or trustees of the charity estates."

Sir John Romilly, M. R. (at p. 264, after extensively reviewing the governing principles and the history of the charities in question) stated his decision in these words:

"My opinion, therefore, is, that there is nothing in the case before me, established in evidence, sufficient to justify the exclusive selection of objects of the charity, which has of late years prevailed in the parish of Hadleigh, and that it will be proper for this Court to make a declaration, that persons of all denominations and opinions are within the scope and objects of these charities, and that, provided the objects selected comply with the conditions imposed by the instruments of foundation in those cases, and in those only, where conditions are annexed to the gift, no further test can be properly required or condition imposed upon them; . . . I presume that such a declaration will be all that may be required in the present case, and that it will be unnecessary to direct any further steps to be taken. Liberty, however, to apply must be reserved."

Diligent search has failed to disclose any authority to the contrary.

(h) *Mr. Shaw errs in suggesting that, if a Trustee personally entertains no Doubt as to his Duty, the Court is without Jurisdiction to entertain a Petition for Instructions, no Matter how substantial may be the Doubts raised by other Persons interested in the Trust.*

"Instructions are granted to protect trustees in the proper discharge of their duties. See *Wellesley College v. Attorney General*, 313 Mass. 722, 729 (1943), and *Hill v. Moors*, 224 Mass. 163 (1916), wherein the Court said at page 165:

" 'Unless a petitioner for instructions has real and serious doubts as to his duty, and the advice of the court is required for his protection and the discharge of his trust, the court is without jurisdiction to entertain such a petition.'

" 'In the light of all the circumstances of this case, the Harvard Corporation has no 'real and serious doubts' as to its duty, and therefore does not seek the 'protection' of the Court. In such a case, the Court would seem to be 'without jurisdiction to entertain' a petition for instructions, whether brought by the Corporation or by the Attorney General.' (P. 13.)

This attempt to invoke the decision in *Hill v. Moors* as a precedent in the present situation is wholly unjustified. What was sought in that case was in effect a declaratory decree to the effect that the plaintiffs in a certain past transaction had acted within their powers as trustees. It is obvious that a decree of this kind is outside the scope of an ordinary suit for instructions, which *ex vi termini* looks to the future, and does not come under any of the other recognized heads of non-statutory relief in equity; hence the court could not be required to entertain the suit in the absence of a declaratory judgment statute, even if none of the parties offered objection.

Thus the decision is irrelevant to the present controversy for at least two reasons, (1) because this suit, like a suit for an injunction, seeks an adjudication respecting the legality of contemplated action and (2) because a suit may now be maintained under G.L. (Ter. Ed.) c. 231A (St. 1945, c. 580) by any person,—trustee or otherwise,—having standing for the purpose to question the legality of action already taken. (See, for example, *Mayor of Holyoke v. Chief of Police of Holyoke*, 328 Mass. 353.)

The language in *Hill v. Moors* upon which the respondent lays so much stress,—“Unless the petitioner for instructions has real and serious doubts,” etc.,—was mere dictum, since the result hinged on the fundamental difficulty mentioned above. The term “jurisdiction,” as is manifest, did not imply that the decree of the single justice (which had confirmed the transaction in question) would have been void if no appeal had been taken. As was said by Holmes, J., in *Massachusetts State Grange v. Benton*, 272 U.S. 525 (at p. 529), “Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked.” What was meant in *Hill v. Moors*, as seems evident, was that before a court of equity can be required to give instructions it must be shown that there is some real necessity for the judicial determination of a matter affecting the administration of the trust. The reference to “the petitioner” and “his duty” merely reflects the fact that the suit was one in which the trustees were the moving parties and which looked to an adjudication respecting a past transaction. There was no occasion to consider what might be true if the adjudication were sought in order to settle questions raised by other parties with regard to contemplated action by the trustee. If the language relied upon by Mr. Shaw may seem to have any wider scope, this is plainly a result of inadvertence.

It is, of course, true that a petition either for instructions or for a declaratory decree cannot be maintained unless it shows some actual occasion for the judicial determination of the particular issue. As is suggested in *Perry on Trusts* (7th Ed.) § 476a, a court of equity cannot be converted into a sort of legal dispensary for handing out opinions with respect to matters as to which the applicants ought to be satisfied with the advice of counsel. To the same effect is the Restatement of Trusts, § 259, Comment b,—

“The trustee is not entitled to instructions as to his powers and duties unless there is a reasonable doubt as to the extent of his powers and duties.”

The rule is formulated by Lehman, J., in *City Bank Farmers' Trust Co. v. Smith*, 263 N.Y. 292 (at p. 297), in these words:

“There is no basis for asking instructions of the court upon a question of law where there is no room for doubt.”

If the court does not feel constrained to refuse altogether to pass on questions readily dealt with otherwise, it may nevertheless manifest its disapproval by the disallowance of costs. In *Goodrich v. Henderson*, 221 Mass. 234, this court said with reference to an executor's petition for instructions (at p. 237):

“The matter [*i.e.*, the right of the life tenant to consume the principal] is too plain to require a careful collection of authorities . . . The other questions argued are not on matters with respect to which the executor has to act at the present time, and therefore are not questions upon which the plaintiff is entitled to the instructions of the court . . . There was no

sufficient reason for the defendants [who were remaindermen] insisting upon the opinion of the full court being taken. The guardian *ad litem* having been appointed by the court, his expenses must be paid. But no other costs or allowances out of the fund are to be made by the court."

In each of these statements, as will be observed, the test suggested is whether the question is one upon which competent opinions may differ, not what the trustee may individually think about it. It seems, indeed, too plain for argument that it is not the trustee's state of mind but the nature of the questions which determines the propriety of seeking instructions.

A petitioner for instructions may personally have no real doubt as to the matter, but conflicting contentions may be made by other persons concerned in one way or another. For a case of this sort it was merely necessary for Mr. Shaw to look again at the case of *President and Fellows of Harvard College v. Attorney General*, 228 Mass. 396, which he cites on page 9 of his letter. In that case the Corporation filed a petition for instructions as to whether it might lawfully carry out a certain agreement which it had made with the Massachusetts Institute of Technology, with regard to the property received by the Corporation under the deeds of trust and will of Gordon McKay. The trustee had itself no doubt as to its right to carry out the agreement, and indeed put it into effect approximately three months before it filed the petition for instructions, as appears in the first paragraph of the report of the case in 228 Mass.

Examination of the original papers in this case shows that the petition filed in behalf of the Harvard Corporation by the same law firm which represents Harvard in the present proceedings contained the following allegations:

Paragraph 11: "The petitioners believe that the performance of the agreement according to its terms and the application for the purpose of the income of the property received under the trust and will * * * will be of benefit to both institutions. They are advised and believe that the agreement provides a plan * * * which is in complete accord with the wishes of McKay as evinced by his deed of trust and his will interpreted in the light of material surrounding facts and circumstances * * *."

Paragraph 12: "Nevertheless, in view of the doubts expressed by trustees Stanley and Gilbert under the deeds of trust and will of McKay to the effect that it is not clear that the said agreement can lawfully be executed * * * the President and Fellows deem it incumbent upon them to ask the instruction of this Honorable Court * * *."

The proceedings in that case up to a certain point were practically identical with the proceedings in the present controversy. An account of the circumstances which led up to the filing of the bill for instructions in the case of the McKay trust is found in an article by Hon. Nathan Matthews, published in *The Harvard Graduates' Magazine*, vol. 26 (1918), pp. 391-403. In this article, after stating that the bill for instructions was filed by the Corporation at the request of certain of the older graduates and members of the bar who were earnestly opposed to the agreement, Mr. Matthews relates the circumstances which led up to the filing of the bill and says:

"Counsel for the trustees of the McKay estate were doubtful of their ability to secure a judicial decision as to the validity of this agreement without suing for the recovery of the whole fund and the termination of the trust; and this course they were reluctant to take. They asked the Corporation to test the question by a suit for instructions; but the Corporation, having received the opinion of eminent counsel that the agreement was valid, were disinclined to do so. In this

situation the Harvard graduates in question applied to the Attorney-General to take action on behalf of the Commonwealth; but this request was denied on account of the financial connection between the state and the Institute of Technology. As is customary in such cases, however, the Attorney-General was willing to allow an information to be brought in his name at the relation of the graduates interested in the matter; and in November, 1914, the Corporation was informed that advantage would be taken of this permission unless the President and Fellows themselves applied to the court for instructions. * * * The Corporation promptly acquiesced in this suggestion, and in May, 1915, filed a bill in equity for the instructions of the court. * * *

"It may be added that the graduates were aroused to action because as lawyers they felt that the sanctity of trusts and wills had been attacked in a most insidious and dangerous way; and because as graduates of the University they were chagrined to think that Harvard College, the earliest and most frequent beneficiary of donations for charitable uses in Massachusetts, should be a party to such a breach of trust. * * *

"The preamble to the agreement of 1905 [an earlier agreement with the Institute of Technology which had been finally rejected by the Institute] recites that as 'the University feels that faithfulness in the performance of these trusts which it has accepted is its first duty, to which all other considerations must yield, this agreement shall not go into effect until and unless the University shall have applied to the Supreme Judicial Court for instructions and the Court shall have made a decree that this agreement may be carried out without violation of its duties as a trustee and in accordance with law and equity' * * *.

"In 1909 the first money was received from the McKay trustees by the Harvard Corporation, and the project of a union with the Institute was again revived, terminating in a formal 'agreement' which was entered into in December, 1913, but was subsequently modified and did not assume its final shape till March, 1915. The Corporation had apparently revised the salutary view held by it in 1905 that faithfulness in the performance of a trust which it had accepted was 'a duty to which all other considerations must yield';

and the agreement of 1913-15, although this contract was not voted by the Corporation until February 23, 1915, and was not ratified by the Overseers till March 1, 1915,—three months at least after the Corporation had promised to ask the court for instructions,—contained no provision for a delay in putting it into effect until the court should make a decree that the agreement might be carried out without violation of the Corporation's duties as a trustee. Not only did the contract of 1913-15 contain no provision of this nature; but, although the bill was filed in May, 1915, the whole scheme of merger contemplated by it was put into effect, for the academic year 1915-16, before the pleadings were completed, and two years before the case was argued and decided."

Notwithstanding the fact that the Corporation had no doubts in the matter, the court did not dismiss the bill as beyond its "jurisdiction to entertain" (Shaw Letter, p. 13), but promptly decided that the agreement was in conflict with the terms of the trust and that the Corporation could not lawfully carry it out.

The court has often stated the circumstances which must exist in order to justify a trustee in asking for instructions. Thus in *Wellesley College v. Attorney General*, 313 Mass. 722, 729, the court said:

"The essentials for the maintenance of a bill for instructions have been said to be the possession of a fiduciary fund concerning which there is a present duty in reference to the disposition of the principal or income, that there are conflicting claims asserted by those interested in the trust res, and that there is no other remedy open to the trustee if he is to be protected in the performance of his duties and not compelled to proceed at his own risk."

Substantially the same statement had been made in many earlier cases, including *Bullard v. Attorney General*, 153

Mass. 249, from which Mr. Justice Crosby quoted in *Hill v. Moors* (224 Mass. 163, at p. 165).

(i) *Mr. Shaw misstates the Law with Respect to the Discretion of Trustees.*

"As the Court said in *Holmes v. Welch*, 314 Mass. 106, 112 (1943), the decision of the trustee 'cannot be overridden by the courts unless the trustees decide arbitrarily, capriciously or in bad faith'." (P. 14.)

This was said with reference to discretionary powers specifically given to the trustees. The case in which it was said, on which Mr. Booras places so much reliance, is discussed in the previous section of this brief (pp. 88-89), dealing with Mr. Booras's errors.

(j) *Mr. Shaw unwarrantably suggests that Harvard's own Interests in the Promotion of Botany in Cambridge may properly influence the Corporation in deciding upon a Course to be taken by it as Trustee of the Arboretum Trust.*

It should be noted (as pointed out in part III of this brief, p. 64) that in two places in his letter Mr. Shaw plainly indicated to Mr. Booras that the separate interest of Harvard in general botanical work in the college might properly influence it in arriving at decisions with regard to the Arboretum trust.

"And eminent botanists now regard the proposed unification as 'an indispensable part of any program of integrating and of more efficiently utilizing Harvard's botanical resources' in furtherance of the largely coextensive purposes of the several botanical departments in the area of morphology, of which the Arboretum is one." (P. 7.)

"Furthermore, the Corporation, as trustee of all University funds, thinks that education in the University in the field of botany can be strengthened

if the several botanical libraries and herbaria in the University are combined in a single, centrally located building." (P. 11.)

Statements like these may well have influenced Mr. Booras. They indicate the theory upon which the Bailey Plan was prepared, namely, that the Arboretum is one of "Harvard's botanical resources," that it is a mere "tool" of the University "to be used in the development of botany as a whole and in the overall interests of the University" (R. 11), and that its resources may properly be applied for the "purposes of the several botanical departments in the area of morphology" and for the purpose of strengthening "education in the University in the field of botany."

VI. IF MANDAMUS IS NOT THE PROPER REMEDY, THE PETITIONERS ARE ENTITLED TO MAINTAIN THEIR PETITION FOR A WRIT OF CERTIORARI.

In part II of this brief it was contended that mandamus was the proper remedy. If for any reason it is not, the petitioners submit that they are entitled to a writ of certiorari.

G.L. (Ter. Ed.) c. 249, § 4, as amended by St. 1943, c. 374, § 1, reads:

"A petition for a writ of certiorari to correct errors in proceedings which are not according to the course of the common law may be presented to a justice of the Supreme Judicial Court, and he may, after notice, hear and determine the same. It shall be open to the petitioner to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was as matter of law insufficient to warrant such action, finding or conclusion. * * *"

It is settled by the decisions of this court that in the case of public officers certiorari lies only where the officer acts in a judicial or quasi-judicial capacity.

"It is the function of a writ of certiorari upon a proper and adequate return of the proceedings to correct substantive errors of law by a judicial or quasi-judicial tribunal which are not otherwise reviewable by a court."

Howe v. Attorney General, 325 Mass. 268, 270.

In the present case the respondent has included as one ground for his demurrer and motion to dismiss the following (R. 57):

"That respondent's refusal to sanction the bringing of an information against trustees of a charitable trust in his name is not the act of a judicial or quasi-judicial tribunal and hence cannot be reviewed on a writ of certiorari."

The difficulty with the respondent's reasoning on this branch of the case is that the objection is superficial. The fundamental question is whether the court, in *any* form of proceeding, can go behind the Attorney General's refusal to authorize the use of his name. If the answer to this question is "No" the case is at an end, whatever the particular proceeding may be. If, however, the answer is "Yes," this means that the petitioners are entitled to maintain one or the other of the two recognized proceedings for determining controversies of this nature (1) a petition for a writ of mandamus and (2) a petition for a writ of certiorari. The line separating the fields of these two remedies, while fairly plain in a general sense, is not always easy to draw in a concrete situation. It is apparent, however, that one remedy cannot be used, as it were, to cut

the throat of the other. A respondent cannot be heard to say, on the one hand, that mandamus will not lie, because the remedy is certiorari and on the other that certiorari will not lie because the remedy is mandamus. The rule that the two remedies are complementary and that misjudgment as to which may be appropriate in a given situation is not fatal is now established by G.L. c. 213, § 1C (inserted by St. 1943, c. 374, § 4)—

“The supreme judicial or the superior court may, before final judgment, and upon terms, allow an amendment changing a petition for a writ of certiorari into a petition for a writ of mandamus, or a petition for a writ of mandamus into a petition for a writ of certiorari, if it is necessary to enable the plaintiff to sustain the proceeding for the cause for which it was intended to be brought. The court in which the amendment is allowed may retain jurisdiction of the cause as amended.”

Assuming that the Attorney General's ruling is subject to judicial review, the petitioners do not urge with finality either that this review must be on their petition for mandamus or that it must be on their petition for certiorari. The considerations which make for mandamus have been set out above. Those which suggest the propriety of certiorari will now be briefly stated.

The decision of Mr. Booras (R. 44), although his conclusions are subject to attack in so many respects, is nevertheless phrased in all respects as a judicial determination. He says in the decision:

“I was assigned by the Attorney General to hear all parties in the dispute and resolve upon a decision in the matter. * * * I have given full and deliberate consideration to all arguments advanced for and against the transfer and to all documents and briefs filed with me.”

He then proceeds to deal with certain of the facts, to state various views of law, and to wind up with the conclusion that "there is no legal breach of trust."

In the return of the respondent it is stated that he assigned to Mr. Booras "the duty to investigate the facts in controversy, to hear and study the arguments advanced by the petitioners and by the trustee, to ascertain the law relative to the subject matter in controversy, and to report fully to respondent" (R. 58).

In the return there follows the statement that Mr. Booras "extended to counsel for the petitioners ample opportunity of presenting to him, both orally and in writing, all facts, arguments and law in support of their request"; that he held lengthy conferences with counsel on both sides and heard their arguments and their contentions as to the law and received from them various documents; and that he "did legal research on the various points of law involved" and "reported to respondent a complete summary of the facts, law and arguments ascertained, elicited, submitted and considered in the course of his investigation and research, including all facts and arguments of law advanced by the petitioners" (R. 58-60).

The return then states that the respondent "considered fully all material reported to him by Mr. Booras, including the facts and arguments advanced by counsel for the petitioners and counsel for the trustee, and he also considered fully the law applicable to the controversy presented in the petition, including the principles of law referred to by counsel for the petitioners in their petition."

Reference may be made again to the cases reported in the first three volumes of the Opinions of the Attorneys General (see pp. 40, 42-44, *supra*).

It appears from these reports that it was the practice of Attorneys General Knowlton, Parker and Malone* to hold hearings on applications for the filing of informations or for the right to use the Attorney General's name in such informations. It appears that in all but three of the reported cases counsel on both sides were present, submitted evidence where a question of fact was involved, and arguments as to the law. The Attorney General in each case prepared a written opinion like that of a court, and the proceedings throughout were plainly of a judicial character.

It is, of course, evident that an official who performs many executive or administrative functions may also in certain matters act in a judicial or quasi-judicial manner.

See *Stiles v. Municipal Council of Lowell*, 233 Mass. 174, 181.

This court has many times been called upon to discriminate, in certiorari cases, between the executive or administrative functions of public authorities and their judicial actions.

In *Attorney General v. Mayor and Aldermen of Northampton*, 143 Mass. 589, the court held that certiorari did not lie to quash the proceedings of the municipal authorities in appointing a police officer, that function being "administrative and not judicial in its character." The court said that certiorari "is the proper remedy to revise the proceedings of county commissioners, or of city councils, or of boards of aldermen, when they act in matters like the laying out of highways, or making assessments for sewers

*The practice of the later Attorneys General does not appear, as no later opinions on applications for the use of the name in informations have been published.

or other improvements. The reason is that, in such matters, they act judicially, and not merely as ministerial or executive officers" (citing many earlier decisions).

Certain cases of other kinds than those referred to in the foregoing quotation in which certiorari has been held to be the proper remedy are the following:

City of Cambridge v. Board of Railroad Commissioners, 153 Mass. 161 (prescribing the details of a crossing of highway and railroad).

General Baking Co. v. Street Commissioners of Boston, 242 Mass. 194 (revocation of permit for garage).

Marcus v. Board of Street Commissioners of Boston, 252 Mass. 331 (permit for the sale of gasoline and construction of garage).

Kidder v. City Council of Brockton, 329 Mass. 288 (similar case).

Gifford v. Commissioner of Public Health, 328 Mass. 608, 619 (approval by Massachusetts Public Buildings Commission of the award of a building contract).

Coyne v. Alcoholic Beverages Control Commission, 312 Mass. 224 (disapproval of license granted by local authorities).

Moneyweight Scale Co. v. McBride, 199 Mass. 503 (decision of sealer of weights and measures as to correctness of scales).

In this last case the court said at page 505:

"If a sealer of weights and measures in deciding that question should proceed on erroneous principles of law, his decision could be quashed on certiorari, and in some cases a writ of mandamus might issue directing him to take specific action."

In *Scudder v. Selectmen of Sandwich*, 309 Mass. 373, dealing with the refusal of the selectmen to grant a license for the storage and sale of gasoline, it was held that there was no ground for a writ of mandamus, the court below having found in substance that they had acted in good faith and not arbitrarily. The court said at pages 376-377:

"Within the area of discretion the power lies in the licensing authority and not in the court. If in deciding the issue before them and in refusing the license the selectmen have adopted erroneous views of the law which have affected the result the remedy is not to be found in what would amount to a usurpation by the court of the licensing power, but lies rather in a petition for a writ of certiorari to review the proceedings of the selectmen upon a proper and adequate return by them" (citing many cases).

In *Attorney General v. Board of Public Welfare of Wilmington*, 328 Mass. 468, a petition for writ of mandamus ordering the board to render aid to the dependent children of a resident of the town, in compliance with a decision of the Department of Public Welfare, the court said at page 471:

"If the decision as to the eligibility of the applicant to receive aid under this second application was intended to be challenged in so far as that question remained in the domain of fact, the respondents could file a petition for a writ of certiorari, and show, if they could, that the conclusion of the department was not supported by anything before it. * * * If the eligibility of the applicant was a question of law, and if the department either by a misconstruction of the statute or otherwise committed an error of law in deciding the question which we think it was within its jurisdiction to decide, the only remedy to correct such an error is a writ of certiorari" (citing many cases).

The petitioners submit with confidence that a review of the Attorney General's ruling cannot be evaded merely upon procedural grounds. If mandamus is not the appropriate remedy, then they are entitled to relief by way of certiorari. The respondent certainly cannot "have it both ways."

VII. THE PETITIONERS HAVE STANDING TO MAINTAIN EITHER A PETITION FOR A WRIT OF MANDAMUS OR A PETITION FOR A WRIT OF CERTIORARI.

This point is raised by paragraph 3 of the respondent's motion to dismiss in the mandamus case (R. 52) and by paragraph 5 of the motion to dismiss and demurrer in the certiorari case (R. 57).

As is alleged in paragraph 2 of the petition (R. 3), the petitioners have been for many years actively interested in the Arboretum and have from time to time made financial contributions to it. Eight of them are members of the Visiting Committee. The present controversy is an attempt "in the public interest to assure that the Corporation's administration of its trusteeship for the Arboretum shall be to the best interests of the Arboretum and in compliance with the terms of the said indenture of 1872." The petitioner Grenville Clark was a member of the Corporation in 1946 when the Bailey Plan was approved (R. 39). Several of the other petitioners have had great experience in botanical and horticultural matters (R. 41).

All but one of them were among the ten persons who offered themselves to the Attorney General as relators (R. 21). Six of the petitioners are citizens of Massachusetts (R. 2) and many of them are Harvard graduates.

It is well settled that in cases of this character it is not essential that those seeking a review of the decisions of

public officers shall have, in the legal sense, a special interest in the subject matter.

In *Brewster v. Sherman*, 195 Mass. 222, a voter and taxpayer of the town of Plymouth sought a writ of mandamus ordering the board of registrars of voters not to count an imperfectly marked ballot on a recount of a vote of the town on the question of granting licenses for the sale of intoxicating liquors. In the opinion (at page 224) the court stated that it was contended that the petitioner "should have a private right or interest in the matter, beyond the right and interest of all the citizens of the town." In overruling this contention the court quoted, and approved as representing the law of Massachusetts, the following statement from High on Extraordinary Legal Remedies:

"When the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws."

The court also quoted Chief Justice Gray's dictum in *Attorney General v. Boston*, 123 Mass. 460, 479:

"There is a great weight of American authority in favor of the doctrine that any private person may move, without the intervention of the attorney general, for a writ of mandamus to enforce a public duty not due to the government as such."

The above statement of the law in the opinion in the *Brewster* case was quoted in *Brooks v. Secretary of the Commonwealth*, 257 Mass. 91, 93, and has been reaffirmed over and over again.

In *Horton v. Attorney General*, 269 Mass. 503, it was held that a small group of voters were proper parties to bring a petition for a writ of certiorari to quash the Attorney General's certificate with respect to a proposed amendment to the Constitution.

In *Parrotta v. Hederson*, 315 Mass. 416, 418, it is said that "mandamus is available to secure the performance of a public duty at the instance of any person who as a citizen or otherwise is legitimately concerned in having it performed" (citing many cases).

See also *Kelley v. Board of Health of Peabody*, 248 Mass. 165, 169 (last paragraph).

Bancroft v. Building Commissioner of Boston, 257 Mass. 82, 84-85.

Morrissey v. State Ballot Law Commission, 312 Mass. 121, 131-132.

Sears v. Treasurer and Receiver General, 327 Mass. 310, 314-315.

Hannigan v. Board of Appeals of Lowell, 328 Mass. 366, 368.

Sunderland v. Building Inspector of North Andover, 328 Mass. 638, 640.

Pilgrim Real Estate, Inc., v. Superintendent of Police of Boston, 330 Mass. 250; [1953] Mass. Adv. Sh. 495, 496.

Most of the cases cited above involve petitions for mandamus, but some of them are certiorari cases.

If the present petitioners have no standing to maintain the petition, no one else has, and the extraordinary result will follow that the ill considered decision of Mr. Booras would put an end, once and for all, to any judicial determination of the long-standing controversy over the Arboretum.

VIII. THERE IS NO MERIT IN THE POINT RAISED BY THE DEMURRERS THAT THE PETITION FAILS TO STATE CONCISELY AND WITH SUBSTANTIAL CERTAINTY THE FACTS NECESSARY TO CONSTITUTE A CAUSE OF ACTION OR CONTAINS IRRELEVANT, IMMATERIAL, IMPERTINENT AND OTHERWISE OBJECTIONABLE MATTER.

This is one of the grounds of the respondent's demurrer in the mandamus case (R. 51, par. 7) and of the respondent's motion to dismiss and demurrer in the certiorari case (R. 57, par. 7).

This case is unusual and in some respects unprecedented. The controversy has a long history and a great many details are essential to an understanding of the issues presented. It was deemed necessary to state the facts very fully, and all the allegations of the petition are relied upon. The grounds upon which the petitioners rest in claiming relief are readily ascertainable.

If any particular parts of the petition are subject to valid objection, the respondent should clearly have moved to strike them out, and raised the question in that way.

The words used in the demurrers "concisely and with substantial certainty," etc., are of course taken from the Pleading and Practice Act (G.L. (Ter. Ed.) c. 231, § 7, Second). These words have often been considered by this court, and the purpose has been repeatedly stated as being to enable the defendants to plead intelligently and directly.

In *Davis v. H. S. & M. W. Snyder Inc.*, 252 Mass. 29, 37, which was an action of contract or tort, the court said, with respect to the allegations of the declaration:

"They are so obscure, indefinite and involved that it is impossible to determine upon what ground the plaintiff charges the defendant with liability. A defendant is entitled to know with reasonable certainty the ground upon which the plaintiff seeks to recover, that he may be able to make answer thereto and be in-

formed of the issues he is called upon to meet. Unless the declaration sets forth in definite terms what those issues are, it cannot be determined what rules of law are applicable thereto."

The demurrer was sustained on this and other grounds.

The last two sentences of the above statement are quoted in *Bowles v. Clark*, 326 Mass. 31, 33.

In *Grandchamp v. Costello*, 289 Mass. 506, 507, an action of contract, Rugg, C.J., said:

"The rule of pleading, both at common law and under the statute, is that a declaration must state concisely and with substantial certainty the substantive facts constituting the cause of action, with such clearness and precision that the defendant may be able to plead to it intelligently and directly."

In *Comerford v. Meier*, 302 Mass. 398, 400, this statement appears:

"The plaintiff was required under the practice act to allege 'concisely and with substantial certainty' the essential facts constituting his cause of action in order to give the defendants such information as to the nature of the asserted claim as would permit them to file appropriate pleadings."

To the same effect see *Carroll v. Cambridge Electric Light Co.*, 312 Mass. 89, 94.

In the present case the respondent long ago filed an answer showing a full understanding of the issues presented by the petition, and the "nature of the asserted claim."

With respect to the various adjectives applied to the petition in the remaining portion of the grounds of the demurrers, it seems sufficient to refer to the case of *Sears v. Treasurer & Receiver General*, 327 Mass. 310, in which, by a petition for a writ of mandamus, the validity of a purported law proposed by an initiative petition was attacked.

A demurrer was filed by the respondent, with respect to which Qua, C.J., said (at pp. 313-314):

"The demurrer in this case asserts that the petition is 'replete with extraneous matter' consisting of references to the petitioners' connection with an organization not involved in the subject matter, of 'declamatory allegations,' of quotations from, or paraphrases of, the Constitution or of its alleged effect, of conclusions of law, or argumentative statements, and of incompetent quotations from a certain publication; and that the petition should not be entertained because of its 'discursiveness' and because of its 'unduly large content' of incompetent, irrelevant, and prejudicial allegations. Undoubtedly substantial portions of the petition are open to one or more of these objections. A bill or petition may be so overloaded with such matter as to obscure the cause of action intended to be stated and to render the preparation of an answer unduly difficult, and so to call for the sustaining of a demurrer [citing cases]. But in our opinion the petition in this instance does not call for such drastic treatment. The objectionable matter is readily separable. Much of it is common knowledge or self-evident. It does not obscure the cause of action intended to be set forth, which is stated with clarity and reasonable conciseness. The objectionable matter could easily have been struck out on motion, if it had been thought worth while to file such a motion. It can now be treated as mere surplusage to which no attention will be paid" (citing cases).

It is the claim of the petitioners that all parts of the petition are material and essential to a full statement of the basis of their claim.

IX. TO JUSTIFY THE PETITION FOR CERTIORARI IT IS UNNECESSARY THAT THERE BE A COMPLETE FORMAL RECORD OF THE PROCEEDINGS.

The second ground of the respondent's motion to dismiss and demurrer in the certiorari case is (R. 57):

"That the proceedings of respondent in reaching his decision not to sanction the bringing of the information sought by petitioners were such that no formal record is available to return to this Court."

In his return to the petition the respondent "certifies that the following return is a true record of all proceedings before him, and his dealings with respect thereto, in the matter of the Arnold Arboretum trust" (R. 57). This is just what the Attorney General was required to file, and it is of no consequence that the proceedings were not comprised in any "formal record." From the nature of the proceedings no such record was made. The application to the Attorney General was not presented in any formal document, there was no hearing, and, at least apart from the decision of Mr. Booras, there was no formal record at all.

The return states the facts with regard to the conferences which the representatives of the parties had separately with Mr. Booras, and appears to annex all the documents which the parties filed with him.

The details of the conversations are not stated, but certain of the documents filed will necessarily indicate the nature of the oral arguments which were submitted to him. Obviously the record is sufficiently complete to enable the court to deal with the questions of law presented.

There are many cases in our reports exemplifying the rule that in a return to a petition for certiorari the respondents are not limited to a formal record but must set forth "the proceedings and facts as they occurred be-

*It is not expressly stated in the return that there was no other correspondence between the Corporation and Mr. Booras except the letter referred to in paragraph (e) (R. 59), and filed with the extension of the return (R. 63). It is assumed that there was no other correspondence.

fore them, in detail, so far as is necessary to present the questions of law."

Inhabitants of Tewksbury v. County Commissioners of Middlesex, 117 Mass. 563, 565.

In that case the court said (p. 564) that "it is necessary, and such is the established practice, for the commissioners or other inferior tribunal, in answer to the petition, to return a copy of their record, except when it is annexed to the petition, and if the record does not state in detail all the facts proved and rulings made, necessary for the determination of the case, to make a return or certificate, stating fully such facts and rulings so far as necessary to raise the questions of law which the petitioners desire to have revised by the court, . . ."

In *Collins v. Mayor and Aldermen of Holyoke*, 146 Mass. 298, the court dealt with a petition for writ of certiorari to quash the proceedings of the mayor and aldermen in assessing part of the cost of a sewer. The only formal records were an order to construct the sewer and a vote to levy the assessment. In the respondents' answer many facts were alleged. The court held "that the statements in the defendant's official answer are to be taken as true, not only in those parts which set out the record, and the acts of the board within its jurisdiction which do not appear in the record, but also in those which allege extraneous facts which might have been traversed, and perhaps controlled by evidence" (p. 305).

In *Janvrin v. Poole*, 181 Mass. 463, dealing with a petition for a writ of certiorari to quash a betterment assessment by the selectmen of a town, the whole record of the selectmen was the vote levying the assessment. Other facts were set up in the answer.

See also the allegations of the returns in *Inhabitants of Westport v. County Commissioners of Bristol*, 246 Mass.

556, 559, and in *McLaughlin v. Municipal Court of the Roxbury District of Boston*, 308 Mass. 397, 399.

X. CONCLUSION.

The discussion of the technical objections raised by the respondent might be prolonged, but this would be unprofitable, since these objections are on any theory peripheral. If the petitioners have a justiciable grievance, they are plainly entitled to maintain one of the two pending petitions. If for any reason it is found to be advisable, the petition for mandamus can readily be amended into a petition for certiorari,—G.L. (Ter. Ed.) c. 213, § 1C; St. 1943, c. 374, § 4,—or vice versa. It may be, indeed, that the relief sought may most appropriately be granted partly in response to the petition for mandamus and partly in response to the petition for certiorari, as in the very recent case of *Pisco v. Police Commissioner of Boston*, [1954] Mass. Adv. Sh. 609.

On the merits the allegations of the respective petitions,—which for the present purpose must be deemed to be true,—present a picture substantially as follows:

The trustee of an important charitable trust has formally announced its intention hereafter to administer the trust in a manner radically different from that which has obtained ever since the establishment of the trust more than eighty years ago. The present petitioners, along with many others who, like them, have contributed largely to the resources of the trust and are actively interested in its welfare, have carefully investigated the plan thus contemplated and are convinced that, if put into effect, it will in vital particulars violate both the letter and the spirit of the trust instrument. Repeated requests that the trustee institute proceedings to determine whether the carrying out

of the plan will be lawful have been wholly unfruitful. Since the only other method of obtaining such a determination is by an information in the name of the Attorney General, the petitioners have made application to that officer accordingly and have supplied the names of responsible persons who are willing to act as relators. In this connection the petitioners have called special attention to the established practice whereby the Attorney General in such a situation does not assume to reach any ultimate conclusion on the merits of the controversy, but grants the desired permission unless the point at issue is so clear as not to be a fit subject of judicial inquiry. The Attorney General, after having been advised by counsel for the petitioners as to the grounds upon which the proposed information would be based, has received from the counsel for the trustee a communication filled with inaccurate representations both as to the law and as to the facts. Without notifying the objectors that this communication has been received the Attorney General through one of his deputies has announced that the application for permission to file the proposed information is denied. This denial has been embodied in a memorandum which indicates that the assistant who prepared it was misled in most vital particulars by the inaccurate representations made to him as just stated. The petitioners, conceiving that they lack standing to proceed against the trustee in their own names, have therefore instituted the present proceedings, the object of each petition being (1) to cause the decision embodied in the Attorney General's memorandum to be vacated and (2) to require him to reconsider the application for leave to proceed in his name and to grant it if, upon full personal consideration of the facts and of correct principles of law, it appears that the issues which the petitioners seek to raise are fit subjects for judicial inquiry. The Attorney General has filed in each case a motion to dismiss and a

demurrer. A reservation brings before the full court the issues thus raised.

Disregarding procedural details for the moment, the fundamental question is whether the trustee of a charitable endowment can successfully baffle the investigation of what may well be a serious breach of trust if only its prestige is such as to overawe the representatives of the Commonwealth. The petitioners believe that the answer to this question is plain. The trustee in effect affirms that "the King can do no wrong." Before any party can avail himself of this rule, however, he must answer a further question: "Who, in a situation like the present, is the King?" Is it a corporation which is, after all, nothing but a creature of the Commonwealth, or is it the whole body of citizens for whose benefit the charity was established and in whose behalf the Commonwealth should be zealous to direct the attention of the courts to any reasonable indication that a breach of trust is imminent?

Respectfully submitted,

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No. 11,441.

JOHN S. AMES ET AL.

^{v.}
ATTORNEY GENERAL.

SAME *v.* SAME.

BRIEF FOR PETITIONERS.

SUFFOLK COUNTY.

ARMON C. GIBBELL & SON, LAW PARTNERS, BOSTON.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY

LAW

JOHN S. AMES, ET ALS

VS.

GEORGE FINGOLD
ATTORNEY GENERAL OF THE COMMONWEALTH

Petition for Writ of Mandamus

JOHN S. AMES, ET ALS

VS.

GEORGE FINGOLD
ATTORNEY GENERAL OF THE COMMONWEALTH

Petition for Writ of Certiorari

RESERVATIONS AND REPORTS.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, SS.

JOHN S. AMES, ET AL

VS.

GEORGE FINGOLD
ATTORNEY GENERAL OF THE COMMONWEALTH

In re Petition for Writ of Mandamus

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RESERVATION AND REPORT.

This cause came on to be heard by me upon the respondent's motion to dismiss and demurrer to the petition as amended and, thereupon, the parties consenting, I reserve the case upon the petition as amended and upon the motion to dismiss and demurrer thereto for the determination of the full court.

HENRY T. LUMMUS
J.S.J.C.

April 14th, 1954.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

IN THE SUPREME JUDICIAL COURT

JOHN S. AMES of Easton in the County of Bristol, BENJAMIN S. BLAKE of Weston in the County of Middlesex, GRENVILLE CLARK of Dublin in the State of New Hampshire, GODFREY L. CABOT of Boston in the County of Suffolk, HENRY F. DUPONT of Winterthur in the State of Delaware, CHILDS FRICK of Roslyn Harbor in the State of New York, ELLERY SEDGWICK of Beverly in the County of Essex, FANNY D. CLARK of said Dublin, LOUISE DUPONT CROWNINSHIELD of said Boston and SUSAN DELANO McKELVEY of said Boston

VS.

THE HONORABLE GEORGE FINGOLD, as he is Attorney General
of the Commonwealth of Massachusetts

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Petition for Writ of Mandamus.

To the Honorable the Justices of the Supreme Judicial Court:—

The petitioners above named respectfully represent as follows:—

1. The purpose of this petition is to make possible a judicial determination of the question whether certain action taken or proposed to be taken by the President and Fellows of Harvard College (hereinafter referred to as "the Corporation") is or would be in the best interests of the Arnold Arboretum and consistent with the terms of an indenture of trust entered into under date of March 29, 1872, by George B. Emerson and others, trustees under the will of James Arnold, parties of the first part, and the Corporation, party of the second part. By said indenture a fund was transferred to the Corporation as trustee

for the purpose of establishing and maintaining an Arboretum (to be called the "Arnold Arboretum") on over 200 acres of land in West Roxbury, Massachusetts, then belonging to the Corporation, and for the support of a professor who should be called the Arnold Professor and should have the care and management of the Arboretum. It was provided in the indenture that the trust fund should not be "diminished by supplementing any other object however meritorious, or kindred in its nature". Further provisions hereinafter mentioned appear in the indenture, a copy of which is hereto annexed marked "A". In the case of *Rotch v. Emerson*, 105 Mass. 431, it was determined that the testamentary provisions pursuant to which the indenture was entered into created a public charity.

2. The petitioners have been for many years actively interested in the Arboretum and have from time to time made financial contributions to it. All the petitioners except Grenville Clark and Ellery Sedgwick are members of the Committee appointed by the Board of Overseers of Harvard University to visit the Arboretum (hereinafter referred to as "the Visiting Committee") and in the present controversy seek in the public interest to assure that the Corporation's administration of its trusteeship for the Arboretum shall be to the best interests of the Arboretum and in compliance with the terms of the said indenture of 1872. From the printed statement of the Board of Overseers with regard to the functions of the Overseers' Visiting Committees it appears that such committees are "appointed to review the activities of the major academic and administrative subdivisions of the University" and that they "have constituted for many years an integral part of Harvard's educational system. They are perhaps the chief agency through which the Board fulfills its responsibilities as trustee for the public in keeping in touch with the affairs of the many faculties and departments of the University."

3. In June 1945 Professor Irving W. Bailey, of the Department of Biology of Harvard University, submitted to the Dean of the Faculty of Arts and Sciences a report prepared by him entitled "Botany and its Applications at Harvard". This report, a printed document of

93 pages, embodied a proposal (Hereinafter referred to as the "Bailey Plan" or "the plan") that the nine independently endowed institutions in some way concerned with botany and then affiliated in one way or another with the University be in effect merged in the Department of Biology of Harvard University for the benefit of research and instruction in botany at Harvard. One of these institutions was the Arboretum, the invested funds of which amount to approximately 50% of the aggregate funds of the nine institutions. The plan was evidently prepared without legal advice and without any recognition of the fact that the funds and property of the Arboretum are held by the Corporation upon a special trust under the said indenture, such funds and property being dealt with throughout the plan as being held by Harvard as part of its disposable assets for the general purposes and interests of Harvard without regard to any special trust affecting such funds and property. On January 22, 1946, the Corporation voted to approve the Bailey Plan, evidently without investigation of the terms upon which the property of the Arboretum was held by the Corporation. Various measures to implement the Bailey Plan were thereupon initiated.

4. The implementation of the plan proceeded slowly and there were substantial delays for different reasons. When the effect of the plan upon the Arboretum began to be realized, opposition developed, and in 1949, when the particulars and implications of the Bailey Plan as affecting the Arboretum became known to the Visiting Committee, it appeared to a number of the members of that committee that the plan would completely overturn the principles upon which the Arboretum had been administered and developed and would gravely injure its work and usefulness to the public. Serious questions were presented as to whether the plan involved a breach of trust with respect to the Arboretum, and, as a result of objections raised by members of the Visiting Committee, the Corporation referred the matter to the Coordinating Committee on the Biological Sciences, of the Board of Overseers. In May 1950 that committee submitted a report approving the plan with minor modifications. Upon receiving this report the Visiting Committee in June 1950 requested the Corporation to defer action implementing the plan as regards the Arboretum. The Corpo-

ration acceded to this request and a group of fourteen members of the Visiting Committee then retained Messrs. Herrick, Smith, Donald, Farley & Ketchum as counsel, who reported in September 1950 that the carrying out of the Bailey Plan would in their opinion violate in many respects the trusts upon which the Arboretum funds and property are held by the Corporation. The Visiting Committee at a largely attended meeting held soon after the receipt of this report voted to recommend to the Corporation that it suspend the putting into effect of the recommendations of the Bailey Plan in so far as they affect the Arboretum until the restrictions imposed upon the Corporation by its duties as trustee should be more fully presented and considered; and this recommendation was forwarded to the Corporation.

5. After receiving the foregoing recommendation the Corporation in October, 1950, further postponed action on the Bailey Plan and submitted the questions raised by the Visiting Committee to its counsel, Messrs. Ropes, Gray, Best, Coolidge & Rugg. Under date of May 1, 1951, an extended opinion on the Bailey Plan as applied to the Arboretum was rendered by such counsel to the Corporation. This opinion concurred in some respects with the views which had been expressed by counsel for the aforesaid fourteen members of the Visiting Committee, but supported the legality of the plan in large measure. The Visiting Committee, as such, then retained counsel, namely Robert G. Dodge and J. W. Farley in association, and requested them to give further consideration to the questions involved, and particularly to the opinion of counsel for the Corporation just referred to, and to report their conclusions to the Visiting Committee. Pursuant to this request, Messrs. Dodge and Farley, counsel for the Visiting Committee, gave the matter further study over a period of months and under date of March 1, 1952, submitted a report in which the issues were analyzed at length and the conclusions previously reached were reaffirmed. In said report of the Visiting Committee's counsel the points outlined in the several subdivisions of the next paragraph hereof were developed in substance.

6. (a) The relation of the Corporation to the Arboretum is that

of the trustee of an express trust. Its duty is the same as that of any trustee of a fund established to promote a particular educational or charitable object. The Corporation has no more right than any other trustee would have to administer the trust otherwise than solely in the best interests of the beneficiary or to apply the trust property to purposes inconsistent with the terms of the trust; and it has in particular no right, in determining the administration of this particular trust, to give weight to what may be conceived to be for the best interests of the University in general as compared with the best interests of the Arboretum. The most fundamental duty owed by a trustee to the beneficiaries of the trust is the duty of loyalty. He must act solely in the interests of the beneficiaries and must lay aside self-interest or the interests of others for whom he may happen to be trustee. The Bailey Plan was framed without any reference to this principle and indeed without any consideration of the fact that the Corporation held the property of the Arboretum on a special trust, the central aim of the plan being to advance the interests of the University as a whole in general botany.

(b) The trust created by the indenture of March 29, 1872 is, as appears from the copy hereto annexed, set forth in simple terms. The Corporation as trustee was required to hold the fund "as a separate and distinct fund", and agreed that it would hold the property and all future property so received "upon the trusts herein declared". The income of the fund (apart from five per cent, to be accumulated) was to be applied in every year "to the establishment and support of an arboretum, to be called the Arnold Arboretum, which shall contain so 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 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 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 income was to be used for no other purpose, "however meritorious or kindred". In 1872 Charles Sprague Sargent was appointed director of the Arboretum, and in 1879, when the fund had increased to \$150,000, he was appointed Arnold Professor, a position which he held until his death in 1927. Under an agreement with the City of Boston in 1882 title to the land was vested in the city, which leased it to the President and Fellows "forever" at a rental of \$1 per year. By this lease the land was to be used for the purposes of the trust. With adequate space assured forever Professor Sargent devoted his efforts toward making the Arboretum preeminent in its field. A staff of able horticulturists was assembled. Field expeditions to various parts of the world brought back species of trees and woody plants theretofore unknown in the United States. In 1892 a brick headquarters and library building was erected on the Arboretum's property at Jamaica Plain with funds given for that purpose. An herbarium, later developed into a collection of nearly 700,000 dried specimens, was started in 1878, and in 1905 the headquarters building was much enlarged so as to house the herbarium. After Professor Sargent's death in 1927, Professor Oakes Ames served as Supervisor of the Arboretum for a nine year period. Professor Elmer D. Merrill was appointed Arnold Professor and Director in 1936, serving until 1946 when he resigned. Dr. Merrill was succeeded as Director of the Arboretum by Professor Karl Sax, who, although not appointed Arnold Professor, was appointed Director in 1947 and has since acted as such. On October 12, 1953, Dr. Richard A. Howard was appointed "Arnold Professor of Botany" and "Professor of Dendrology", his appointment in both capacities to take effect on February 1, 1954. For seven years from 1946 until October 1953 no Arnold Professor was appointed.

(c) After Professor Sargent's death in 1927 his friends were successful in raising approximately \$1,000,000 as the Charles Sprague Sargent Memorial Fund for the endowment of the Arnold Arboretum. The solicitation material consisted primarily of an elaborate 37 page brochure, which laid its entire emphasis on the Arboretum as a self-contained and integrated organization, having its own purposes and staff and engaging in its own activities. Stress was laid over and over

again upon the importance of the research carried on at the Arboretum by its staff and visiting scientists and the inestimable value to the public of the results of the research. Emphasis was placed on the value for purposes of scientific research of the collections in the herbarium, even then very large, and the library was stated to be "the most complete collection of printed matter that is anywhere assembled as bearing upon the world's woody plants". As the brochure stated:

"The Arboretum serves as a storehouse of knowledge and a center of research. The collections in the Herbarium and the Arboretum Library are being constantly used by students, sometimes from Harvard and no less frequently by men from far away parts of the world who come to pursue special studies and to prepare reports for books. * * * Many of the leading forestry experts have spent considerable periods of study at the Arboretum. [A long list of such experts is given.] The Arboretum is the workshop in which was prepared Professor Sargent's classic 'Silva of North America' in 14 folio volumes. * * * Not only is the Arboretum a storehouse of scientific knowledge about trees and shrubs but it is a research laboratory for experiments which may have results of distinct commercial value."

The brochure further recited that "The title and ultimate responsibility for the Arboretum is lodged in the President and Fellows of Harvard College *as trustees*" [emphasis supplied] and asked for the addition of \$1,000,000 to the Arboretum's "permanent endowment".

(d) Before Professor Sargent's death, and in later years, other friends of the Arboretum by gift and legacy have brought its total endowment to more than \$4,000,000 at book value and some \$5,000,000 at market value. These gifts were made directly to the Arboretum or to the Harvard Corporation for the "use" or for the "benefit" or "purposes" of the Arboretum. Many of the gifts were made without specification of the use to be made of the money. Other donors or testators specified that the money should be used for particular purposes, all of these purposes being within the scope of the normal activities of an arboretum.

(e) Before the Bailey Plan was approved in 1946 the Arnold Arboretum was a self-contained and integrated institution with a locus in Jamaica Plain and a world-wide reputation under its own name. The Arnold Professor (or Professor Ames as Supervisor) who controlled its staff, was immediately responsible to the Corporation and communicated directly with the President as to budgets and other matters requiring consultation with the Corporation as trustee. On the Arboretum grounds the library and herbarium grew to outstanding positions in their field under the direction of its scientists. For its first seventy-five years therefore, apart from such control as could appropriately be exercised by its trustee, the Arnold Arboretum was managed and controlled by its own staff. As an institution under its own name it progressed and gained widespread recognition and fame, a notable collection of dried specimens and a library of great value. Beyond this it acquired a very considerable endowment.

(f) The Bailey Plan was formulated, as has been stated, without regard for the obligations of the Corporation as trustee of a special trust for the Arboretum and with the evident primary purpose of furthering the general purposes and interests of Harvard. The plan included sweeping recommendations looking to the "integration"—in effect merging—of the nine so-called independently endowed establishments, including the Arboretum, into two so-called "areas" or "institutes", the establishments so merged eventually to become mere subsidiary divisions of these "institutes", with a "Biological Council" having effective control of the funds and activities of the several establishments. It was affirmed in the Bailey Report over and over again that the proposed organization would promote the future welfare of botany as a whole and would make more efficient the work of research and instruction in botany at Harvard. On the other hand, the Bailey Report showed no regard for or interest in horticulture, which was a prime purpose of the Arboretum, or any consciousness of the status of the Arboretum as an institution whose property was held under a special trust. On the contrary, the property of the Arboretum was treated throughout as being general assets of Harvard subject to the control of the Corporation for Harvard's general purposes and

interests. The plan involved the "integration" to a large extent of the income of the Arboretum with that of the other eight independently endowed agencies and of the Department of Biology (which includes botany), and the use of the combined income for research in general botany, various branches of which are not of interest to the Arboretum, and for other general botanical purposes. The Arboretum had much the largest income of any of the agencies to be integrated with it, and was indeed referred to in the Bailey Report as "the goose that lays the golden eggs". Consequently its funds were and are of particular interest to those desirous of advancing the cause of general botany at Harvard, irrespective of the special purposes and interests of the Arboretum.

It was and still is further proposed by the Corporation's vote of January 19, 1953 (a copy of which is hereto annexed marked "C") that the bulk of the Arboretum's library and herbarium "related to research" be removed to a new building in Cambridge, the cost of operating which would be largely charged upon the income of Arboretum funds. As the Bailey Report states, one of the three objects for which the resources of the Arboretum are being utilized is the "maintenance of a large herbarium and library as a basis for research in taxonomy". And from the summary given in the Report of the expenditures of the Arboretum during the year preceding the date of the Report it appears that the sums devoted to "Herbarium, Library and taxonomic research" amounted to \$51,411 out of a total of \$111,407. Paragraph 10 of the aforesaid Corporation vote of January 19, 1953 (Exhibit C hereto) expressly provides for the removal from Jamaica Plain to Cambridge of the "main body of the library and herbarium of the Arboretum related to research" and for the retention at Jamaica Plain only of "such books and specimens as may be required to provide there a working herbarium and library". Since virtually all of the herbarium and library is "related to research" the effect of the proposed removal would obviously be to transfer to Cambridge all the important work and research heretofore conducted at the Arboretum and to commingle it with the general botanical research of the University; and whether or not such removal would be to the benefit of

botanical research in the University, it would be contrary to the best interests of the Arboretum and consequently inconsistent with and contrary to the duty of the Corporation as Trustee. As counsel for the Visiting Committee, Messrs. Dodge and Farley, gave much consideration in their report of March 1, 1952, to the proposed removal to Cambridge of the bulk of the library and herbarium, stating their opinion that such removal would be contrary to the interests of the Arboretum, that it would take from the place in which they should be kept the principal tools used in the Arboretum's scientific work and would be inconsistent with the existence of the Arboretum as a unified and integrated institution in accordance with the terms of its endowment and the intent of donors to its funds. It was also pointed out in their report that the removal would involve the Arboretum in an indefinite amount of additional expense, as it would not only be called upon to pay a considerable share of the expense of maintaining the new building, but would also have to continue to employ a staff for the care and management of such part of the library and herbarium as is to be left behind.

(g) In a foreward to the Bailey Report Paul H. Buck, Dean of the Faculty of Arts and Sciences, made the following statement:

"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."

And the Coordinating Committee of the Overseers in its aforesaid report of May, 1950, described the Arboretum 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". It was doubtless the acceptance of the views thus

stated by Dean Buck and the Coordinating Committee which led the Corporation, prior to the submission of the report dated March 1, 1952 of counsel for the Visiting Committee, to endorse the Bailey Plan, substantially in its entirety.

7. The report of March 1, 1952, submitted to the Visiting Committee by its counsel, concluded with the following paragraphs:

"We believe it unfortunate that the questions at issue in this matter should be the subject of controversy except before a tribunal with authority to render a decision.

"Material questions of law are involved which concern the proper administration of trust funds of which the Harvard Corporation is trustee. We think the arguments we have advanced are sound.

"Whether or not the trustee of these funds, or counsel for the trustee, agree with our position, it cannot be doubted that there is a serious question regarding the propriety of the action of the trustee.

"In such circumstances, unless these differences of opinion can be resolved satisfactorily to all concerned, the trustee should seek the judgment of a court of competent jurisdiction.

"Comparable matters in which Harvard has been involved have several times been determined by the courts, as in the case of the McKay trust, where the President and Fellows filed a bill for instructions.

"We suggest that this is another instance where such a solution should be sought, unless a full and mutually satisfactory settlement of the questions raised can be agreed upon. Prolonged argument other than before a court is not likely to be either satisfactory or conclusive."

8. After receiving the report of its counsel dated March 1, 1952, a meeting of the Visiting Committee was held on April 29, 1952. Twenty members of the Committee being present a resolution was adopted by a large majority which contained a statement of a comprehensive plan submitted as a solution of the controversy. Copies of the statement were sent to the Overseers and the Corporation. The Visiting Committee's plan began as follows:

"As a first step in any constructive plan, the Committee believes it is essential that the Bailey Plan (including the present plan for the removal to Cambridge of the major part of the library and herbaria) be completely rescinded so far as the Arboretum is concerned. In the light of the recent carefully considered legal opinion of Messrs. R. G. Dodge and J. W. Farley, there is at the very least serious doubt as to the legality of the Bailey Plan as applied to the Arboretum. In these circumstances, whether or not one agrees with the Dodge-Farley opinion as against the Ropes, Gray opinion, it is inconceivable that any attempt would be made to apply the Bailey Plan to the Arboretum without at least a petition by the Corporation for a court decision."

By this resolution and at various times thereafter the importance of obtaining a judicial determination of the matters at issue was urged upon the Corporation, but without avail.

At a later meeting of the Visiting Committee it was reported that the statement adopted at the April 29, 1952 meeting had been circulated to the members of the Committee not present at that meeting and had been approved by all the absentees, namely, Christian A. Herter, Benjamin S. Blake, Mrs. Joseph M. Cudahy, Childs Frick, Mrs. Henry V. Greenough and Clarence L. Hay.

9. After counsel for the Visiting Committee had been granted for the first time, late in 1952, a hearing before the Overseers' Coordinating Committee and another before a committee of the Corporation, Messrs. Dodge and Farley on December 22, 1952, submitted to the Corporation

through President James B. Conant a suggested Corporation vote for the adjustment of the entire controversy. A copy of the letter of that date to President Conant, in which the proposed vote was enclosed, is hereto annexed marked "B". The suggested vote was not accepted by the Corporation. Instead it finally adopted, on January 19, 1953 the aforementioned resolution (Exhibit C) stating the policy which would govern its "administration of the Arnold Arboretum and the use of all funds held by the Corporation in trust for the purposes of the Arboretum". In this resolution the Corporation for the first time officially recognized that it held the Arboretum's property upon a special trust and that this trust must be administered in the Arboretum's interests.

Paragraph 1 of the resolution of January 19, 1953, reads as follows:

"The plan contained in the Bailey Report of June 1945 shall not apply to the Arboretum or to the principal or income of its endowment. The Corporation recognizes that the property and endowment held for the purposes of the Arboretum are 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 resolution concluded, however, by reestablishing in paragraph 10 thereof one of the important and objectionable features of the Bailey Plan, namely, the aforementioned provision for the removal to Cambridge of "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". In this paragraph it is declared that "the Corporation determines that it is in the best interests of the Arboretum and will promote the purposes of its endowment", to effect the removal.

It is obvious that a "working library and herbarium" deprived of material relating to research, could be of little value at the Arboretum as instruments of research and that such removal would break down the Arboretum as an integrated scientific institution.

The idea that the greater part of the library and herbarium should be removed originated in the Bailey Plan, at a time when the trust relationship between the Corporation and the Arboretum was not recognized. Upon information and belief the petitioners allege that the Corporation became committed to the botanists at Harvard to carry out this part of the Bailey Plan and as early as 1946 placed itself in a position in this respect from which it could not easily retreat, and this commitment prevented it, after the trust relationship was discovered and recognized, from judging the interests of the Arboretum impartially.

There are other respects in which the provisions of the resolution adopted by the Corporation on January 19, 1953, are open to serious doubt in respect of their conformity to the obligations of the Corporation as trustee for the Arboretum.

Among other things, the compromise plan proposed in the resolution of the Visiting Committee on April 29, 1952, as mentioned in paragraph 8 thereof, urged the Corporation to declare that in the administration of the trust it would act "solely with a view to the best interests of the Arboretum"; and the same language was in the proposed vote sent to President Conant with counsel's letter of December 22, 1952, (Exhibit B). In paragraph 1 of the January 19, 1953 resolution however, which is quoted above, the word "solely" was omitted.

Moreover, the petitioners would wish to urge in a trial of the issues that paragraph 5 of the vote of the Corporation of January 19, 1953, dealing with the authority of the Arnold Professor in respect of appointments to the Arboretum staff, is of very doubtful validity in that it is inconsistent with the provision of the indenture of 1872 whereby the Arnold Professor is to have the "care and management" of the Arboretum. This paragraph 5 provides that recommendations for appointments to the staff of the Arboretum may be initiated not only by the Arnold Professor, but also, independently of him and potentially without his approval or even knowledge, by the President

of the University. The language is that "such recommendations may be initiated from time to time by the Arnold Professor *or* by the President". [Emphasis supplied.] This provision would seriously detract from the status and authority of the Arnold Professor and would undermine his position.

10. Shortly after the passage of the aforesaid resolution of the Corporation of January 19, 1953, counsel for the present petitioners caused fifteen leading authorities throughout the United States, in no way connected with Harvard, to be interviewed with a view to ascertaining their opinion as to whether it would be in the best interests of the Arboretum to carry out the proposal for the removal to Cambridge of the main body of its library and herbarium related to research. The virtually unanimous opinion of these impartial authorities was that the removal, whether or not it would help botany at Harvard or elsewhere, would break down the present integrated character of the Arboretum and would be contrary to its interests, especially as a scientific institution. This opinion rests on the proposition that a distinguished horticultural-botanical institution like the Arboretum needs *to have together* in one location the three main elements requisite for a well-rounded institution of this character, namely: (a) an excellent horticultural-botanical library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs. The Arboretum now has all three of these. Its library has some 40,000 books and 15,000 pamphlets and is nearly, if not quite, unique. Its herbarium has nearly 700,000 specimens and is of great value. Its living collection, containing some 6,000 species and varieties, is probably the most complete and famous American collection of this sort. The conjunction of these three elements in one place is what has given the Arboretum a world-wide status and reputation, and this conjunction would be destroyed if the resolution of January 19, 1953, were carried out.

In his annual reports as Arnold Professor Sargent made frequent references to the importance of the library and the herbarium in the scientific work of the Arboretum. In his report for 1923-24 he said:

"The experience of the last fifty years shows that such an institution [an arboretum] 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. * * * 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."

Emphasizing the importance of the herbarium, which was annually increasing in size as the result of expeditions to various parts of the world, but which then contained less than half as many specimens as it now contains, he wrote that the aim should be to make:

"A complete collection of dried plants which will make it possible to study in one place in a satisfactory manner the trees of the world and their original variations and distribution. Such a collection is needed and there is no better place for it than the Arnold Arboretum, for at the Arnold Arboretum there is one of the largest collections of living trees and shrubs which can be grown in such a severe climate and an unsurpassed library devoted to the subject."

In his article on "The First Fifty Years of the Arnold Arboretum", published in the Journal of the Arnold Arboretum in January 1923, Sargent wrote:

"The Arnold Arboretum is not a School of Forestry or of Landscape Gardening. It is a station for the study of trees as individuals in their scientific relations, economic properties and cultural requirements and possibilities. On the information gathered in museums like the Arnold Arboretum successful silviculture and landscape gardening are dependent. * * *

"[During its first fifty years] the greatest collection of the hardy trees and shrubs of the northern hemisphere has been made and arranged, and many new plants largely discovered through its explorations have been distributed.

"It has established the largest and most important herbarium in the world devoted exclusively to preserving the records of trees and shrubs, and a library which within the limits of its special subjects is not surpassed. * * *

"In discussing the future of the Arboretum and its needs it must be remembered that during its first half century it has been managed not merely as a New England museum but as a national and international institution working to increase knowledge of trees in all parts of the world and as anxious to help a student in Tasmania or New Caledonia as in Massachusetts. An institution with such ambitions must be equipped to answer any question about any tree growing in any part of the world which may be addressed to it. * * *

"If the Arboretum is to become a great institution for gathering and spreading information about trees and allied plants, specimens and a series of photographs of every species of tree in the world should be found in its herbarium. The work which it has accomplished in its first fifty years in North America and the Japanese Empire should be extended over the rest of the world. * * * In the future the student of trees must depend for any knowledge of many trees on the material and information preserved in institutions like the Arnold Arboretum."

To break up the integration of the Arboretum by the proposed removal can do nothing but damage to the Arboretum as a scientific institution. It would be disadvantageous to the usefulness of the Arboretum to the public, to its achievements in its general scientific field, to its contribution to horticulture and botany in its special field, to its work of scientific research, to its future financial support, and to

its reputation and prestige which are essential for its greatest usefulness. The result of dividing the facilities would be to divide the time of the Arnold Professor and his staff between Jamaica Plain and Cambridge. It would require some or all of them to shuttle back and forth to a disconcerting and wasteful extent. The net result would be gravely to impair the Arboretum's work; some say it would virtually destroy it.

The opinion of the experts who have been consulted confirms that of these petitioners, all of whom have had a long and close association with the Arboretum and a number of whom have had large experience with horticulture and with botanical gardens. All unite in the strong conviction that the carrying out of the removal plan would very gravely damage the Arboretum and would be definitely contrary to its interests.

11. The Arboretum has many friends not only in Massachusetts, but elsewhere. It has taken the lead in the development of horticulture in this country. It is probably the most distinguished horticultural-botanical institution in North America. It is a credit to Boston and Massachusetts. It has a great field of future usefulness and its future can be as distinguished as its past. It is, however, dependent on continued support, moral and financial, of a considerable number of people of both large and small means. Confidence has been widely shaken as to whether money given to the Arboretum would be used for the purposes for which the Arboretum primarily exists or whether its funds and property would be diverted to other purposes which, however worthy, are not the purposes of the Arboretum. There is little or no prospect that substantial gifts can be obtained unless and until this situation is cleared up.

This lack of confidence has been accentuated by the refusal of the Harvard Corporation to seek the court's instructions in accordance with the common practice of trustees where a question is raised by responsible persons as to whether the trust is being carried out. The

Corporation has many times been requested by the Visiting Committee and its representatives to institute such proceedings. As has been stated above, the propriety of such action was emphasized in the report of counsel to the Visiting Committee dated March 1, 1952, and the Corporation was urged to follow this course in the resolution of the Visiting Committee of April 29, 1952, and at various times thereafter. The Corporation was again asked to file a petition for instructions, with particular reference to its right to remove the major part of the library and herbarium, in the aforementioned letter of Messrs. Dodge and Farley to President Conant of December 22, 1952, (Exhibit "B"). The same request was renewed in writing after the publication of the resolution adopted by the Corporation on January 19, 1953. The Corporation, however, ignored or refused all these requests.

12. In view of the foregoing, counsel for the petitioners conceived that this was plainly a situation in which, according to all the precedents, the Attorney General should permit the use of his name in the bringing of proceedings to determine whether the trust (with which the Corporation had finally conceded the Arboretum property to be charged) was in prospect of abuse. Accordingly, counsel for the petitioners, in April 1953, informed the respondent that they represented certain persons who were interested in a case involving a public charity and feared that a breach of trust was imminent, and they requested that he permit the use of his name in an information to be brought with a view of obtaining a declaratory decree. The respondent notified counsel that they should take the matter up with Assistant Attorney General Booras and they did so.

13. After a telephone talk with Mr. Booras counsel sent him a copy of their report of March 1, 1952, referred to in paragraph 5 above and in other paragraphs, and by two letters to him outlined the nature of the controversy and requested an opportunity to talk with him. This opportunity was given them on April 30, 1953, and at the interview counsel discussed the case at considerable length, advanced various arguments in support of their contentions, stated that it might be impossible except by a suit in the name of the Attorney General to

bring the question at issue before the court, and gave him the names of ten responsible persons who were willing to act as relators, of whom nine are among the present petitioners, the other being incapacitated by illness.

It was further pointed out that, in deciding whether to permit the use of his name the Attorney General was not called upon to decide the merits of the controversy, but that, according to long established usage, permission should be granted if it appeared (1) that the matter was of public importance and that responsible citizens, acting in good faith and with no object other than to secure the performance of a charitable trust in accordance with the intent of the donors, were prepared to assume the expenses of the proceeding and in particular to make themselves liable for costs, and (2) that, whatever might be the Attorney General's personal views as to how the issues of fact and law ought to be decided, these issues were clearly a fit subject of judicial inquiry. Counsel called Mr. Booras' attention to certain opinions of former Attorney General Knowlton, in which these principles were in substance stated.

Thereafter counsel learned that Mr. Booras had been in consultation with various representatives of the Corporation, including its legal adviser, and wrote him on May 2, 1953, stating that as counsel for friends of the Arboretum, who were the moving parties in the matter, they should have an opportunity to reply to any arguments which might have been made by the representatives of the Corporation in their effort to prevent the use of the Attorney General's name. Mr. Booras accordingly set a further meeting for June 9, 1953, and on that day counsel for the present petitioners, with Grenville Clark, one of the petitioners, had a conference with Mr. Booras. The matter was again reviewed before him, but he gave no intimation as to what arguments had been made on behalf of the Corporation or what further information, if any, he needed. At no time was there any hearing in the legal sense. No evidence was offered or taken at any time. Mr. Clark made a statement in accord with a memorandum, copy of which is hereto annexed marked "D", and certain decisions of our court were referred to.

14. No further communication passed between the petitioners and the respondent or his assistant until July 3, 1953, when counsel received from Mr. Booras a memorandum of his decision, of which a copy is hereto annexed marked "E", denying the application for the use of the Attorney General's name.

15. The petitioners submit that from this memorandum and from the facts hereinbefore recited it is apparent that the office of the Attorney General has misconceived its duty in the premises.

If the conclusion set out in Mr. Booras' memorandum be assumed to be that of the respondent, he must be taken to have permitted himself to be materially influenced by irrelevant considerations. While the petitioners recognize that the course to be taken lies in a general sense within the discretion of the respondent, they submit that, if his decision in a given case is manifestly affected by errors of law or he has failed to give the parties a proper hearing, the court has power to command him to vacate the defective decision and to give such a hearing and in arriving at a further conclusion to give weight only to those considerations which are as a matter of law relevant, excluding all other considerations.

16. The petitioners submit that in the following particulars, among others, the decision now in question is repugnant to the principles upon which the respondent is required to act:

(a) The respondent has assumed, without hearing any evidence, to refuse the present application because of a belief that the weight of the arguments on one side and on the other is with the Corporation, whereas he should have gone no further with respect to the probable outcome of the contemplated proceeding than to satisfy himself as to whether the issues—whatever his personal judgment upon them,—are a fit subject for judicial inquiry.

(b) The respondent has based his conclusion largely upon what

he calls "the practical construction and decision of the University, which has been administering the endowment through so many years", whereas there has been no "practical construction" in any proper sense with respect to the present issues because the removal of the library and herbarium from the Arboretum was never seriously suggested by anybody prior to the promulgation of the Bailey Plan.

(c) The respondent has proceeded on the assumption that the rule applied in *Holmes v. Welch*, 314 Mass. 106, governs the present situation. This assumption is unwarranted. In *Holmes v. Welch* the controversy was as to whether the court should override the judgment of the trustees in a matter which was committed by the express terms of the trust instrument to their discretion and as to which they had no adverse interest. In the present case the object of the trust as defined in the trust indenture is primarily the establishment and support of an Arboretum on a particular site in West Roxbury and admits of the carrying on of research as an activity of the institution thus localized, no discretion with respect to the transfer of any such activity being vested in the trustee. Moreover, the interest of the Corporation as trustee in the present case is essentially adverse in that the Corporation has many other interests to protect and forward, so that, far from there being any presumption in favor of the course taken or proposed by the trustee as regards the Arboretum, that course can be sustained only by showing beyond all reasonable doubt that it will promote the objects of the trust, i.e., the best interests of the Arboretum alone. In the present case, there is at least a sharp conflict of expert opinion as to whether the proposed removal of the library and herbarium will be in the best interests of the Arboretum; and the Corporation is manifestly in no position to make an impartial and final decision as between these opinions.

(d) The decision of Mr. Booras asserts that "there will continue to be a library and herbarium at Jamaica Plain adequate for arboretum activities there". There is no warrant for this conclusion, particularly in view of the facts that scientific research has been and should be a

principal activity of the Arboretum and that it is proposed to remove from Jamaica Plain most of the material relating to such research, namely, the "main body of the library and herbarium related to research".

(e) The statement with which the respondent's memorandum closes,—“To permit the use of the name of the Attorney General in cases like the present, where it is clear to him the trustee is acting in good faith and within the bounds of reasonable judgment and sound discretion, simply because others, equally in good faith, differ with the decision of the trustee, would open the door to unreasonable and vexatious litigations.”—exhibits a fundamental misconception. The petitioners do not suggest that the Corporation is not acting in good faith. Their contention is that the matter in question does not lie within the field of “reasonable judgment” or “sound discretion” because, as admitted by the Corporation, the trust must be administered in the best interests of the Arboretum, and because on the facts the course which the trustee favors is not in the Arboretum's best interests, and consequently there is no justification for the proposed action as matter of law, even though the trustee, having adverse interests, asserts the contrary.

(f) Mr. Booras gave the parties no hearing in any proper sense and was in no position to make findings of fact, as he assumed to do, upon the merits of the controversy.

(g) The respondent improperly delegated to Mr. Booras the final determination of the matter, and the decision, as appears on its face, is not the respondent's. but that of Mr. Booras.

The petitioners therefore pray that the court issue a writ of mandamus commanding the respondent to vacate the decision embodied in the memorandum above referred to and (1) to grant the petitioners a hearing in the proper sense of the term, and (2) to reconsider the petitioners' application and to grant it if, upon full personal considera-

tion of the facts and of correct principles of law, it appears that the issues which the petitioners seek to raise are fit subjects for judicial inquiry, even though it may appear to him that the past and proposed action of the Corporation complained of is not contrary to the best interests of the Arboretum and is within the terms of the trust.

ROBERT G. DODGE

J. W. FARLEY

ENDICOTT PEABODY

Attorneys for the Petitioners.

A.

This Indenture made and executed on this twenty ninth day of March in the year of our Lord one thousand eight hundred and seventy two, by and between George B. Emerson, John J. Dixwell, and Francis E. Parker, Esquires, as they are Trustees under the will of James Arnold, late of New Bedford, in the County of Bristol, Merchant, deceased, Party of the first part, and The President and Fellows of Harvard College, Party of the second part, Witnesseth,—

That whereas the said James Arnold by his last will devised and bequeathed to the said party of the first part one and a quarter twenty fourth parts of the residue of his estate “in trust, to be by them applied for the promotion of Agriculture or Horticultural improvements, or other Philosophical or Philanthropic purposes at their discretion, and to provide for the continuance of this trust hereafter to such persons, and on such conditions as they, or a majority of them, may deem proper, to carry out the intention of the donor”;—

And whereas Benjamin Bussey late of Roxbury in the County of Norfolk, Merchant, deceased, by his last will and testament devised to the said party of the second part an estate in remainder subject to

certain life estates in the estate on which he had lived in said Roxbury, called "Woodland Hill", consisting of over two hundred acres of land, in trust and confidence that they would "establish there a course of instruction in practical agriculture, in useful and ornamental gardening, ✓ in botany, and in such other branches of natural science, as may tend to promote a knowledge of practical agriculture and the various arts subservient thereto, and connected therewith, and cause such courses of lectures to be delivered there, at such seasons of the year, and under such regulations as they may think best adapted to promote the ends designed:—the institution so established to be called the "Bussey Institution";—

And whereas the said party of the first part have agreed and determined, in the exercise of the discretion given them under the will of the said James Arnold, that the disposition of the property devised and bequeathed to them as aforesaid in the manner and for the purposes and upon the conditions hereinafter set forth 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, to carry out the intention of the donor.

Now therefore it is agreed, bargained, and covenanted by and between the said Party of the first part and the said party of the second part as follows:—

First, The said Emerson, Dixwell, and Parker, Trustees, party of the first part, in consideration of the covenants agreements and undertakings of the said President and Fellows hereinafter set forth do hereby give, grant, bargain, sell, convey, assign and transfer to the said President and Fellows of Harvard College, party of the second part, and their assigns forever, the whole property and estate devised and bequeathed to them, the party of the first part, under and by virtue of the will of the said James Arnold, which has been already received or shall be hereafter received by the said party of the first part, (excepting and reserving therefrom a sum sufficient to pay the actual

expenses incurred by said party of the first part) a schedule of which so far as received is hereto annexed, 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, namely,—

That the said party of the second part shall hold the same as a separate and distinct fund, and shall allow the whole nett income thereof, (after deducting the necessary expenses of managing the same, and also deducting, if they see fit one third part of such nett income in each year as is hereinafter provided,) to accumulate and add the same to the principal, until the said fund shall amount, at a just valuation, to One hundred and fifty thousand dollars, and until the land at West Roxbury hereinafter described shall come into the possession of the said party of the second part as an estate in possession free of all life tenancies, or other incumbrances.

Second, When both said events shall have happened, that the said party of the second part shall accumulate five per centum of the said nett income, in every year, and add the same to the capital, as a part of the said permanent and separate trust fund.

Third, That the said party of the second part shall devote the remainder of the said nett income in every year, 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 labelled, 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.

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.

Fourth, Until the happening of both of the events named in the first clause, the said party of the second part may expend one third part of said nett income in every year, and no more, in such preparation of the land hereinafter named, and in such collecting or raising of specimens, and the necessary superintendence thereof, as will promote the general and ultimate purpose above stated, but in no other way.

Fifth, 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.

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 trusts herein declared; and further, in consideration of said transfer and payment, they agree to dedicate exclusively to the purpose of said Arboretum, a parcel of land lying in West Roxbury, in the County of Norfolk, shewn on the plan accompanying and to be recorded with this indenture, and bounded and described as follows, namely, beginning at the junction of South Street and Bussey Street in said West Roxbury, and bounded Southerly and Southeasterly on said South Street about three thousand one hundred and eighty five feet; northerly and north-easterly on land of Bradstreet about one thousand four hundred and thirty eight feet; northeasterly on land of Goldsmith about nine hundred

and fifty five feet; northwesterly on land of Weld about nine hundred and thirty feet; northwesterly and northerly on land of Lewis about twelve hundred and twelve feet; northwesterly on Centre Street about thirteen hundred and twenty feet; Southerly and Southwesterly on land of Howard about thirteen hundred and four feet; westerly on land of Smith about two hundred and ninety feet; and Southwesterly on Bussey Street about thirteen hundred feet to the point of beginning. The said land is part of the land devised to the said President and Fellows of Harvard College by the said Benjamin Bussey, as before recited, by his will which is of record in the County of Norfolk; and the interest of the said President and Fellows therein is an estate in remainder which will become an estate in possession upon the expiration of certain lives now in being; and it is hereby agreed that from and after the time when said estate becomes an estate in possession the said President and Fellows will hold the same as hereinbefore declared and not otherwise. But it is agreed and provided, nevertheless, that the said President and Fellows may reserve out of said land for the purpose of sites for school buildings, green houses, tool houses, and other like buildings, and of the grounds appurtenant to such buildings, and of the mansion house, such a parcel, or such parcels of land as they may deem necessary, not exceeding in all fifteen acres; and it is provided also that for the purpose of fixing the time when the said President and Fellows shall be entitled to use the entire income (less five per centum) of the said accumulated fund, the life estate now existing of Thomas Motley, Esquire, in one parcel of said land, shall not be considered as a life estate or incumbrance within the intent of this agreement.

In witness whereof the said George B. Emerson, John J. Dixwell and Francis E. Parker, Trustees, Party of the first part, and the said President and Fellows of Harvard College, Party of the second part, by Charles W. Eliot, President, and Nathaniel Silsbee, Treasurer of said College, have hereunto set their hands and seals on the day and year first above named.

(Signed and acknowledged by the three trustees named in the first paragraph of the indenture and, in behalf of the President and Fellows, by Charles W. Eliot, President, and Nath. Silsbee, Treasurer.)

December 22, 1952

President James B. Conant
Massachusetts Hall
Cambridge 38, Massachusetts

Dear Mr. Conant:

We enclose a suggestion for a statement of policy in the Arnold Arboretum matter. As to paragraphing it follows the proposed statement of policy contained in the resolution of the Overseers' Co-ordinating Committee on the Biological Sciences dated November 7, 1952, except that it contains one additional paragraph numbered 10. It embodies changes from the statement proposed by the Co-ordinating Committee which if acceptable to the Corporation would enable us to say to the Overseers' Committee to Visit the Arnold Arboretum that the statement of policy meets the legal points we have raised and that it would seem to us to offer a reasonably satisfactory solution.

One important point is disposed of by the Co-ordinating Committees' proposed statement of policy, namely that the Bailey Plan should not apply to the Arboretum. Nevertheless, questions remain as to the application of this statement.

The addition of a second sentence in paragraph 1 of the enclosure is intended to make explicit a point which we think fundamental, i.e. that the Corporation recognizes its obligation as trustee of the Arboretum's tangible property and funds to administer the trust in the sole interest of the Arboretum.

No change is suggested in paragraph 6. The suggested changes in paragraphs 1, 2, 3, 4, 5, 7 and 8 relate in one way or another to what may be called the administrative relations between the Arboretum and the University. They are, in general, designed to give clear recognition

As to paragraph 9, you will see that it states a policy contrary to that of paragraph 9 in the statement proposed by the November 7th resolution. Instead of finding that the removal of the main body of the Arboretum's library and herbarium to Cambridge is in the Arboretum's interest, it states that in view of serious doubt in this regard the removal will not occur.

On the basis of the evidence available to us this conclusion could be stated more strongly to the effect that such a removal appears definitely contrary to the Arboretum's interests. Since this is a fundamental point, we wish to cite certain reasons why, as we believe, such a removal would in fact be against the Arboretum's interests and therefore unjustifiable on the part of the Corporation as trustee.

We believe that an impartial consideration of the facts will show that whatever the advantage to Harvard and its botanical or biological departments from moving important parts of the Arboretum's library and herbarium to Cambridge, this would be disadvantageous to the Arboretum. It would, we believe, be disadvantageous to its usefulness to the public, to its achievement in its general scientific field, to its contribution to horticulture and botany in its special fields, to its future financial support, and to the reputation and prestige which are essential for its greatest usefulness.

The Arboretum can best be described as a horticultural-botanical institution because two separate yet interrelated and mutually supplementary sets of activities are carried on there. The institution is admirably equipped for this interrelated work. It has:

(1) a fine collection of some 6000 species and varieties of trees and woody plants in an area of 425 acres (including the Weston property) of which it was recently said by a good authority that "there is no other comparable collection and there is not likely to be for many years";

(2) an outstanding and unique library;

(3) an excellent herbarium;

(4) an endowment of over \$4,000,000. and many loyal friends;
and

(5) an excellent staff combining horticultural with botanical knowledge and skills.

It is, therefore, a well rounded and integrated institution, which is a prime reason why it enjoys such great prestige here and abroad.

The effect of the removal of the main body of the library and collections to Cambridge would be to break up this integrated institution. By dividing the facilities it would also divide the time of the Arnold Professor and his staff between Jamaica Plain and Cambridge. It would require some or all of them to shuttle back and forth to a disconcerting and wasteful extent. The net result would be gravely to impair the Arboretum's work; some say virtually to destroy it.

In thus impairing its work the removal would impair the Arboretum's reputation and make it difficult or impossible to find a man of first class ability, with proper qualifications in horticulture as well as in botany, who would be willing to accept the position of Arnold Professor.

On the other hand, if the present integration of horticultural-botanical activities can be not only maintained but developed, there is a great future ahead for the Arboretum, both scientifically and in serving the vast new public which is just beginning to be interested in horticulture.

We feel that many of those who have advocated the Bailey Plan, including the removal feature, as applied to the Arboretum, have not done so with the basic principle clearly in mind that the trust of the Arboretum's property and endowments must be administered with an eye single to the Arboretum's interests. We feel that if they approached the matter as tested by that criterion, rather than from the standpoint of the general effect of the removal on the University's botanical interests as a whole, many of them would be unable to say that the removal could or would benefit the Arboretum.

It may be that some might still argue that the removal would benefit the Arboretum itself as well as the combined botanical activities; but we judge that any such opinions would be more than offset by the weight of impartial testimony to the contrary.

We hope that the Corporation will see fit to recognize that there is at least grave doubt as to whether the removal would be in the Arboretum's interest and will, consequently, cancel that feature of the Bailey Plan. If so we believe that it should be possible to agree on language covering the various points on the administrative matters. If not, we believe that the best course would be a submission to the Courts through a petition by the Corporation as trustee.

We wish to add our regret that conferences on this matter were not held long ago. After receiving the Co-ordinating Committee's resolution of November 7, 1952, we met on November 23rd with the Co-ordinating Committee and with a committee of the Corporation on December 15th. These meetings were the first opportunity the representatives of the Visiting Committee had been granted to confer with the Co-ordinating Committee or the Corporation. We feel that an earlier meeting would either have resulted in an agreement, or in submitting the matters in question for judicial decision as to the duties of the trustee. In either case, the present questions would already have been settled or be in a fair way to be determined.

The long delay and uncertainty have been damaging to the Arboretum, partly because under the circumstances it has been impossible to seek large gifts or legacies. As a result of the recent meetings we think it should be possible to reach an understanding without much further delay. It is our belief that these matters should now either be agreed upon or submitted to the Courts.

We are sending copies of this letter and the enclosed draft to Mr. Laird Bell as chairman of the Co-ordinating Committee.

We shall be glad, if desired, to confer further with the Co-ordinating Committee, the Corporation's committee or counsel.

Sincerely yours,

ROBERT G. DODGE
J. W. FARLEY

Enc.

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C.

*Resolution adopted by the Harvard Corporation on
January 19, 1953.*

Resolved that, upon the recommendation of the Board of Overseers and after further consideration, the Corporation hereby adopts the following statement of policy to govern the administration of the Arnold Arboretum and the use of all funds held by the Corporation in trust for the purposes of the Arboretum:

1. The plan contained in the Bailey Report of June 1945 shall not apply to the Arboretum or to the principal or income of its endowment. The Corporation recognizes that the property and endowment held for the purposes of the Arboretum are 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.

2. As soon as is practicable, the President, after consideration of the advice and recommendations of an *ad hoc* committee, will nominate and the Corporation will appoint an Arnold Professor, bearing in mind that the Arnold Professor should have among his qualifications a demonstrated interest in and knowledge of the care and management of an arboretum for the collection, cultivation and development of trees, shrubs and herbaceous plants and activities incidental thereto.
3. The Arnold Professor shall have the care and management of the Arboretum, subject to such control on the part of the Corporation as is given it by the terms of the Indenture of 1872 and of later gifts for the purposes of the Arboretum. In the exercise of such control and its duties as trustee of endowment funds held in trust for the purposes of the Arboretum, the Corporation will act through the President, who may be assisted by such other administrative officer or officers as the Corporation may from time to time designate. The Arnold Professor shall have the right to discuss with the President any matters concerning the care and management of the Arboretum.
4. As to tenure, since the duties of the Arnold Professor are largely administrative, the Corporation believes that for the protection of the Arboretum's interests he should be removable not only "for grave misconduct or neglect of duty", as now provided in the case of officers of instruction, but should also be subject to removal if, having in mind only the Arboretum's interests, the Corporation determines that his administration is not a successful one. In connection with his additional duties under the terms of the Indenture of 1872 to "teach the knowledge of trees in the University" and to "give such other

instruction therein as may be naturally, directly and usefully connected therewith", the incumbent of the Arnold Professorship shall also be appointed Professor of Dendrology and, as such, shall hold tenure in the University as an officer of instruction of professorial rank.

5. Recommendations for other appointments to the staff of the Arnold Arboretum may be initiated from time to time by the Arnold Professor or by the President and all such appointments shall be made in accordance with the procedures followed in connection with other Corporation appointments of like rank, including the use of *ad hoc* committees.
6. The annual budget of the Arnold Arboretum shall be prepared by the Arnold Professor or under his direction and shall be submitted to the Corporation through the President and such other administrative officer or officers as the Corporation may from time to time designate, whose comments and recommendations may accompany those of the Arnold Professor.
7. The annual net income from the endowments of the Arnold Arboretum shall at all times be expended for purposes within the terms of such endowments and in such manner as is in the best interests of the Arboretum. For the present, such net income (except in the case of gifts expressly designated for a particular purpose of the Arboretum) shall be first applied to the support of the living collections and buildings at Jamaica Plain, the Arnold Professorship, and the library and herbarium of the Arboretum, and thereafter, to the extent available, to the support of all other Arboretum activities, including instruction and research in fields of knowledge related to trees, shrubs and herbaceous plants.
8. The activities supported by the endowment of the Arnold Arboretum may be coördinated with other University activities in botany to the extent that such coördination is in the best interests of the Arboretum and will promote the purposes of its endowment. Proposals for such coördination may be

initiated from time to time by the Arnold Professor or by the President. The Arnold Professor shall be *ex officio* a member of the University's Biological Council.

9. These policies and arrangements contemplate fruitful and harmonious coöperation between the Arboretum and other parts of the University and the coördination of activities to the extent that such coördination is in the best interests of the Arboretum. The corporation is confident that these relations will develop successfully.
10. In the exercise of its duties as trustee of endowment funds held in trust for the purposes of the Arnold Arboretum, the Corporation determines 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 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 books and specimens to be so housed in Cambridge shall be appropriately identified as a part of the Arboretum and shall remain under the care and management of the Arnold Professor. The Arnold Professor and the Director of the University Library shall recommend to the Corporation through the President what books are to be retained at Jamaica Plain. The Arnold Professor and the Director of The New York Botanical Garden shall recommend to the Corporation through the President what specimens are to be retained at Jamaica Plain. No part of the cost of the construction of the central building in Cambridge shall be borne by Arboretum funds, the entire cost to be provided from unrestricted funds of the University. A part of the expense of the annual maintenance and operation of the central building (as distinguished from the care and maintenance of the library and herbarium of the Arboretum housed therein) shall be charged to the income of the Arboretum endowment in accordance with the standard procedure of the University for allocating such costs.

*Notes of Grenville Clark for a Statement to the
Attorney General on June 9, 1953.*

I. Ten citizens long interested in the Arnold Arboretum and Harvard University are applying for leave to bring a suit in the name of the Attorney General to test the question whether it would be a breach of trust to carry out the vote of the Harvard Corporation (the President and Fellows of Harvard College) dated January 19, 1953. These persons are John S. Ames (Boston), Godfrey L. Cabot (Boston), Grenville Clark and Mrs. Grenville Clark (Dublin, N. H.), Mrs. Francis B. Crowninshield (Boston and Delaware), Henry F. duPont (Winterthur, Del.), Childs Frick (Roslyn, N. Y.), Mrs. Louis A. Frothingham (Boston), Mrs. Susan Delano McKelvey (Boston), and Ellery Sedgwick (Beverly). All of the above except Messrs. Sedgwick and Clark are members of the Harvard Overseers' Committee to Visit the Arnold Arboretum.

Following the Harvard Corporation's vote of January 19, 1953 this group asked Messrs. Robert G. Dodge and J. W. Farley (who had jointly been counsel for the Visiting Committee in relation to the application of the so-called Bailey Plan to the Arboretum) to advise whether the carrying out of certain features of the Plan set forth in the January 19 vote would or might involve a breach of trust and whether the Courts of Massachusetts might so determine, if the matter were litigated. After very careful inquiry, including consultation with some fifteen leading authorities throughout the country in no way connected with Harvard, counsel advised that the Courts would very possibly so hold. On this basis the group, being previously convinced that the carrying out of the vote would in fact gravely injure the Arboretum, asked counsel to make this application for leave to bring a suit to test the legal issues.

II. The main question, I assume, is whether there is a reasonable possibility that the Courts would hold that the carrying out of the

January 19 vote would involve a breach of trust,—especially in that feature of the vote (Par. 10) which calls for the removal from Jamaica Plain to Cambridge of the “main body of the library and herbarium of the Arboretum related to research * * *”.

III. In my judgment there is much more than a reasonable possibility that a judicial tribunal would find that the carrying out of the vote would involve a breach of trust. I was a member of the Harvard Corporation at the time the Bailey Plan was approved in 1946 and until November 27, 1950. I am very familiar with the circumstances under which the Bailey Plan was originally approved by the Corporation in 1946; and ever since the Visiting Committee in 1949-'50 raised serious questions about the application of the Bailey Plan to the Arboretum, I have thoroughly studied the facts and the various opinions of counsel. On this basis, together with my experience as a practicing lawyer in New York 1906-'46 (during which I had experience in questions relating to the duties of trustees), my judgment is that it is very likely that an experienced and impartial tribunal would decide that the carrying out of the vote would not be in the interests of the Arboretum and consequently would forbid it as a breach of trust.

IV. The reasons for my conclusion include the following:

Although by Paragraph 1 of the vote the applicable principle of law is no longer in dispute, i.e. that the Corporation holds the Arboretum's property and endowment on a special trust to be administered “with a view to the best interests of the Arboretum”, this admitted principle is contradicted in practice by Paragraph 10 which purports to “determine” that the removal to Cambridge of the main body of the library and herbarium related to research will be in “the best interests of the Arboretum and will promote the purpose of its endowment”.

This contradiction is because, in the practically unanimous opinion of the impartial authorities who were consulted, the removal of most of the library and herbarium from the headquarters in Jamaica Plain

would break down the integrated character of the institution. And, whether or not the removal would help botany at Harvard or elsewhere, their virtually unanimous opinion was that this would clearly be adverse to the Arboretum as an institution. This opinion rests on the proposition that a distinguished horticultural-botanical institution like the Arboretum needs *to have together* in one location the three main elements requisite for a well-rounded institution of this character, namely: (a) An excellent horticultural-botanical library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs. The Arboretum now has all three of these. Its library has 60,000 books and 20,000 pamphlets and is nearly, if not quite, unique. Its herbarium has 600,000 specimens and is of great value. Its living collection, containing some 6,000 species and varieties, is probably the most complete and famous American collection of this sort. The conjunction of these three elements in one place is what has given the Arboretum a world-wide status and reputation. To break up this integration by removing the major part of its library and herbarium to Cambridge may or may not benefit botany. But a very powerful weight of opinion can be produced to the effect that it can do nothing but damage to the Arboretum as a scientific institution.

A considerable number (some fifteen in all) of the best authorities in the United States outside of Harvard have been consulted by personal interview on this question. They include men of long experience and great distinction in this field.

The virtually unanimous opinion of these authorities is that the break-up of the present integrated character of the Arboretum would injure the morale of the Arboretum's staff, reduce its usefulness and prestige and would, consequently, be against its interests. There is no doubt in my opinion that the number of impartial authorities who would hold the same opinion could be largely increased and that on the trial of a litigation a very weighty body of testimony could be adduced to this effect. It may or may not be that important testimony to the contrary could be brought forward, but it is certain that no Court

could lightly dismiss the body of impartial and authoritative professional opinion which could and would be marshaled to show that the carrying out of the removal feature would be destructive of the Arboretum's interests.

My opinion is that after hearing the testimony and notwithstanding any presumption that might exist in favor of the Corporation's "determination", an experienced Master or Judge would find it difficult to avoid the conclusion that a breach of trust would be involved.

V. Apart from the opinion of the above-mentioned professional authorities, the strong conviction of the persons making this application ought to have weight. They are united in the belief that the carrying out of the January 19 vote would very gravely damage the Arboretum and, far from being in its interests, would be precisely the opposite to a serious extent. All of the ten persons here applying have had a long and close association with the Arboretum and a number of them are themselves highly qualified to give opinions of importance on the issue involved. For example, John S. Ames is President of the Massachusetts Horticultural Society and is well known in the horticultural world. Henry F. duPont has himself one of the best American collections of plants and shrubs; and is a Director of the New York Botanical Garden and other horticultural-botanical organizations. Childs Frick has his own arboretum at Roslyn, N. Y., which he has personally supervised for many years; has been in close touch with the Arnold Arboretum for a generation; and has studied this issue with the utmost care. Mrs. McKelvey is really a professional herself; she is the author of excellent horticultural-botanical books and has been a member of the Visiting Committee for many years. There are others of the group such as Mr. Cabot and Mr. Sedgwick whose opinions are entitled to weight. Altogether the united judgment of these ten persons that the carrying out of the January 19 vote would gravely injure the Arboretum ought not to be ignored; on the contrary, it should be given substantial weight.

VI. It may be argued that the removal of most of the library and

herbarium to Cambridge would meet a problem of safe housing for these valuable books and specimens and that this may offset the argument that the separation of the library and herbarium from the living collections is contrary to the Arboretum's interests and therefore a breach of trust. It is true that the library and herbarium need safer and better housing in Jamaica Plain. But it is also true that this problem has been carefully considered and that there is a perfectly feasible solution for it if there is no removal to Cambridge. This solution is to build a new fireproof and air-conditioned wing on the Arboretum's headquarters building in Jamaica Plain, transfer the herbarium to it and house the library in the present fireproof quarters which now contain the herbarium. The cost of this is estimated at not over \$200,000 which could be financed in various ways. One feasible method would be: (a) To use the Arboretum's "building fund" established in 1892 amounting to \$91,223; (b) to apply the Arboretum's "credit balance" with the University which amounted as of June 30, 1952 to \$63,495; and (c) to obtain the needed balance of, say, \$50,000 by subscription from friends of the arboretum. As to the last, there could be no doubt of the ability to raise the needed amount since the many friends of the Arboretum would be so relieved by the cancellation of this threat to its future that they would undoubtedly subscribe this amount, or even more, to meet the housing problem once it were known that the Bailey Plan had actually been withdrawn in all its features as applied to the Arboretum.

In this connection it must be remembered that Paragraph 10 of the January 19 vote calls not only for the removal of most of the library and herbarium to Cambridge, but also for the use of a substantial amount of the Arboretum's income (estimated at \$12,000 per annum for the present) for "the annual maintenance and operation of the central building" to which the Arboretum's books and specimens would be moved. The minimum cost of this maintenance would require the income of \$250,000 of the Arboretum's endowment and this might run much higher in later years.

VII. There are the strongest practical reasons why the clearing up of this legal issue through a decision of the Supreme Judicial Court is advisable.

The Arboretum has many friends not only in Massachusetts, but elsewhere. It has an endowment of over \$4,000,000. It has taken the lead in the development of horticulture in this country. It is one of the most distinguished, if not the most distinguished, horticultural-botanical institutions in the country. It is a credit to Boston and Massachusetts. It has a great field of future usefulness; and its future could be as distinguished as its past. It is, however, dependent on continued support, moral and financial, of a considerable number of people of both large and small means. Confidence has now been widely shaken because of the doubt as to whether money given to the Arboretum will be used for the purposes for which the Arboretum primarily exists or whether its funds and property will be diverted to other purposes which, however worthy, are not the purposes of the Arboretum. There is little or no prospect that substantial gifts can be obtained unless and until this situation is cleared up.

This lack of confidence has been accentuated by the refusal of the Harvard Corporation voluntarily to seek the Court's instructions in accordance with the almost invariable practice of a responsible trustee, where a question is raised by responsible people as to whether the trust is being carried out. This refusal has made a painful impression in many quarters.

A judicial determination is therefore necessary in order to clear up once and for all the question whether a breach of trust is involved. If the Court's ruling is that the carrying out of the January 19 vote would involve a breach of trust the way would be open to solve the housing problem and to obtain new and large gifts which it is now impossible even to solicit. If, on the other hand, the decision is that no breach of trust would be involved, that cloud would at least be lifted.

Mr. Booras' Decision.

Application has been made to the Attorney General for the filing of an information against the President and Fellows of Harvard College as Trustee of the Arnold Arboretum, alleging, in substance, that the proposed removal of the major part of the library and herbarium of the Arboretum to a central botanical building in Cambridge is inconsistent with the terms of the Arboretum endowment and constitutes a legal breach of trust.

I was assigned by the Attorney General to hear all parties in the dispute and resolve upon a decision in the matter. In addition to my inspection of the Arboretum and the present edifice in which the library and herbarium are now housed, as well as the building now under construction in Cambridge where they are proposed to be transferred, I have given full and deliberate consideration to all arguments advanced for and against the transfer and to all documents and briefs filed with me.

The Arboretum Trust was created by an Indenture of 1872 under which its purposes were declared:

"... 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 of which shall be raised or collected as fast as is practicable, and each specimen thereof shall be distinctly labelled, 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."

All subsequent gifts to or for the Arboretum came under the terms of the original trust.

Thus Harvard as trustee was not only vested with the responsibility of control, management and development of an Arboretum, but also with that of teaching "the knowledge of trees in the University" and with the giving of "such other instruction therein as may be naturally, directly, and usefully connected therewith." In short, the trust had a double aim: establishment of an Arboretum and instruction at the University.

Under the trusteeship of Harvard the Arboretum has attained world-wide status and reputation and is considered one of the most distinguished horticultural-botanical institutions.

The Harvard Corporation has now decided by its vote of January 19, 1953, to remove the major part of the library and herbarium from the Arboretum to a new building in Cambridge and for the retention at Jamaica Plain of such books and specimens as may be required there for a working library and herbarium. Just what books and specimens are to be retained at the Arboretum will be determined upon the recommendation to be made by committees, of which the Arnold Professor will be a member. Thus, there will continue to be a library and herbarium at Jamaica Plain adequate for Arboretum activities there; and there will also be an arboretum library and herbarium in Cambridge where many Arboretum activities, such as "teaching in the University" and research in the horticultural-botanical science, will be conducted.

Indeed, neither express directives are found in the trust indenture for a library and herbarium at the Arboretum nor restraints as to their location or relocation when established. Even if any doubt existed in the matter, the practical construction and decision of the University, which has been administering the endowment through so many years, is to be given great weight and consideration.

The proposed relators have contended that the transfer will not only be against the best interest of the Arboretum but that it would cripple the Arboretum as an institution. They have cited many pro-

fessional authorities in support of this contention. On the other hand, the University maintains that the transfer would be solely for the best interest of the Arboretum and will more greatly promote the purposes and aims of the trust. Equally significant professional authorities approve and highly recommend the action.

The decision of a trustee "cannot be overridden by the courts unless the trustees decide arbitrarily, capriciously or in bad faith." *Holmes v. Welch*, 314 Mass. 106. There is not the remotest evidence here that Harvard has reached its decision in any manner other than honestly, faithfully and for what it considers to be the best interests of the Arboretum.

There is no legal breach of trust. To permit the use of the name of the Attorney General in cases like the present, where it is clear to him the trustee is acting in good faith and within the bounds of reasonable judgment and sound discretion, simply because others, equally in good faith, differ with the decision of the trustee, would open the door to unreasonable and vexatious litigations. Accordingly, by direction of the Attorney General, the application is denied.

(Sgd.) HARRIS J. BOORAS

July 2, 1953

Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPREME JUDICIAL COURT.

(SEAL)

On the foregoing petition it is ordered, that the petitioners give notice to the said respondent to appear before the Justices of this Court to be holden at Boston within and for said County of Suffolk, on Wednesday, the twenty-third day of December, current, at 9:30 o'clock, A.M. by serving him with an attested copy of said petition and of this order thereon, forthwith that he may then and there show cause why the prayer of said petition should not be granted.

By the Court, (RONAN, J.)

December 9, 1953

CHESTER A. DOLAN, JR., *Clerk.*

SUFFOLK, SS. SUPREME JUDICIAL COURT
FILED Dec. 9, 1953
CHESTER A. DOLAN, JR., *Clerk.*

In re Petition for Writ of Mandamus.

PETITIONERS' MOTION TO AMEND THE PETITION.

The petitioners move to amend their petition by adding the following allegations at the places indicated.

1. By inserting at the end of Paragraph 6(c) the following sentence:

"In the Sargent Fund brochure there is no reference to teaching in Cambridge by the Arnold Professor or by any other member of the staff of the Arboretum."

2. By inserting after Paragraph 6(f) the following unnumbered paragraph:

"We are advised that it is the intent of the Corporation to merge and intermingle the Arboretum books and herbarium specimens for shelving and storage with the various other botanical libraries and herbaria to be housed in the new central building in Cambridge. Any shelf of books in this new building may include half a dozen Arboretum books sprinkled in with botanical books from other collections. The only means of identifying Arboretum books or herbarium specimens will be by means of a book plate in the book or a stamped legend on the herbarium specimen and by an appropriate legend on the various cards in the central card catalogue. Once physically merged with the books and specimens of the Harvard botany collections, the Arboretum books and specimens will be under the effective control of the Institute of Research in General Plant Morphology. They will no longer be part of an identifiable Arboretum library or herbarium nor can they remain under the effective care and supervision of the Arnold Professor as required by the indenture."

3. By inserting after Paragraph 10 the following paragraphs:

"10(a). In the early years Professor Sargent maintained the office of the Arboretum at a house in Brookline near his residence and about a mile from the Arboretum. Here he began at his own expense the formation of a library and herbarium. The library had grown to about 6000 volumes in 1892, in which year Horatio Hollis Hunnewell furnished the Arboretum with money for the construction of the brick building at Jamaica Plain. When it was finished late in the year Professor Sargent gave his library to the Arboretum, and the library and herbarium, together with the offices, were moved to the new building. The library and herbarium have always been under the same roof with the Arboretum office from the founding of the Arboretum to the present time.

"The library and herbarium of the Arboretum were established as tools for the scientific research which has always been carried on at the Arboretum by its staff. Four members of the Arboretum staff are engaged in full time research at the Arboretum and much of this work leads to scientific publications of the kind which have added so much to the reputation of the Arboretum. We are informed that both in quality and in number the publications of the Arnold Arboretum equal or surpass those of the Harvard botany department and all other botanical agencies allied with Harvard combined.

"At no time has any Arnold Professor given any instruction in Cambridge. Graduate students from Cambridge have from time to time been given instruction at the Arboretum under the direction of members of the Arboretum staff and since 1928 certain staff members have given courses at the college to a limited extent.

"We are advised that the only students registered at Cambridge who would normally use the herbarium and library are graduate students majoring in taxonomy and engaged in research work; that in the average year there are only approximately 3 to 5 such graduate students registered at Harvard; that the extensive

collections of the Gray Herbarium in Cambridge, which includes an herbarium of 1,350,000 specimens and a library of more than 40,000 books and pamphlets, are entirely adequate for most of the graduate students working in taxonomy; and that Arboretum books and herbarium specimens are made freely available to the professional staff and graduate students in Cambridge by a courier service or at the Arboretum. We are further advised that undergraduate students taking courses in botany or majoring in that subject do not need and would not use the taxonomic collections of the Arboretum, and that there is no justification for any contention that the transfer of the Arboretum herbarium and library to Cambridge will appreciably facilitate either teaching or the advancement of knowledge in the field in which the Arboretum carries on its activities.

“There is nothing in the description of the Arboretum’s functions published in any of the Harvard University catalogues which refers to any teaching in Cambridge by any member of the Arboretum staff.

“In the catalogue of 1886-7 the functions of the Arboretum are thus described:

‘The Arnold Arboretum was founded for the purpose of scientific research and experiment in arboriculture, forestry and dendrology and as a museum of trees and shrubs suited to the climate of Massachusetts.

‘Anyone properly qualified to pursue the study of practical arboriculture or forestry may be admitted to the Arboretum as a student. Such students will be permitted to take part in the work carried on in the Arboretum as well as to make use of its library. They will also receive from officers of the Arboretum such assistance and advice in the study of any branch of arboriculture or dendrology as can be rendered without interference with current work. * * * Application for admission may be made to the Director, with whom the fee for instruction may be agreed upon.’

"Essentially the same statement appears regularly in subsequent catalogues. The Harvard University Catalogue for 1952-53 contains the following statement with respect to the Arboretum:

'The Arnold Arboretum was founded in 1872 for the purpose of furthering scientific research in dendrology and arboriculture, and providing a site for a garden of trees and shrubs suited to the climate of Massachusetts. . . .

'The living and reference collections and the Library may be used by qualified students and visiting specialists, who also have the opportunity of freely consulting staff members regarding problems in which they are interested. Individuals qualified to pursue the study of arboriculture and dendrology may be admitted to the Arboretum as students. For those interested in practical horticulture a series of popular demonstrations is available during the late spring and early summer. Prospective students or investigators should communicate with the individual staff member under whom they desire to work.' "

4. By inserting after Paragraph 16(g) the following paragraph:

"(h). The conclusions reached by Mr. Booras were evidently influenced by the letter written him by counsel for the Corporation on June 10, 1953, which is a part of the extended return in the certiorari case brought by the present petitioners against the Attorney General and numbered 53,612 on the docket of this court. This letter, which is marked Exhibit 11 to said extended return and is incorporated herein by reference and made a part of this petition, misstates the law in various respects.

ROBERT G. DODGE

J. WELLS FARLEY

ENDICOTT PEABODY

Attorneys for the Petitioners

SUFFOLK, SS. SUPREME JUDICIAL COURT

FILED Apr. 2, 1954

CHESTER A. DOLAN, JR., *Clerk.*

April 14, 1954

Allowed by the Court after hearing.

(LUMMUS, J.)

Attest: FRANK H. HALLETT, *Asst. Clerk.*

In re Petition for Writ of Mandamus.

RESPONDENT'S DEMURRER.

Now comes the respondent, George Fingold, Attorney General of the Commonwealth, and without waiving his motion to dismiss filed herewith, but expressly insisting upon the same, demurs to the petition generally and for grounds of demurrer assigns the four grounds recited in support of his motion to dismiss and in addition the following:

5. That the matters alleged in the petition are insufficient in law to entitle these petitioners to relief;

6. That in so far as respondent's decision may be reviewed upon this petition, such review must be confined to whether that decision was an abuse of discretion, and the petition does not state facts constituting an abuse of discretion;

7. That the petition does not state concisely and with substantial certainty the substantive facts necessary to constitute a cause of action, but consists largely of conclusions of law and verbose, argumentative, repetitious, impertinent, immaterial, and irrelevant matter, much of which is irrelevant not only to any judgment to be made of the correctness of respondent's decision and the manner in which it was reached, but also to the question of whether any breach of trust impends, so that it can have no bearing whatsoever on any issue raised by the petition.

GEORGE FINGOLD,
Attorney General of the Commonwealth

By HARRIS A. REYNOLDS
Assistant Attorney General

SUFFOLK, SS. SUPREME JUDICIAL COURT

FILED Dec. 23, 1953

CHESTER A. DOLAN, JR., *Clerk.*

In re Petition for Writ of Mandamus.**RESPONDENT'S MOTION TO DISMISS.**

Now comes the respondent George Fingold, Attorney General of the Commonwealth, and moves that the petition for writ of mandamus be dismissed on the following grounds:

1. That any controversy between petitioners and respondent raised by this petition is not justiciable and not within the jurisdiction of the Court to resolve;

2. That respondent's refusal to sanction the bringing of an information in his name against the trustees of the Arnold Arboretum is a decision not subject to judicial review;

3. That, as appears from the petition and particularly paragraph 1 thereof, the purpose of the petition is to secure a judicial determination of the question whether certain action by the trustees of the Arnold Arboretum trust would be a breach of said trust, whereas, as likewise appears from the petition and particularly paragraph 2 thereof, petitioners lack any private or special interest in said trust, and therefore lack standing to maintain the petition;

4. That the decision sought to be vacated by the writ of mandamus prayed for in the petition is committed by law to respondent's discretion and is not subject to control by writ of mandamus, which lies only to compel performance of ministerial acts.

GEORGE FINGOLD,
Attorney General of the Commonwealth

By HARRIS A. REYNOLDS

SUFFOLK, SS. SUPREME JUDICIAL COURT

FILED Dec. 23, 1953

CHESTER A. DOLAN, JR., *Clerk.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT

JOHN S. AMES, ET ALS

vs.

THE HONORABLE GEORGE FINGOLD,
as he is Attorney General of the Commonwealth of Massachusetts.

In re Petition for Writ of Certiorari.

RESERVATION AND REPORT.

This cause came on to be heard by me upon the respondent's substituted motion to dismiss, demurrer, and return to the petition as said return has been extended upon respondent's motion to extend return, and thereupon, the parties consenting, I reserve the case upon the petition, said substituted motion to dismiss, demurrer, and return, as extended, for the determination of the full court.

HENRY T. LUMMUS
J. S. J. C.

April 14th, 1954.

Petition for Writ of Certiorari.

To the Honorable the Justices of the Supreme Judicial Court:—

The petitioners above named respectfully represent as follows:—

I. The petitioners are desirous of obtaining a judicial determination of the question whether certain action taken or proposed to be taken by the President and Fellows of Harvard College (hereinafter referred to as "the Corporation") is or would be in the best interests of the Arnold Arboretum and consistent with the terms of an indenture of trust entered into under date of March 29, 1872, by George B. Emerson and others, trustees under the will of James Arnold, parties of the first part, and the Corporation, party of the second part, transferring a fund to the Corporation as trustee for the purpose of establishing and maintaining an Arboretum (to be called the "Arnold Arboretum") on over 200 acres of land in West Roxbury, Massachusetts, then belonging to the Corporation, and for the support of a professor who should be called the Arnold Professor and should have the care and management of the Arboretum. To this end the petitioners have applied to the respondent for the use of his name in bringing proceedings to determine whether the trust is in prospect of abuse. This application was, however, denied in a decision of Assistant Attorney General Booras.

II. The petitioners are advised that this denial of their application was improvident and erroneous as matter of law, and was made without any proper hearing and as a result of the improper delegation of the respondent's authority to the Assistant Attorney General. They have accordingly filed in this court a petition (No. 53611 on the law docket) for a writ of mandamus commanding the respondent to vacate the said denial of their application, to grant a hearing thereon and to decide the matter according to correct principles of law.

III. Being uncertain whether their remedy is a petition for mandamus or a petition for certiorari, the petitioners (not waiving their

said petition for mandamus, but insisting thereon) bring the present petition as an alternative means of attaining the desired relief, incorporating herein by reference Paragraph 1 to 16 inclusive of their petition for mandamus and adopting all the allegations of said paragraphs as if set forth verbatim herein.

Wherefore the petitioners pray that there be issued a writ of certiorari to set aside and quash the said denial of their application for the use of the respondent's name and that the respondent be required to grant a hearing on said application and to decide the matter in accordance with correct principles of law.

ROBERT G. DODGE

J. W. FARLEY

ENDICOTT PEABODY

Attorneys for the Petitioners.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPREME JUDICIAL COURT.

(SEAL)

On the foregoing petition it is ordered, that the petitioners give notice to the said respondent to appear before the Justices of this Court to be holden at Boston within and for said County of Suffolk, on Wednesday, the twenty-third day of December, current, at 9:30 o'clock, A.M. by serving him with an attested copy of said petition and of this order thereon, forthwith that he may then and there show cause why the prayer of said petition should not be granted.

By the Court, (RONAN, J.)

CHESTER A. DOLAN, JR., *Clerk.*

December 9, 1953

SUFFOLK, SS. SUPREME JUDICIAL COURT

FILED Dec. 9, 1953

CHESTER A. DOLAN, JR., *Clerk.*

In re Petition for Writ of Certiorari.**MOTION FOR SUBSTITUTION OF PLEADINGS.**

Now comes the respondent in the above entitled action and moves to substitute for his motion to dismiss and demurrer, heretofore filed, the pleading entitled Respondent's Motion to Dismiss, Demurrer, and Return attached hereto.

GEORGE FINGOLD,
Attorney General of the Commonwealth

By HARRIS A. REYNOLDS,
Assistant Attorney General.

**RESPONDENT'S MOTION TO DISMISS, DEMURRER,
RETURN AND ANSWER.**

Now comes the respondent George Fingold, Attorney General of the Commonwealth, and moves to dismiss the petition for writ of certiorari, and demurs thereto, on the following grounds:

1. That respondent's refusal to sanction the bringing of an information against trustees of a charitable trust in his name is not the act of a judicial or quasi-judicial tribunal and hence cannot be reviewed on a writ of certiorari.

2. That the proceedings of respondent in reaching his decision not to sanction the bringing of the information sought by petitioners were such that no formal record is available to return to this Court.

3. That respondent's refusal to sanction the bringing of said information is a decision not subject to judicial review.

4. That any controversy between petitioners and respondent raised by this petition is not justiciable and not within the jurisdiction of the Court to resolve.

5. That the petition shows no private or special interest of petitioners in the trust which would be the subject of their information, and they therefore lack standing to maintain the petition.

6. That the matters alleged in the petition are insufficient in law to entitle these petitioners to relief.

7. That the petition fails to state concisely and with substantial certainty the substantive facts on which the cause of action is based, is verbose and argumentative, and pleads irrelevant, immaterial, impertinent, and evidentiary matter.

Without waiving the above motion to dismiss and demurrer but expressly insisting upon the same, respondent certifies that the following return is a true record of all proceedings before him, and his doings with respect thereto, in the matter of the Arnold Arboretum trust:

1. In late April, 1953, attorneys for the petitioners notified respondent that they represented certain persons who claimed that the proposed removal to Cambridge of the greater part of the Arboretum library and herbarium now located at Jamaica Plain would constitute a breach of trust by the President and Fellows of Harvard College (hereinafter sometimes called the "Corporation" or the "trustee"). They requested respondent in his capacity as Attorney General to permit the use of his name on an information to be filed by such persons as relators to obtain a declaratory decree on that particular question: whether said proposed removal would be a breach of trust. Respondent promptly assigned to Assistant Attorney General Harris J. Booras (then the Assistant Attorney General in charge of the enforcement of charitable trusts) the duty to investigate the facts in controversy, to hear and study the arguments advanced by the petitioners and by the trustee, to ascertain the law relative to the subject matter in controversy, and to report fully to respondent.

2. In carrying out the aforesaid instructions, Mr. Booras did the following:

(a) He extended to counsel for the petitioners ample opportunity of presenting to him, both orally and in writing, all facts, arguments and law in support of their request.

(b) He held lengthy conferences with counsel for petitioners, who presented their arguments in such conferences and in letters, and who submitted to him in connection therewith various documents including a copy of the 85-page opinion of Robert G. Dodge, Esquire, and J. W. Farley, Esquire, dated March 1, 1952, on the Bailey Plan, referred to at page 4 of the mandamus petition incorporated by reference into this petition for writ of certiorari (filed with this return as Exhibit 1), a copy of the letter of Robert G. Dodge and J. W. Farley, dated December 22, 1952, a true copy of which is attached to the mandamus petition as Exhibit "B", a memorandum dated June 9, 1953 by petitioner Grenville Clark, a true copy of which is attached to the mandamus petition as Exhibit

"D", a five-page memorandum of law (filed herewith as Exhibit 2), a copy of a letter dated May 5, 1952 to the Members of the Committee to Visit the Arnold Arboretum from Robert G. Dodge and J. W. Farley, to which letter was attached a copy of the minutes of the meeting of said Visiting Committee on April 29, 1952, referred to at pages 10 and 11 of the mandamus petition (which letter and minutes are filed herewith as Exhibit 3), and a copy of the four-page vote suggested for adoption by the Corporation by Messrs. Dodge and Farley and referred to at page 11 of the mandamus petition (filed herewith as Exhibit 4).

In the course of said conferences, Mr. Booras informed counsel for the petitioners that he intended to consult with representatives of the Corporation, and counsel for the petitioners acquiesced in such procedure and informed him who were counsel for the Corporation. Neither during said conferences, nor to respondent personally, did counsel for petitioners request a type of hearing other than that which they received or a statement of arguments advanced by counsel for the Corporation. At no time did they suggest that, or ask whether, any information, other than that which they had already offered, was essential to a decision by respondent.

(c) He extended to Messrs. Ropes, Gray, Best, Coolidge & Rugg, counsel for the trustee, the President and Fellows of Harvard College, opportunity equal to that extended petitioners' counsel to submit to him facts, contrary arguments and law. As a result he had two conferences with such counsel and received from them a letter setting forth their views. He also received from such counsel a copy of the vote of the President and Fellows of Harvard College on January 19, 1953, a true copy of which is annexed to the mandamus petition as Exhibit "C", a copy of the elaborate 37-page brochure on the Arboretum referred to on page 6 of the mandamus petition (filed herewith as Exhibit 5), copies of plans of the Arboretum grounds (filed herewith as Exhibit 6), a copy of the 81-page opinion on the Bailey Plan of Messrs. Ropes, Gray, Best, Coolidge & Rugg dated May 1, 1951, and referred to at page

4 of the mandamus petition (filed herewith as Exhibit 7), copies of the Harvard Alumni Bulletins for March 9, 1946 and April 18, 1953, containing articles on the Bailey Plan and summarizing the controversy thereon (filed herewith as Exhibits 8 and 9) and a copy of Report of the Coordinating Committee on Biological Sciences referred to on page 3 of the mandamus petition (filed herewith as Exhibit 10).

(d) He spent one full day in visiting the Arboretum grounds at Jamaica Plain, the old building in which its library and herbarium are now housed, and the new building being constructed in Cambridge to which the major part of Arboretum library and herbarium are proposed to be removed.

(e) He did legal research on the various points of law involved.

(f) In the course of several lengthy consultations, he reported to respondent a complete summary of the facts, law and arguments ascertained, elicited, submitted and considered in the course of his investigation and research, including all facts and arguments of law advanced by the petitioners.

3. Respondent considered fully all material reported to him by Mr. Booras, including the facts and arguments advanced by counsel for the petitioners and counsel for the trustee, and he also considered fully the law applicable to the controversy presented in the petition, including the principles of law referred to by counsel for the petitioners in their petition.

4. Respondent concluded that it would not be in the public interest for him as Attorney General to lend his name to the proceedings proposed by the petitioners, and accordingly rejected their request that he do so.

5. Respondent instructed Mr. Booras to notify counsel for the petitioners of the Attorney General's decision not to permit the use of his name in the proceedings proposed by the petitioners. Mr. Booras did so by letter dated July 2, 1953, copy of which is annexed to the

mandamus petition as Exhibit "E", in which Mr. Booras also set forth some of the more cogent reasons for the decision reached.

All exhibits filed herewith are incorporated in this return reference.

6. After the decision of respondent had been reached and counsel for petitioners and counsel for the trustee had been notified, counsel for petitioners sought reconsideration of the decision. Respondent thereupon reconsidered his decision, but, no arguments having been advanced which had not previously been considered, the original decision was adhered to.

Further, in return to the petition, respondent says that it appears from the return that the petition is not maintainable for the reasons set out as grounds for respondent's motion to dismiss and demurrer and for the further reasons:

8. That the petition sets forth no error of law apparent on the record, and

9. That any review of respondent's decision upon this petition and return must be confined to whether respondent's return shows an abuse of discretion in reaching said decision, and the return shows no such abuse of discretion.

WHEREFORE respondent prays that the petition be dismissed.

GEORGE FINGOLD,
Attorney General of the Commonwealth.

SUFFOLK, SS. SUPREME JUDICIAL COURT
FILED Jan. 6, 1954
CHESTER A. DOLAN, JR., *Clerk.*

January 13th, 1954
Allowed by the Court after hearing.
(WILKINS, J.)
Attest: FRANK H. HALLETT, *Asst. Clerk.*

CERTIFICATE OF NOTICE OF MOTION.

I, Harris A. Reynolds, Assistant Attorney General, hereby certify that on the 17th day of March, 1954, I gave notice in writing to the following counsel for the petitioners by mailing to each a letter addressed to

John W. Farley, Esquire
1 Federal Street
Boston, Massachusetts

Endicott Peabody, Esquire
50 State Street
Boston, Massachusetts

that I would present to the Court Motion to Extend Return on March 24, 1954, at 9.30 o'clock a.m. A copy of said Motion was enclosed with each letter.

HARRIS A. REYNOLDS

SUFFOLK, SS.

Boston, Mass., March 23, 1954

Then personally appeared Harris A. Reynolds, and made oath that the foregoing statement subscribed to by him is true.

Before me,

MARY ALICE SULLIVAN
Notary Public

In re Petition for Writ of Certiorari.

MOTION TO EXTEND RETURN.

Now comes the respondent in the above-entitled action and moves that his return to the petition be extended by inserting after paragraph 6 of said return the following:

6A. The original letter of counsel for the Corporation to Mr. Booras, referred to in paragraph 2 (c) of the return, dated June 10, 1953, is filed with the return as Exhibit 11 and is incorporated in the return by reference.

6B. Copies of the letters and original letters constituting the correspondence which took place between counsel for the petitioners and Mr. Booras are filed with the return as Exhibits 12 through 20, inclusive, and are incorporated in the return by reference, as follows:

Letter of Mr. Dodge to Mr. Booras, dated April 24, 1953;

Letter of Mr. Dodge to Mr. Booras, dated April 28, 1953;

Letter of Mr. Dodge to Mr. Booras, dated May 15, 1953;

Copy of letter of Mr. Booras to Mr. Dodge, dated May 18, 1953;

Letter of Mr. Dodge to Mr. Booras, dated May 21, 1953;

Copy of letter of Mr. Booras to Mr. Dodge, dated May 22, 1953;

Letter of Mr. Dodge to Mr. Booras, dated May 22, 1953;

Letter of Mr. Dodge to Mr. Booras, dated May 26, 1953;

Copy of letter of Mr. Booras to Mr. Dodge, dated May 27, 1953.

6C. One of the conferences referred to in paragraph 2(b) of this return was held on June 9, 1953, at the offices of the Attorney General, between Mr. Booras and counsel for the petitioners and Mr. Grenville Clark. At that conference, the petitioners' position, both legal and factual, was again advanced at length to Mr. Booras.

GEORGE FINGOLD
Attorney General of the Commonwealth

SUFFOLK, SS. SUPREME JUDICIAL COURT
FILED March 16, 1954
CHESTER A. DOLAN, JR., *Clerk.*

March 24, 1954
Allowed by the Court after hearing.
(COUNIHAN, J.)
Attest: FRANK H. HALLETT, *Asst. Clerk.*

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MOTION TO AMEND PETITION.

The petitioners move to amend paragraph III of their petition by inserting after the word "mandamus" in the fifth line thereof the following words: "with any amendments of any of said paragraphs which may be allowed by the court".

ROBERT G. DODGE

J. W. FARLEY
Attorneys for the Petitioners.

SUFFOLK, SS. SUPREME JUDICIAL COURT
FILED AND ALLOWED Apr. 14, 1954
(LUMMUS, J.)
CHESTER A. DOLAN, JR., *Clerk.*

In re Petition for Writ of Certiorari.

**CERTIFICATE UNDER RULE 6 OF THE RULES OF THE
SUPREME JUDICIAL COURT FOR THE REGULATION
OF PRACTICE BEFORE THE FULL COURT.**

I hereby certify that the reproduction of the following exhibits incorporated in the return of the respondent as extended, and herein-after identified, would entail burdensome and unwarranted expense and therefore need not be reproduced:

Exhibit 1. The 85 page opinion of Robert G. Dodge and J. W. Farley, dated March 1, 1952, on the Bailey Plan.

Exhibit 2. A 5 page Memorandum of Law.

Exhibit 3. A letter of May 5, 1952, from Robert G. Dodge and J. W. Farley to the Members of the Committee to Visit the Arnold Arboretum, with the copy of the minutes of the meeting of said Visiting Committee on April 29, 1952.

Exhibit 4. The 4 page vote suggested by Messrs. Dodge and Farley for adoption by the Corporation.

Exhibit 5. The 37 page brochure on the Arboretum.

Exhibit 6. Plans of the Arboretum grounds.

Exhibit 7. The 81 page opinion on the Bailey Plan of Messrs. Ropes, Gray, Best, Coolidge & Rugg, dated May 1, 1951.

Exhibits 8 and 9. The Harvard Alumni Bulletins for March 9, 1946 and April 18, 1953, containing articles on the Bailey Plan and summarizing the controversy thereon.

Exhibit 10. The Report of the Coordinating Committee on Biological Sciences.

Exhibit 11. Letter of counsel for the Corporation to Mr. Booras, dated June 10, 1953.

Exhibits 12-20. The correspondence between counsel for the petitioners and Mr. Booras, referred to in paragraph 6 B of the Motion to Extend Return.

And I further order that the foregoing exhibits be held in the custody of the Clerk of this Court and be transmitted to the Clerk of the Supreme Judicial Court of the Commonwealth when the record of this Reservation and Report shall be entered in that Court.

HENRY T. LUMMUS
J. S. J. C.

April 14th, 1954.

STIPULATION.

It is hereby agreed that for the purpose of the presentation of each of the above cases to the full court the records be prepared and printed as a consolidated record.

ROBERT G. DODGE

Attorney for the Petitioners.

HARRIS A. REYNOLDS, *Asst. Atty-Gen.*

Attorney for the Respondent.

SUFFOLK, SS. SUPREME JUDICIAL COURT

FILED AND APPROVED Apr. 14, 1954

(LUMMUS, J.)

CHESTER A. DOLAN, JR., *Clerk.*

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COPY,

ATTEST:

Clerk.

May 5, 1952

TO THE MEMBERS OF THE COMMITTEE TO
VISIT THE ARNOLD ARBORETUM:

It seems desirable to report to the members of the Visiting Committee regarding the meeting of the Committee held on Tuesday, April 29th, so that they may have a memorandum of what took place, copies of the votes passed, and of the Statement and Plan which was approved.

The Sub-Committee (Mr. Page, Chairman, Mrs. Clark and Messrs. Wolcott, Ames and Weeks) met at eleven o'clock, prior to the general meeting. Messrs. Grenville Clark, Dodge and Farley were present by invitation.

The Statement and Plan, which had been sent to the members of the Visiting Committee, was presented to the meeting and fully discussed.

The Sub-Committee, the Chairman not voting, voted to recommend to the full Committee the Statement and Plan referred to above, with a few minor changes, which did not affect its purport.

Thereafter, at one o'clock the full Committee met at lunch. The recommendations of the Sub-Committee were reported to the full Committee by Mr. Wolcott, who made a short statement of explanation.

Mr. Wolcott was appointed Secretary of the meeting.

The Chairman explained to the meeting that the normal course of procedure would be that the recommendations of the Visiting Committee would be reported to the Overseers' Meeting which is to be held in the middle of May, that the Overseers would refer the matter to its Coordinating Committee on Biological Sciences, and that in due course that Committee would report back to the Overseers, who would then take such action as they deemed appropriate in reporting to the Corporation.

It was reported to the meeting that all those members of the Visiting Committee who were unable to attend the meeting had seen copies of the Statement and Plan, and had expressed their approval prior to the meeting.

After a brief discussion the votes and recommendations set forth in the enclosed copy of the minutes of the meeting were passed, with one dissenting vote.

Very truly yours,

Robert G. Dodge
J. W. Farley

Enc.

COMMITTEE TO VISIT THE ARNOLD ARBORETUM

MINUTES OF MEETING

April 29, 1952

Pursuant to notice duly given the meeting was called to order at the Harvard Club of Boston at 1 p.m. Twenty members of the committee were present and in addition Dr. Karl Sax and Messrs. R. G. Dodge and J. W. Farley. Mr. Wolcott was appointed Secretary Pro Tem.

On recommendation of the Sub-Committee and after discussion the following Resolutions were adopted with one dissenting vote:

RESOLVED: That the Committee to Visit the Arnold Arboretum adopts the following statement and authorizes and requests the Chairman to transmit it to the Board of Overseers of Harvard College with a copy for information to the President and Fellows.

FURTHER RESOLVED: That the Sub-Committee of five (Arthur W. Page, Chairman, Mrs. Grenville Clark, John S. Ames, Edward A. Weeks, Jr. and Oliver Wolcott) be continued and that the employment of counsel (Messrs. R. G. Dodge and J. W. Farley) be continued, with authority to have such discussions with the Governing Boards of Harvard University or their representatives as may be necessary or advisable.

STATEMENT OF THE COMMITTEE TO VISIT
THE ARNOLD ARBORETUM

First: The Committee wishes to emphasize that, while the Committee considers that it has an obligation to do what it can to safeguard the proper interests of the Arboretum, it is by no means unmindful of the interests of botany at Harvard or of the general interests of the University. The Committee does not consider that these several interests are opposed. On the contrary, the Committee believes that they are entirely reconcilable. It is from this standpoint that the following plan is submitted as a constructive solution, intended to be helpful not only to the future of the Arboretum but to the development of botany and the overall interests of the University.

Second: As a first step in any constructive plan, the Committee believes it is essential that the Bailey Plan (including the present plan for the removal to Cambridge of the major part of the library and herbaria) be completely rescinded so far as the Arboretum is concerned. In the light of the recent carefully considered legal opinion of Messrs. Robert G. Dodge and J. W. Farley, there is at the very least serious doubt as to the legality of the Bailey Plan as applied to the Arboretum. In these circumstances, whether or not one agrees with the Dodge-Farley opinion as against the Ropes, Gray opinion, it is inconceivable that any attempt would be made to apply the Bailey Plan to the Arboretum without at least a petition by the Corporation for a court decision.

There are, however, serious objections to a court proceeding. It would involve further delay and considerable expense; and no court could dispose of the non-legal questions in the situation relating to possible breach of faith with donors and as to the wisdom of subordinating the Arboretum to the claims of botany. On the other hand, there are strong reasons for arriving at a solution as soon as may be.

It is clear that while the Bailey Plan overhangs the Arboretum, it is impracticable to obtain the acceptance of the Arnold Professorship and Directorship of the Arboretum by a distinguished and vigorous man highly qualified in horticulture and otherwise. It is also virtually impossible to obtain substantial gifts or legacies while the impression prevails that the Arboretum's former mission and work may be abandoned or impaired.

The rescission of the Bailey Plan as it concerns the Arboretum would not, in the Committee's opinion, mean sacrificing the principal benefits the plan was designed to accomplish. We believe, indeed, that the desirable objectives of the Bailey Plan can be better achieved if the initiative and executive supervision with regard to Arboretum affairs are left with the Arboretum's management. This would conduce to harmonious relations and thereby to effective solutions of particular problems such as duplications in libraries, herbaria and teaching loads; and it would promote voluntary cooperation with the botanical agencies of the University in projects of common interest. Such cooperation has existed in the past under relations that have brought distinction both to the Arboretum and the University among botanists and horticulturists throughout the world. If the Arboretum is allowed to continue its own work within the breadth of purpose permissible under the indenture (which includes herbaceous plants as well as trees and shrubs), without impairment of its prestige and under strong leadership, there is every reason to believe that it can make still greater contributions in future to the welfare of Harvard botany.

For all these reasons, the Committee considers it essential (as a foundation upon which to build) that the Bailey Plan be rescinded as regards the Arboretum.

Third: The Committee respectfully suggests that simultaneously with the exclusion of the Arboretum from the Bailey Plan the University should announce the following:

(a) The organization of a Finance Committee for the Arboretum, with the understanding that if not less than \$150,000 is subscribed within, say, two years, the University will contribute \$150,000.

(b) The organization of a Finance Committee for Botany at Harvard, with the understanding that if not less than \$500,000 is subscribed within, say, three years, the University will contribute \$200,000.

It is believed that both efforts should be successful. While it is true that substantial gifts for the Arboretum have been lacking since announcement of the Bailey Plan, this is not surprising in view of the implications of that plan for the Arboretum when they were understood. When, however, it is made clear that the identity of the Arboretum will be preserved, that its library

and main collections will remain at Jamaica Plain and that its horticultural work will be continued under the management of its Director, (the Arnold Professor when appointed) pursuant to the method which brought it prestige and prosperity for over 70 years, the atmosphere will be entirely different. It can then be expected that the friends of the Arboretum will respond with subscriptions of at least \$150,000 to safeguard its collections and supplement its resources.

As to botany, it might be difficult to raise \$500,000 from individuals. But in view of the possibilities already revealed in the field of economic botany, it should be possible to obtain considerable gifts from foundations, with an excellent prospect of finding at least \$500,000 within a few years.

If these funds were raised, the minimum amount of new outside money would be \$650,000 and the maximum contribution of University funds \$650,000. The minimum amount provided for the Arboretum and botany would be \$1,300,000, of which \$300,000 would be for the Arboretum and \$1,000,000 for botany.

The Visiting Committee believes that important and beneficial results would follow from the success of such a plan. Litigation would be avoided and harmony restored. Coordination could be established on the basis of cordial cooperation. The Arboretum's identity and work would be preserved and the way opened for the appointment of an Arnold Professor fully qualified and interested to undertake the position. Moreover, its resources would be increased by at least \$300,000, with every prospect that it would again begin to receive large legacies and gifts as in the prior years. With regard to botany, the use of the additional income from at least \$1,000,000 would obviously be of great help; and as to the general interests of the University, it seems clear that the result would be advantageous.

The Visiting Committee hopes that the Governing Boards will see fit to adopt this plan or one substantially similar.

It was reported that the statement as adopted had been circulated to the members of the Committee and had been approved by all those who were absent, being Christian A. Herter, Benjamin S. Blake, Mrs. Joseph M. Gudahy, Childs Frick, Mrs. Henry V. Greenough, and Clarence L. May.

Dr. Sax then reported on some of the work being done at the Arboretum and answered questions from members of the Committee.

The meeting then adjourned.

A true record.

A T T E S T:

/s/ C. Wolcott
Secretary Pro Tem

No.

LAW

JOHN S. AMES, ET AL'S

VS.

GEORGE FINGOLD

ATTORNEY GENERAL OF THE COMMONWEALTH

Petition for Writ of Mandamus

JOHN S. AMES, ET AL'S

VS.

GEORGE FINGOLD

ATTORNEY GENERAL OF THE COMMONWEALTH

Petition for Writ of Certiorari

RESERVATIONS AND REPORTS.

SUFFOLK COUNTY

THE ARNOLD ARBORETUM CONTROVERSY

PETITIONS

to the

SUPREME JUDICIAL COURT

of

MASSACHUSETTS

filed December 9, 1953

[The purpose of these petitions is to obtain permission to bring a test suit in order to determine whether the carrying out of a vote of the Corporation of Harvard University dated January 19, 1953 would be a breach of trust in respect of the Arnold Arboretum.]

PRINTED ON BEHALF OF THE

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.

ROOM 808 • 50 STATE STREET • BOSTON, MASSACHUSETTS

MEMORANDUM TO THOSE INTERESTED IN THE ARNOLD
ARBORETUM CONTROVERSY

You may be interested in these petitions brought against the Attorney General of Massachusetts by friends of the Arnold Arboretum.

If successful in this suit we are hopeful that a trial on the merits may be had as to whether or not a breach of trust is being perpetrated by the removal of the library and herbarium of the Arnold Arboretum to a building in Cambridge wherein other collections will also be placed.

Endicott Peabody
Secretary, Pro Tem
Arnold Arboretum

THE ARNOLD ARBORETUM CONTROVERSY

PETITIONS

to the

SUPREME JUDICIAL COURT

of

MASSACHUSETTS

filed December 9, 1953

[The purpose of these petitions is to obtain permission to bring a test suit in order to determine whether the carrying out of a vote of the Corporation of Harvard University dated January 19, 1953 would be a breach of trust in respect of the Arnold Arboretum.]

PRINTED ON BEHALF OF THE

ASSOCIATION FOR THE ARNOLD ARBORETUM, INC.
ROOM 808 • 50 STATE STREET • BOSTON, MASSACHUSETTS

In the Supreme Judicial Court,

Suffolk, ss.

John S. Ames of Easton in the County of Bristol, Benjamin S. Blake of Weston in the County of Middlesex, Grenville Clark of Dublin in the State of New Hampshire, Godfrey L. Cabot of Boston in the County of Suffolk, Henry F. duPont of Winterthur in the State of Delaware, Childs Frick of Roslyn Harbor in the State of New York, Ellery Sedgwick of Beverly in the County of Essex, Fanny D. Clark of said Dublin, Louise duPont Crowninshield of said Boston and Susan Delano McKelvey of said Boston

v.

The Honorable George Fingold, as he is Attorney General of the Commonwealth of Massachusetts

Petition for Writ of Mandamus.

To the Honorable the Justices of the Supreme Judicial Court:-

The petitioners above named respectfully represent as follows:-

1. The purpose of this petition is to make possible a judicial determination of the question whether certain action taken or proposed to be taken by the President and Fellows of Harvard College (hereinafter referred to as "the Corporation") is or would be in the best interests of the Arnold Arboretum and consistent with the terms of an indenture of trust entered into under date of March 29, 1872, by George B. Emerson and others, trustees under the will of James Arnold, parties of the first part, and the Corporation, party of the second part. By said indenture a fund was transferred to the Corporation as trustee for the purpose of establishing and maintaining an Arboretum (to be called the "Arnold Arboretum") on over 200 acres of land in West Roxbury, Massachusetts, then belonging to the Corporation, and for the support of a professor who should be called the Arnold Professor and should have the care and management of the Arboretum. It was provided in the indenture that the trust fund should not be "diminished by supplementing any other object, however meritorious, or kindred in its nature". Further provisions hereinafter mentioned appear in the indenture, a copy of which is hereto annexed marked "A". In the case of *Rotch v. Emerson*, 105 Mass. 431, it was determined that the testamentary provisions pursuant to which the indenture was entered into created a public charity.

2. The petitioners have been for many years actively interested in the Arboretum and have from time to time made financial contributions to it. All the petitioners except Grenville Clark and Ellery Sedgwick are members of the Committee appointed by the Board of Overseers of Harvard University to visit the Arboretum (hereinafter referred to as "the Visiting Committee") and in the present controversy seek in the public interest to assure that the Corporation's administration of its trusteeship for the Arboretum shall be to the best interests of the Arboretum and in compliance with the terms of the said indenture of 1872. From the printed statement of the Board of Overseers with regard to the functions of the Overseers' Visiting Committees it appears that such committees are "appointed to review the activities of the major academic and administrative subdivisions of the University" and that they "have constituted for many years an integral part of Harvard's educational system. They are perhaps the chief agency through which the Board fulfills its responsibilities as trustee for the public in keeping in touch with the affairs of the many faculties and departments of the University."

3. In June 1945 Professor Irving W. Bailey, of the Department of Biology of Harvard University, submitted to the Dean of the Faculty of Arts and Sciences a report prepared by him entitled "Botany and its Applications at Harvard". This report, a printed document of 93 pages, embodied a proposal (hereinafter referred to as the "Bailey Plan" or "the plan") that the nine independently endowed institutions in some way concerned with botany and then affiliated in one way or another with the University be in effect merged in the Department of Biology of Harvard University for the benefit of research and instruction in botany at Harvard. One of these institutions was the Arboretum, the invested funds of which amount to approximately 50% of the aggregate funds of the nine institutions. The plan was evidently prepared without legal advice and without any recognition of the fact that the funds and property of the Arboretum are held by the Corporation upon a special trust under the said indenture, such funds and property being dealt with throughout the plan as being held by Harvard as part of its disposable assets for the general purposes and interests of Harvard without regard to any special trust affecting such funds and property. On January 22, 1946, the Corporation voted to approve the Bailey Plan, evidently without investigation of the terms upon which the property of the Arboretum was held by the Corporation. Various measures to implement the Bailey Plan were thereupon initiated.

4. The implementation of the plan proceeded slowly and there were substantial delays for different reasons. When the effect of the plan upon the Arboretum began to be realized, opposition developed, and in 1949, when the particulars and implications of the Bailey Plan as affecting the Arboretum became known to the Visiting Committee, it appeared to a number of the members of that committee that the plan would completely overturn the principles upon which the Arboretum had been administered and developed and would gravely injure its work and usefulness to the public. Serious questions were presented as to whether the plan involved a breach of trust with respect

to the Arboretum, and, as a result of objections raised by members of the Visiting Committee, the Corporation referred the matter to the Coordinating Committee on the Biological Sciences, of the Board of Overseers. In May 1950 that Committee submitted a report approving the plan with minor modifications. Upon receiving this report the Visiting Committee in June 1950 requested the Corporation to defer action implementing the plan as regards the Arboretum. The Corporation acceded to this request and a group of fourteen members of the Visiting Committee then retained Messrs. Herrick, Smith, Donald, Farley & Ketchum as counsel, who reported in September 1950 that the carrying out of the Bailey Plan would in their opinion violate in many respects the trusts upon which the Arboretum funds and property are held by the Corporation. The Visiting Committee at a largely attended meeting held soon after the receipt of this report voted to recommend to the Corporation that it suspend the putting into effect of the recommendations of the Bailey Plan in so far as they affect the Arboretum until the restrictions imposed upon the Corporation by its duties as trustee should be more fully presented and considered; and this recommendation was forwarded to the Corporation.

5. After receiving the foregoing recommendation the Corporation in October, 1950, further postponed action on the Bailey Plan and submitted the questions raised by the Visiting Committee to its counsel, Messrs. Ropes, Gray, Best, Coolidge & Ruggs. Under date of May 1, 1951, an extended opinion on the Bailey Plan as applied to the Arboretum was rendered by such counsel to the Corporation. This opinion concurred in some respects with the views which had been expressed by counsel for the aforesaid fourteen members of the Visiting Committee, but supported the legality of the plan in large measure. The Visiting Committee, as such, then retained counsel, namely Robert G. Dodge and J. W. Farley in association, and requested them to give further consideration to the questions involved, and particularly to the opinion of counsel for the Corporation just referred to, and to report their conclusions to the Visiting Committee. Pursuant to this request, Messrs. Dodge and Farley, counsel for the Visiting Committee, gave the matter further study over a period of months and under date of March 1, 1952, submitted a report in which the issues were analyzed at length and the conclusions previously reached were reaffirmed. In said report of the Visiting Committee's counsel the points outlined in the several subdivisions of the next paragraph hereof were developed in substance.

6. (a) The relation of the Corporation to the Arboretum is that of the trustee of an express trust. Its duty is the same as that of any trustee of a fund established to promote a particular educational or charitable object. The Corporation has no more right than any other trustee would have to administer the trust otherwise than solely in the best interests of the beneficiary or to apply the trust property to purposes inconsistent with the terms of the trust; and it has in particular no right, in determining the administration of this particular trust, to give weight to what may be conceived to be for the best interests of the University in general as compared with the best interests of

the Arboretum. The most fundamental duty owed by a trustee to the beneficiaries of the trust is the duty of loyalty. He must act solely in the interests of the beneficiaries and must lay aside self-interest or the interests of others for whom he may happen to be trustee. The Bailey Plan was framed without any reference to this principle and indeed without any consideration of the fact that the Corporation held the property of the Arboretum on a special trust, the central aim of the plan being to advance the interests of the University as a whole in general botany.

(b) The trust created by the indenture of March 29, 1872 is, as appears from the copy hereto annexed, set forth in simple terms. The Corporation as trustee was required to hold the fund "as a separate and distinct fund", and agreed that it would hold the property and all future property so received "upon the trusts herein declared". The income of the fund (apart from five per cent, to be accumulated) was to be applied in every year "to the establishment and support of an arboretum, to be called the Arnold Arboretum, which shall contain so 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 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 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 income was to be used for no other purpose, "however meritorious or kindred". In 1872 Charles Sprague Sargent was appointed director of the Arboretum, and in 1879, when the fund had increased to \$150,000, he was appointed Arnold Professor, a position which he held until his death in 1927. Under an agreement with the City of Boston in 1882 title to the land was vested in the city, which leased it to the President and Fellows "forever" at a rental of \$1 per year. By this lease the land was to be used for the purposes of the trust. With adequate space assured forever Professor Sargent devoted his efforts toward making the Arboretum preeminent in its field. A staff of able horticulturists was assembled. Field expeditions to various parts of the world brought back species of trees and woody plants theretofore unknown in the United States. In 1892 a brick headquarters and library building was erected on the Arboretum's property at Jamaica Plain with funds given for that purpose. An herbarium, later developed into a collection of nearly 700,000 dried specimens, was started in 1878, and in 1905 the headquarters building was much enlarged so as to house the herbarium. After Professor Sargent's death in 1927, Professor Oakes Ames served as Supervisor of the Arboretum for a nine year period. Professor Elmer D. Merrill was appointed Arnold Professor and Director in 1936, serving until 1946 when he resigned. Dr. Merrill was succeeded as Director of the Arboretum by Professor Karl Sax, who, although not appointed Arnold Professor, was appointed Director in 1947 and has since acted as such. On October 12, 1953,

Dr. Richard A. Howard was appointed "Arnold Professor of Botany" and "Professor of Dendrology", his appointment in both capacities to take effect on February 1, 1954. For seven years from 1946 until October 1953 no Arnold Professor was appointed.

(c) After Professor Sargent's death in 1927 his friends were successful in raising approximately \$1,000,000 as the Charles Sprague Sargent Memorial Fund for the endowment of the Arnold Arboretum. The solicitation material consisted primarily of an elaborate 37 page brochure, which laid its entire emphasis on the Arboretum as a self-contained and integrated organization, having its own purposes and staff and engaging in its own activities. Stress was laid over and over again upon the importance of the research carried on at the Arboretum by its staff and visiting scientists and the inestimable value to the public of the results of the research. Emphasis was placed on the value for purposes of scientific research of the collections in the herbarium, even then very large, and the library was stated to be "the most complete collection of printed matter that is anywhere assembled as bearing upon the world's woody plants". As the brochure stated:

"The Arboretum serves as a storehouse of knowledge and a center of research. The collections in the Herbarium and the Arboretum Library are being constantly used by students, sometimes from Harvard and no less frequently by men from far away parts of the world who come to pursue special studies and to prepare reports for books. * * * Many of the leading forestry experts have spent considerable periods of study at the Arboretum. [A long list of such experts is given.] The Arboretum is the workshop in which was prepared Professor Sargent's classic 'Silva of North America' in 14 folio volumes. * * * Not only is the Arboretum a storehouse of scientific knowledge about trees and shrubs but it is a research laboratory for experiments which may have results of distinct commercial value."

The brochure further recited that "The title and ultimate responsibility for the Arboretum is lodged in the President and Fellows of Harvard College as trustees" [emphasis supplied] and asked for the addition of \$1,000,000 to the Arboretum's "permanent endowment".

(d) Before Professor Sargent's death, and in later years, other friends of the Arboretum by gift and legacy have brought its total endowment to more than \$4,000,000 at book value and some \$5,000,000 at market value. These gifts were made directly to the Arboretum or to the Harvard Corporation for the "use" or for the "benefit" or "purposes" of the Arboretum. Many of the gifts were made without specification of the use to be made of the money. Other donors or testators specified that the money should be used for particular purposes, all of these purposes being within the scope of the normal activities of an arboretum.

(e) Before the Bailey Plan was approved in 1946 the Arnold Arboretum was a self-contained and integrated institution with a locus in Jamaica Plain and a world-wide reputation under its own name. The Arnold Professor (or Professor Ames as Supervisor) who controlled its staff, was immediately responsible to the Corporation and communicated directly with the President

as to budgets and other matters requiring consultation with the Corporation as trustee. On the Arboretum grounds the library and herbarium grew to outstanding positions in their field under the direction of its scientists. For its first seventy-five years therefore, apart from such control as could appropriately be exercised by its trustee, the Arnold Arboretum was managed and controlled by its own staff. As an institution under its own name it progressed and gained widespread recognition and fame, a notable collection of dried specimens and a library of great value. Beyond this it acquired a very considerable endowment.

(f) The Bailey Plan was formulated, as has been stated, without regard for the obligations of the Corporation as trustee of a special trust for the Arboretum and with the evident primary purpose of furthering the general purposes and interests of Harvard. The plan included sweeping recommendations looking to the "integration" — in effect merging — of the nine so-called independently endowed establishments, including the Arboretum, into two so-called "areas" or "institutes", the establishments so merged eventually to become mere subsidiary divisions of these "institutes", with a "Biological Council" having effective control of the funds and activities of the several establishments. It was affirmed in the Bailey Report over and over again that the proposed organization would promote the future welfare of botany as a whole and would make more efficient the work of research and instruction in botany at Harvard. On the other hand, the Bailey Report showed no regard for or interest in horticulture, which was a prime purpose of the Arboretum, or any consciousness of the status of the Arboretum as an institution whose property was held under a special trust. On the contrary, the property of the Arboretum was treated throughout as being general assets of Harvard subject to the control of the Corporation for Harvard's general purposes and interests. The plan involved the "integration" to a large extent of the income of the Arboretum with that of the other eight independently endowed agencies and of the Department of Biology (which includes botany), and the use of the combined income for research in general botany, various branches of which are not of interest to the Arboretum, and for other general botanical purposes. The Arboretum had much the largest income of any of the agencies to be integrated with it, and was indeed referred to in the Bailey Report as "the goose that lays the golden eggs". Consequently its funds were and are of particular interest to those desirous of advancing the cause of general botany at Harvard, irrespective of the special purposes and interests of the Arboretum.

It was and still is further proposed by the Corporation's vote of January 19, 1953 (a copy of which is hereto annexed marked "C") that the bulk of the Arboretum's library and herbarium "related to research" be removed to a new building in Cambridge, the cost of operating which would be largely charged upon the income of Arboretum funds. As the Bailey Report states, one of the three objects for which the resources of the Arboretum are being utilized is the "maintenance of a large herbarium and library as a basis for research in taxonomy". And from the summary given in the Report of the

expenditures of the Arboretum during the year preceding the date of the Report it appears that the sums devoted to "Herbarium, Library and taxonomic research" amounted to \$51,411 out of a total of \$111,407. Paragraph 10 of the aforesaid Corporation vote of January 19, 1953 (Exhibit C hereto) expressly provides for the removal from Jamaica Plain to Cambridge of the "main body of the library and herbarium of the Arboretum related to research" and for the retention at Jamaica Plain only of "such books and specimens as may be required to provide there a working herbarium and library". Since virtually all of the herbarium and library is "related to research" the effect of the proposed removal would obviously be to transfer to Cambridge all the important work and research heretofore conducted at the Arboretum and to commingle it with the general botanical research of the University; and whether or not such removal would be to the benefit of botanical research in the University, it would be contrary to the best interests of the Arboretum and consequently inconsistent with and contrary to the duty of the Corporation as Trustee. As counsel for the Visiting Committee, Messrs. Dodge and Farley, gave much consideration in their report of March 1, 1952, to the proposed removal to Cambridge of the bulk of the library and herbarium, stating their opinion that such removal would be contrary to the interests of the Arboretum, that it would take from the place in which they should be kept the principal tools used in the Arboretum's scientific work and would be inconsistent with the existence of the Arboretum as a unified and integrated institution in accordance with the terms of its endowment and the intent of donors to its funds. It was also pointed out in their report that the removal would involve the Arboretum in an indefinite amount of additional expense, as it would not only be called upon to pay a considerable share of the expense of maintaining the new building, but would also have to continue to employ a staff for the care and management of such part of the library and herbarium as is to be left behind.

(g) In a foreword to the Bailey Report Paul H. Buck, Dean of the Faculty of Arts and Sciences, made the following statement:

"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."

And the Coordinating Committee of the Overseers in its aforesaid report of May, 1950, described the Arboretum 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". It was doubtless the acceptance of the views thus stated by Dean Buck and the Coordinating Committee which led the Corporation, prior to the submission of the report dated March 1, 1952 of counsel for the Visiting Committee, to endorse the Bailey Plan, substantially in its entirety.

7. The report of March 1, 1952, submitted to the Visiting Committee by its counsel, concluded with the following paragraphs:

"We believe it unfortunate that the questions at issue in this matter should be the subject of controversy except before a tribunal with authority to render a decision.

"Material questions of law are involved which concern the proper administration of trust funds of which the Harvard Corporation is trustee. We think the arguments we have advanced are sound.

"Whether or not the trustee of these funds, or counsel for the trustee, agree with our position, it cannot be doubted that there is a serious question regarding the propriety of the action of the trustee.

"In such circumstances, unless these differences of opinion can be resolved satisfactorily to all concerned, the trustee should seek the judgment of a court of competent jurisdiction.

"Comparable matters in which Harvard has been involved have several times been determined by the courts, as in the case of the McKay trust, where the President and Fellows filed a bill for instructions.

"We suggest that this is another instance where such a solution should be sought, unless a full and mutually satisfactory settlement of the questions raised can be agreed upon. Prolonged argument other than before a court is not likely to be either satisfactory or conclusive."

8. After receiving the report of its counsel dated March 1, 1952, a meeting of the Visiting Committee was held on April 29, 1952. Twenty members of the Committee being present a resolution was adopted by a large majority which contained a statement of a comprehensive plan submitted as a solution of the controversy. Copies of the statement were sent to the Overseers and the Corporation. The Visiting Committee's plan began as follows:

"As a first step in any constructive plan, the Committee believes it is essential that the Bailey Plan (including the present plan for the removal to Cambridge of the major part of the library and herbaria) be completely rescinded so far as the Arboretum is concerned. In the light of the recent carefully considered legal opinion of Messrs. R. G. Dodge and J. W. Farley, there is at the very least serious doubt as to the legality of the Bailey Plan as applied to the Arboretum. In these circumstances, whether or not one agrees with the Dodge-Farley opinion as against the Ropes, Gray opinion, it is inconceivable that any attempt would be made to apply the Bailey Plan to the Arboretum without at least a petition by the Corporation for a court decision."

By this resolution and at various times thereafter the importance of obtaining a judicial determination of the matters at issue was urged upon the Corporation, but without avail.

At a later meeting of the Visiting Committee it was reported that the statement adopted at the April 29, 1952 meeting had been circulated to the members of the Committee not present at that meeting and had been approved by all the absentees, namely, Christian A. Herter, Benjamin S. Blake, Mrs. Joseph M. Cudahy, Childs Frick, Mrs. Henry V. Greenough and Clarence L. Hay.

9. After counsel for the Visiting Committee had been granted for the first time, late in 1952, a hearing before the Overseers' Coordinating Committee

and another before a committee of the Corporation, Messrs. Dodge and Farley on December 22, 1952, submitted to the Corporation through President James B. Conant a suggested Corporation vote for the adjustment of the entire controversy. A copy of the letter of that date to President Conant, in which the proposed vote was enclosed, is hereto annexed marked "B". The suggested vote was not accepted by the Corporation. Instead it finally adopted, on January 19, 1953 the aforementioned resolution (Exhibit C) stating the policy which would govern its "administration of the Arnold Arboretum and the use of all funds held by the Corporation in trust for the purposes of the Arboretum". In this resolution the Corporation for the first time officially recognized that it held the Arboretum's property upon a special trust and that this trust must be administered in the Arboretum's interests.

Paragraph 1 of the resolution of January 19, 1953, reads as follows:

"The plan contained in the Bailey Report of June 1945 shall not apply to the Arboretum or to the principal or income of its endowment. The Corporation recognizes that the property and endowment held for the purposes of the Arboretum are 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 resolution concluded, however, by reestablishing in paragraph 10 thereof one of the important and objectionable features of the Bailey Plan, namely, the aforementioned provision for the removal to Cambridge of "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". In this paragraph it is declared that "the Corporation determines that it is in the best interests of the Arboretum and will promote the purposes of its endowment", to effect the removal.

It is obvious that a "working library and herbarium" deprived of material relating to research, could be of little value at the Arboretum as instruments of research and that such removal would break down the Arboretum as an integrated scientific institution.

The idea that the greater part of the library and herbarium should be removed originated in the Bailey Plan, at a time when the trust relationship between the Corporation and the Arboretum was not recognized. Upon information and belief the petitioners allege that the Corporation became committed to the botanists at Harvard to carry out this part of the Bailey Plan and as early as 1946 placed itself in a position in this respect from which it could not easily retreat, and this commitment prevented it, after the trust relationship was discovered and recognized, from judging the interests of the Arboretum impartially.

There are other respects in which the provisions of the resolution adopted by the Corporation on January 19, 1953, are open to serious doubt in respect of their conformity to the obligations of the Corporation as trustee for the Arboretum.

Among other things, the compromise plan proposed in the resolution of the Visiting Committee on April 29, 1952, as mentioned in paragraph 8 thereof, urged the Corporation to declare that in the administration of the trust it would

act "solely with a view to the best interests of the Arboretum"; and the same language was in the proposed vote sent to President Conant with counsel's letter of December 22, 1952, (Exhibit B). In paragraph 1 of the January 19, 1953 resolution, however, which is quoted above, the word "solely" was omitted.

Moreover, the petitioners would wish to urge in a trial of the issues that paragraph 5 of the vote of the Corporation of January 19, 1953, dealing with the authority of the Arnold Professor in respect of appointments to the Arboretum staff, is of very doubtful validity in that it is inconsistent with the provision of the indenture of 1872 whereby the Arnold Professor is to have the "care and management" of the Arboretum. This paragraph 5 provides that recommendations for appointments to the staff of the Arboretum may be initiated not only by the Arnold Professor, but also, independently of him and potentially without his approval or even knowledge, by the President of the University. The language is that "such recommendations may be initiated from time to time by the Arnold Professor or by the President". [Emphasis supplied.] This provision would seriously detract from the status and authority of the Arnold Professor and would undermine his position.

10. Shortly after the passage of the aforesaid resolution of the Corporation of January 19, 1953, counsel for the present petitioners caused fifteen leading authorities throughout the United States, in no way connected with Harvard, to be interviewed with a view to ascertaining their opinion as to whether it would be in the best interests of the Arboretum to carry out the proposal for the removal to Cambridge of the main body of its library and herbarium related to research. The virtually unanimous opinion of these impartial authorities was that the removal, whether or not it would help botany at Harvard or elsewhere, would break down the present integrated character of the Arboretum and would be contrary to its interests, especially as a scientific institution. This opinion rests on the proposition that a distinguished horticultural-botanical institution like the Arboretum needs to have together in one location the three main elements requisite for a well-rounded institution of this character, namely: (a) an excellent horticultural-botanical library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs. The Arboretum now has all three of these. Its library has some 40,000 books and 15,000 pamphlets and is nearly, if not quite, unique. Its herbarium has nearly 700,000 specimens and is of great value. Its living collection, containing some 6,000 species and varieties, is probably the most complete and famous American collection of this sort. The conjunction of these three elements in one place is what has given the Arboretum a world-wide status and reputation, and this conjunction would be destroyed if the resolution of January 19, 1953, were carried out.

In his annual reports as Arnold Professor Sargent made frequent references to the importance of the library and the herbarium in the scientific work of the Arboretum. In his report for 1923-24 he said:

"The experience of the last fifty years shows that such an institution [an arboretum] 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. * * * 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."

Emphasizing the importance of the herbarium, which was annually increasing in size as the result of expeditions to various parts of the world, but which then contained less than half as many specimens as it now contains, he wrote that the aim should be to make:

"A complete collection of dried plants which will make it possible to study in one place in a satisfactory manner the trees of the world and their original variations and distribution. Such a collection is needed and there is no better place for it than the Arnold Arboretum, for at the Arnold Arboretum there is one of the largest collections of living trees and shrubs which can be grown in such a severe climate and an unsurpassed library devoted to the subject."

In his article on "The First Fifty Years of the Arnold Arboretum", published in the Journal of the Arnold Arboretum in January 1923, Sargent wrote:

"The Arnold Arboretum is not a School of Forestry or of Landscape Gardening. It is a station for the study of trees as individuals in their scientific relations, economic properties and cultural requirements and possibilities. On the information gathered in museums like the Arnold Arboretum successful silviculture and landscape gardening are dependent. * * *

"[During its first fifty years] the greatest collection of the hardy trees and shrubs of the northern hemisphere has been made and arranged, and many new plants largely discovered through its explorations have been distributed.

"It has established the largest and most important herbarium in the world devoted exclusively to preserving the records of trees and shrubs, and a library which within the limits of its special subjects is not surpassed. * * *

"In discussing the future of the Arboretum and its needs it must be remembered that during its first half century it has been managed not merely as a New England museum but as a national and international institution working to increase knowledge of trees in all parts of the world and as anxious to help a student in Tasmania or New Caledonia as in Massachusetts. An institution with such ambitions must be equipped to answer any question about any tree growing in any part of the world which may be addressed to it. * * *

"If the Arboretum is to become a great institution for gathering and spreading information about trees and allied plants, specimens and a series of photographs of every species of tree in the world should be found in its herbarium. The work which it has accomplished in its first fifty years in North America and the Japanese Empire should be extended over the rest of the world. * * * In the future the student of trees must depend for any knowledge of many trees on the material and information preserved in institutions like the Arnold Arboretum."

To break up the integration of the Arboretum by the proposed removal can do nothing but damage to the Arboretum as a scientific institution. It would

be disadvantageous to the usefulness of the Arboretum to the public, to its achievements in its general scientific field, to its contribution to horticulture and botany in its special field, to its work of scientific research, to its future financial support, and to its reputation and prestige which are essential for its greatest usefulness. The result of dividing the facilities would be to divide the time of the Arnold Professor and his staff between Jamaica Plain and Cambridge. It would require some or all of them to shuttle back and forth to a disconcerting and wasteful extent. The net result would be gravely to impair the Arboretum's work; some say it would virtually destroy it.

The opinion of the experts who have been consulted confirms that of these petitioners, all of whom have had a long and close association with the Arboretum and a number of whom have had large experience with horticulture and with botanical gardens. All unite in the strong conviction that the carrying out of the removal plan would very gravely damage the Arboretum and would be definitely contrary to its interests.

11. The Arboretum has many friends not only in Massachusetts, but elsewhere. It has taken the lead in the development of horticulture in this country. It is probably the most distinguished horticultural-botanical institution in North America. It is a credit to Boston and Massachusetts. It has a great field of future usefulness and its future can be as distinguished as its past. It is, however, dependent on continued support, moral and financial, of a considerable number of people of both large and small means. Confidence has been widely shaken as to whether money given to the Arboretum would be used for the purposes for which the Arboretum primarily exists or whether its funds and property would be diverted to other purposes which, however worthy, are not the purposes of the Arboretum. There is little or no prospect that substantial gifts can be obtained unless and until this situation is cleared up.

This lack of confidence has been accentuated by the refusal of the Harvard Corporation to seek the court's instructions in accordance with the common practice of trustees where a question is raised by responsible persons as to whether the trust is being carried out. The Corporation has many times been requested by the Visiting Committee and its representatives to institute such proceedings. As has been stated above, the propriety of such action was emphasized in the report of counsel to the Visiting Committee dated March 1, 1952, and the Corporation was urged to follow this course in the resolution of the Visiting Committee of April 29, 1952, and at various times thereafter. The Corporation was again asked to file a petition for instructions, with particular reference to its right to remove the major part of the library and herbarium, in the aforementioned letter of Messrs. Dodge and Farley to President Conant of December 22, 1952, (Exhibit "B"). The same request was renewed in writing after the publication of the resolution adopted by the Corporation on January 19, 1953. The Corporation, however, ignored or refused all these requests.

12. In view of the foregoing, counsel for the petitioners conceived that this was plainly a situation in which, according to all the precedents, the Attorney General should permit the use of his name in the bringing of proceedings

to determine whether the trust (with which the Corporation had finally conceded the Arboretum property to be charged) was in prospect of abuse. Accordingly, counsel for the petitioners, in April 1953, informed the respondent that they represented certain persons who were interested in a case involving a public charity and feared that a breach of trust was imminent, and they requested that he permit the use of his name in an information to be brought with a view of obtaining a declaratory decree. The respondent notified counsel that they should take the matter up with Assistant Attorney General Booras and they did so.

13. After a telephone talk with Mr. Booras counsel sent him a copy of their report of March 1, 1952, referred to in paragraph 5 above and in other paragraphs, and by two letters to him outlined the nature of the controversy and requested an opportunity to talk with him. This opportunity was given them on April 30, 1953, and at the interview counsel discussed the case at considerable length, advanced various arguments in support of their contentions, stated that it might be impossible except by a suit in the name of the Attorney General to bring the questions at issue before the court, and gave him the names of ten responsible persons who were willing to act as relators, of whom nine are among the present petitioners, the other being incapacitated by illness.

It was further pointed out that, in deciding whether to permit the use of his name the Attorney General was not called upon to decide the merits of the controversy, but that, according to long established usage, permission should be granted if it appeared (1) that the matter was of public importance and that responsible citizens, acting in good faith and with no object other than to secure the performance of a charitable trust in accordance with the intent of the donors, were prepared to assume the expenses of the proceeding and in particular to make themselves liable for costs, and (2) that, whatever might be the Attorney General's personal views as to how the issues of fact and law ought to be decided, these issues were clearly a fit subject of judicial inquiry. Counsel called Mr. Booras' attention to certain opinions of former Attorney General Knowlton, in which these principles were in substance stated.

Thereafter counsel learned that Mr. Booras had been in consultation with various representatives of the Corporation, including its legal adviser, and wrote him on May 2, 1953, stating that as counsel for friends of the Arboretum, who were the moving parties in the matter, they should have an opportunity to reply to any arguments which might have been made by the representatives of the Corporation in their effort to prevent the use of the Attorney General's name. Mr. Booras accordingly set a further meeting for June 9, 1953, and on that day counsel for the present petitioners, with Grenville Clark, one of the petitioners, had a conference with Mr. Booras. The matter was again reviewed before him, but he gave no intimation as to what arguments had been made on behalf of the Corporation or what further information, if any, he needed. At no time was there any hearing in the legal sense. No evidence was offered or taken at any time. Mr. Clark made a statement in accord with a memorandum, copy of which is hereto annexed, marked "D", and certain decisions of our court were referred to.

14. No further communication passed between the petitioners and the respondent or his assistant until July 3, 1953, when counsel received from Mr. Booras a memorandum of his decision, of which a copy is hereto annexed marked "E", denying the application for the use of the Attorney General's name.

15. The petitioners submit that from this memorandum and from the facts hereinbefore recited it is apparent that the office of the Attorney General has misconceived its duty in the premises.

If the conclusion set out in Mr. Booras' memorandum be assumed to be that of the respondent, he must be taken to have permitted himself to be materially influenced by irrelevant considerations. While the petitioners recognize that the course to be taken lies in a general sense within the discretion of the respondent, they submit that, if his decision in a given case is manifestly affected by errors of law or he has failed to give the parties a proper hearing, the court has power to command him to vacate the defective decision and to give such a hearing and in arriving at a further conclusion to give weight only to those considerations which are as matter of law relevant, excluding all other considerations.

16. The petitioners submit that in the following particulars, among others, the decision now in question is repugnant to the principles upon which the respondent is required to act:

(a) The respondent has assumed, without hearing any evidence, to refuse the present application because of a belief that the weight of the arguments on one side and on the other is with the Corporation, whereas he should have gone no further with respect to the probable outcome of the contemplated proceeding than to satisfy himself as to whether the issues — whatever his personal judgment upon them, — are a fit subject for judicial inquiry.

(b) The respondent has based his conclusion largely upon what he calls "the practical construction and decision of the University, which has been administering the endowment through so many years", whereas there has been no "practical construction" in any proper sense with respect to the present issues because the removal of the library and herbarium from the Arboretum was never seriously suggested by anybody prior to the promulgation of the Bailey Plan.

(c) The respondent has proceeded on the assumption that the rule applied in *Holmes v. Welch*, 314 Mass. 106, governs the present situation. This assumption is unwarranted. In *Holmes v. Welch* the controversy was as to whether the court should override the judgment of the trustees in a matter which was committed by the express terms of the trust instrument to their discretion and as to which they had no adverse interest. In the present case the object of the trust as defined in the trust indenture is primarily the establishment and support of an Arboretum on a particular site in West Roxbury

and admits of the carrying on of research as an activity of the institution thus localized, no discretion with respect to the transfer of any such activity being vested in the trustee. Moreover, the interest of the Corporation as trustee in the present case is essentially adverse in that the Corporation has many other interests to protect and forward, so that, far from there being any presumption in favor of the course taken or proposed by the trustee as regards the Arboretum, that course can be sustained only by showing beyond all reasonable doubt that it will promote the objects of the trust, i.e., the best interests of the Arboretum alone. In the present case, there is at the least a sharp conflict of expert opinion as to whether the proposed removal of the library and herbarium will be in the best interests of the Arboretum; and the Corporation is manifestly in no position to make an impartial and final decision as between these opinions.

(d) The decision of Mr. Booras asserts that "there will continue to be a library and herbarium at Jamaica Plain adequate for arboretum activities there". There is no warrant for this conclusion, particularly in view of the facts that scientific research has been and should be a principal activity of the Arboretum and that it is proposed to remove from Jamaica Plain most of the material relating to such research, namely, the "main body of the library and herbarium related to research".

(e) The statement with which the respondent's memorandum closes, "To permit the use of the name of the Attorney General in cases like the present, where it is clear to him the trustee is acting in good faith and within the bounds of reasonable judgment and sound discretion, simply because others, equally in good faith, differ with the decision of the trustee, would open the door to unreasonable and vexatious litigations." — exhibits a fundamental misconception. The petitioners do not suggest that the Corporation is not acting in good faith. Their contention is that the matter in question does not lie within the field of "reasonable judgment" or "sound discretion" because, as admitted by the Corporation, the trust must be administered in the best interests of the Arboretum, and because on the facts the course which the trustee favors is not in the Arboretum's best interests, and consequently there is no justification for the proposed action as matter of law, even though the trustee, having adverse interests, asserts the contrary.

(f) Mr. Booras gave the parties no hearing in any proper sense and was in no position to make findings of fact, as he assumed to do, upon the merits of the controversy.

(g) The respondent improperly delegated to Mr. Booras the final determination of the matter, and the decision, as appears on its face, is not the respondent's, but that of Mr. Booras.

The petitioners therefore pray that the court issue a writ of mandamus

commanding the respondent to vacate the decision embodied in the memorandum above referred to and (1) to grant the petitioners a hearing in the proper sense of the term, and (2) to reconsider the petitioners' application and to grant it if, upon full personal consideration of the facts and of correct principles of law, it appears that the issues which the petitioners seek to raise are fit subjects for judicial inquiry, even though it may appear to him that the past and proposed action of the Corporation complained of is not contrary to the best interests of the Arboretum and is within the terms of the trust.

ROBERT G. DODGE
J. W. FARLEY
ENDICOTT PEABODY
Attorneys for the Petitioners.

A.

This Indenture made and executed on this twenty ninth day of March in the year of our Lord one thousand eight hundred and seventy two, by and between George B. Emerson, John J. Dixwell, and Francis E. Parker, Esquires, as they are Trustees under the will of James Arnold, late of New Bedford, in the County of Bristol, Merchant, deceased, Party of the first part, and The President and Fellows of Harvard College, Party of the second part, Witnesseth,—

That whereas the said James Arnold by his last will devised and bequeathed to the said party of the first part one and a quarter twenty fourth parts of the residue of his estate "in trust, to be by them applied for the promotion of Agricultural or Horticultural improvements, or other Philosophical or Philanthropic purposes at their discretion, and to provide for the continuance of this trust hereafter to such persons, and on such conditions as they, or a majority of them, may deem proper, to carry out the intention of the donor"; —

And whereas Benjamin Bussey late of Roxbury in the County of Norfolk, Merchant, deceased, by his last will and testament devised to the said party of the second part an estate in remainder subject to certain life estates in the estate on which he had lived in said Roxbury, called "Woodland Hill", consisting of over two hundred acres of land, in trust and confidence that they would "establish there a course of instruction in practical agriculture, in useful and ornamental gardening, in botany, and in such other branches of natural science, as may tend to promote a knowledge of practical agriculture and the various arts subservient thereto, and connected therewith, and cause such courses of lectures to be delivered there, at such seasons of the year, and under such regulations as they may think best adapted to promote the ends designed:—the institution so established to be called the "Bussey Institution"; —

And whereas the said party of the first part have agreed and determined, in the exercise of the discretion given them under the will of the said James Arnold, that the disposition of the property devised and bequeathed to them as aforesaid in the manner and for the purposes and upon the conditions hereinafter set forth 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, to carry out the intention of the donor.

Now therefore it is agreed, bargained, and covenanted by and between the said Party of the first part and the said party of the second part as follows:—

First, The said Emerson, Dixwell, and Parker, Trustees, party of the first part, in consideration of the covenants agreements and undertakings of the said President and Fellows hereinafter set forth do hereby give, grant, bargain, sell, convey, assign and transfer to the said President and Fellows of Harvard College, party of the second part, and their assigns forever, the whole property and estate devised and bequeathed to them, the party of the first part, under and by virtue of the will of the said James Arnold, which has been already received or shall be hereafter received by the said party of the first part, (excepting and reserving

therefrom a sum sufficient to pay the actual expenses incurred by said party of the first part) a schedule of which so far as received is hereto annexed, 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, namely,—

That the said party of the second part shall hold the same as a separate and distinct fund, and shall allow the whole nett income thereof, (after deducting the necessary expenses of managing the same, and also deducting, if they see fit one third part of such nett income in each year as is hereinafter provided,) to accumulate and add the same to the principal, until the said fund shall amount, at a just valuation, to One hundred and fifty thousand dollars, and until the land at West Roxbury hereinafter described shall come into the possession of the said party of the second part as an estate in possession free of all life tenancies, or other incumbrances.

Second, When both said events shall have happened, that the said party of the second part shall accumulate five per centum of the said nett income, in every year, and add the same to the capital, as a part of the said permanent and separate trust fund.

Third, That the said party of the second part shall devote the remainder of the said nett income in every year, 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 labelled, 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. 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.

Fourth, Until the happening of both of the events named in the first clause, the said party of the second part may expend one third part of said nett income in every year, and no more, in such preparation of the land hereinafter named, and in such collecting or raising of specimens, and the necessary superintendence thereof, as will promote the general and ultimate purpose above stated, but in no other way.

Fifth, 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.

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 trusts herein declared; and further, in consideration of said transfer and payment, they agree to dedicate exclusively to the purpose of said Arboretum, a parcel of land lying in West Roxbury, in the County of Norfolk, shewn on the plan accompanying and to be recorded with this indenture, and bounded and described as follows, namely, beginning at the junction of South Street and Bussey Street in said West Roxbury, and bounded Southerly and Southeasterly on said South Street about three thousand one hundred and eighty five feet; northerly and northeasterly on land of Bradstreet about one thousand four hundred and thirty eight feet; northeasterly on land of Goldsmith about nine hundred and fifty five feet; northwesterly on land of Weld about nine hundred and thirty feet; northwesterly and northerly on land of Lewis about twelve hundred and twelve feet; northwesterly on Centre Street about thirteen hundred and twenty feet; Southerly and Southwesterly on land of Howard about thirteen hundred and four feet; westerly on land of Smith about two hundred and ninety feet; and Southwesterly on Bussey Street about thirteen hundred feet to the point of beginning. The said land is part of the land devised to the said President and Fellows of Harvard College by the said Benjamin Bussey, as before recited, by his will which is of record in the County of Norfolk; and the interest of the said President and Fellows therein is an estate in remainder which will become an estate in possession upon the expiration of certain lives now in being; and it is hereby agreed that from and after the time when said estate becomes an estate in possession the said President and Fellows will hold the same as hereinbefore declared and not otherwise. But it is agreed and provided, nevertheless, that the said President and Fellows may reserve out of said land for the purpose of sites for school buildings, green houses, tool houses, and other like buildings, and of the grounds appurtenant to such buildings, and of the mansion house, such a parcel, or such parcels of land as they may deem necessary, not exceeding in all fifteen acres; and it is provided also that for the purpose of fixing the time when the said President and Fellows shall be entitled to use the entire income (less five per centum) of the said accumulated fund, the life estate now existing of Thomas Motley, Esquire, in one parcel of said land, shall not be considered as a life estate or incumbrance within the intent of this agreement.

In witness whereof the said George B. Emerson, John J. Dixwell and Francis E. Parker, Trustees, Party of the first part, and the said President and

Fellows of Harvard College, Party of the second part, by Charles W. Eliot, President, and Nathaniel Silsbee, Treasurer of said College, have hereunto set their hands and seals on the day and year first above named.

(Signed and acknowledged by the three trustees named in the first paragraph of the indenture and, in behalf of the President and Fellows, by Charles W. Eliot, President, and Nath. Silsbee, Treasurer.)

B.

December 22, 1952

President James B. Conant
Massachusetts Hall
Cambridge 38, Massachusetts

Dear Mr. Conant:

We enclose a suggestion for a statement of policy in the Arnold Arboretum matter. As to paragraphing it follows the proposed statement of policy contained in the resolution of the Overseers' Co-ordinating Committee on the Biological Sciences dated November 7, 1952, except that it contains one additional paragraph numbered 10. It embodies changes from the statement proposed by the Co-ordinating Committee which if acceptable to the Corporation would enable us to say to the Overseers' Committee to Visit the Arnold Arboretum that the statement of policy meets the legal points we have raised and that it would seem to us to offer a reasonably satisfactory solution.

One important point is disposed of by the Co-ordinating Committees' proposed statement of policy, namely that the Bailey Plan should not apply to the Arboretum. Nevertheless, questions remain as to the application of this statement.

The addition of a second sentence in paragraph 1 of the enclosure is intended to make explicit a point which we think fundamental, i.e. that the Corporation recognizes its obligation as trustee of the Arboretum's tangible property and funds to administer the trust in the sole interest of the Arboretum.

No change is suggested in paragraph 6. The suggested changes in paragraphs 1, 2, 3, 4, 5, 7 and 8 relate in one way or another to what may be called the administrative relations between the Arboretum and the University. They are, in general, designed to give clear recognition to the duties incumbent upon the trustee and to insure a degree of autonomy and scope to the Arnold Professor that will comply with the provision as to "care and management" of the Arboretum and will make the position attractive to a first class man qualified for the position by reason of demonstrated knowledge of and interest in the horticultural aspects of the Arboretum's work.

As to paragraph 9, you will see that it states a policy contrary to that of paragraph 9 in the statement proposed by the November 7th resolution. Instead of finding that the removal of the main body of the Arboretum's library and herbarium to Cambridge is in the Arboretum's interest, it states that in view of serious doubt in this regard the removal will not occur.

On the basis of the evidence available to us this conclusion could be stated more strongly to the effect that such a removal appears definitely contrary to the Arboretum's interests. Since this is a fundamental point, we wish to cite certain reasons why, as we believe, such a removal would in fact be against the Arboretum's interests and therefore unjustifiable on the part of the Corporation as trustee.

We believe that an impartial consideration of the facts will show that whatever the advantage to Harvard and its botanical or biological departments from moving important parts of the Arboretum's library and herbarium to Cambridge, this would be disadvantageous to the Arboretum. It would, we believe, be disadvantageous to its usefulness to the public, to its achievement in its general scientific field, to its contribution to horticulture and botany in its special fields, to its future financial support, and to the reputation and prestige which are essential for its greatest usefulness.

The Arboretum can best be described as a horticultural-botanical institution because two separate yet interrelated and mutually supplementary sets of activities are carried on there. The institution is admirably equipped for this interrelated work. It has:

- (1) a fine collection of some 6000 species and varieties of trees and woody plants in an area of 425 acres (including the Weston property) of which it was recently said by a good authority that "there is no other comparable collection and there is not likely to be for many years";
- (2) an outstanding and unique library;
- (3) an excellent herbarium;
- (4) an endowment of over \$4,000,000. and many loyal friends; and
- (5) an excellent staff combining horticultural with botanical knowledge and skills.

It is, therefore, a well rounded and integrated institution, which is a prime reason why it enjoys such great prestige here and abroad.

The effect of the removal of the main body of the library and collections to Cambridge would be to break up this integrated institution. By dividing the facilities it would also divide the time of the Arnold Professor and his staff between Jamaica Plain and Cambridge. It would require some or all of them to shuttle back and forth to a disconcerting and wasteful extent. The net result would be gravely to impair the Arboretum's work; some say virtually to destroy it.

In thus impairing its work the removal would impair the Arboretum's reputation and make it difficult or impossible to find a man of first class ability, with proper qualifications in horticulture as well as in botany, who would be willing to accept the position of Arnold Professor.

On the other hand, if the present integration of horticultural-botanical activities can be not only maintained but developed, there is a great future ahead for the Arboretum, both scientifically and in serving the vast new public which is just beginning to be interested in horticulture.

We feel that many of those who have advocated the Bailey Plan, including the removal feature, as applied to the Arboretum, have not done so with the basic principle clearly in mind that the trust of the Arboretum's property and endowments must be administered with an eye single to the Arboretum's interests. We feel that if they approached the matter as tested by that criterion, rather

than from the standpoint of the general effect of the removal on the University's botanical interests as a whole, many of them would be unable to say that the removal could or would benefit the Arboretum.

It may be that some might still argue that the removal would benefit the Arboretum itself as well as the combined botanical activities; but we judge that any such opinions would be more than offset by the weight of impartial testimony to the contrary.

We hope that the Corporation will see fit to recognize that there is at least grave doubt as to whether the removal would be in the Arboretum's interest and will, consequently, cancel that feature of the Bailey Plan. If so we believe that it should be possible to agree on language covering the various points on the administrative matters. If not, we believe that the best course would be a submission to the Courts through a petition by the Corporation as trustee.

We wish to add our regret that conferences on this matter were not held long ago. After receiving the Co-ordinating Committee's resolution of November 7, 1952, we met on November 23rd with the Co-ordinating Committee and with a committee of the Corporation on December 15th. These meetings were the first opportunity the representatives of the Visiting Committee had been granted to confer with the Co-ordinating Committee or the Corporation.

We feel that an earlier meeting would either have resulted in an agreement, or in submitting the matters in question for judicial decision as to the duties of the trustee. In either case, the present questions would already have been settled or be in a fair way to be determined.

The long delay and uncertainty have been damaging to the Arboretum, partly because under the circumstances it has been impossible to seek large gifts or legacies. As a result of the recent meetings we think it should be possible to reach an understanding without much further delay. It is our belief that these matters should now either be agreed upon or submitted to the Courts.

We are sending copies of this letter and the enclosed draft to Mr. Laird Bell as chairman of the Co-ordinating Committee.

We shall be glad, if desired, to confer further with the Co-ordinating Committee, the Corporation's committee or counsel.

Sincerely yours,

Robert G. Dodge

J. W. Farley

Enc.

C.

*Resolution adopted by the Harvard Corporation on
January 19, 1953.*

Resolved that, upon the recommendation of the Board of Overseers and after further consideration, the Corporation hereby adopts the following statement of policy to govern the administration of the Arnold Arboretum and the use of all funds held by the Corporation in trust for the purposes of the Arboretum:

1. The plan contained in the Bailey Report of June 1945 shall not apply to the Arboretum or to the principal or income of its endowment. The Corporation recognizes that the property and endowment held for the purposes of the Arboretum are 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.
2. As soon as is practicable, the President, after consideration of the advice and recommendations of an *ad hoc* committee, will nominate and the Corporation will appoint an Arnold Professor, bearing in mind that the Arnold Professor should have among his qualifications a demonstrated interest in and knowledge of the care and management of an arboretum for the collection, cultivation and development of trees, shrubs and herbaceous plants and activities incidental thereto.
3. The Arnold Professor shall have the care and management of the Arboretum, subject to such control on the part of the Corporation as is given it by the terms of the Indenture of 1872 and of later gifts for the purposes of the Arboretum. In the exercise of such control and its duties as trustee of endowment funds held in trust for the purposes of the Arboretum, the Corporation will act through the President, who may be assisted by such other administrative officer or officers as the Corporation may from time to time designate. The Arnold Professor shall have the right to discuss with the President any matters concerning the care and management of the Arboretum.
4. As to tenure, since the duties of the Arnold Professor are largely administrative, the Corporation believes that for the protection of the Arboretum's interests he should be removable not only "for grave misconduct or neglect of duty", as now provided in the case of officers of instruction, but should also be subject to removal if, having in mind only the Arboretum's interests, the Corporation determines that his administration is not a successful one. In connection with his additional duties under the

terms of the Indenture of 1872 to "teach the knowledge of trees in the University" and to "give such other instruction therein as may be naturally, directly and usefully connected therewith", the incumbent of the Arnold Professorship shall also be appointed Professor of Dendrology and, as such, shall hold tenure in the University as an officer of instruction of professorial rank.

5. Recommendations for other appointments to the staff of the Arnold Arboretum may be initiated from time to time by the Arnold Professor or by the President and all such appointments shall be made in accordance with the procedures followed in connection with other Corporation appointments of like rank, including the use of *ad hoc* committees.
6. The annual budget of the Arnold Arboretum shall be prepared by the Arnold Professor or under his direction and shall be submitted to the Corporation through the President and such other administrative officer or officers as the Corporation may from time to time designate, whose comments and recommendations may accompany those of the Arnold Professor.
7. The annual net income from the endowments of the Arnold Arboretum shall at all times be expended for purposes within the terms of such endowments and in such manner as is in the best interests of the Arboretum. For the present, such net income (except in the case of gifts expressly designated for a particular purpose of the Arboretum) shall be first applied to the support of the living collections and buildings at Jamaica Plain, the Arnold Professorship, and the library and herbarium of the Arboretum, and thereafter, to the extent available, to the support of all other Arboretum activities, including instruction and research in fields of knowledge related to trees, shrubs and herbaceous plants.
8. The activities supported by the endowment of the Arnold Arboretum may be coordinated with other University activities in botany to the extent that such coordination is in the best interests of the Arboretum and will promote the purposes of its endowment. Proposals for such coordination may be initiated from time to time by the Arnold Professor or by the President. The Arnold Professor shall be *ex officio* a member of the University's Biological Council.
9. These policies and arrangements contemplate fruitful and harmonious cooperation between the Arboretum and other parts of the University and the coordination of activities to the extent that such coordination is in the best interests of the Arboretum. The corporation is confident that these relations will develop successfully.

10. In the exercise of its duties as trustee of endowment funds held in trust for the purposes of the Arnold Arboretum, the Corporation determines 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 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 books and specimens to be so housed in Cambridge shall be appropriately identified as a part of the Arboretum and shall remain under the care and management of the Arnold Professor. The Arnold Professor and the Director of the University Library shall recommend to the Corporation through the President what books are to be retained at Jamaica Plain. The Arnold Professor and the Director of The New York Botanical Garden shall recommend to the Corporation through the President what specimens are to be retained at Jamaica Plain. No part of the cost of the construction of the central building in Cambridge shall be borne by Arboretum funds, the entire cost to be provided from unrestricted funds of the University. A part of the expense of the annual maintenance and operation of the central building (as distinguished from the care and maintenance of the library and herbarium of the Arboretum housed therein) shall be charged to the income of the Arboretum endowment in accordance with the standard procedure of the University for allocating such costs.

D.

*Notes of Grenville Clark for a Statement to
the Attorney General on June 9, 1953.*

I. Ten citizens long interested in the Arnold Arboretum and Harvard University are applying for leave to bring a suit in the name of the Attorney General to test the question whether it would be a breach of trust to carry out the vote of the Harvard Corporation (the President and Fellows of Harvard College) dated January 19, 1953. These persons are John S. Ames (Boston), Godfrey L. Cabot (Boston), Grenville Clark and Mrs. Grenville Clark (Dublin, N. H.), Mrs. Francis B. Crowninshield (Boston and Delaware), Henry F. duPont (Winterthur, Del.), Childs Frick (Roslyn, N. Y.), Mrs. Louis A. Frothingham (Boston), Mrs. Susan Delano McKelvey (Boston), and Ellery Sedgwick (Beverly). All of the above except Messrs. Sedgwick and Clark are members of the Harvard Overseers' Committee to Visit the Arnold Arboretum.

Following the Harvard Corporation's vote of January 19, 1953 this group asked Messrs. Robert G. Dodge and J. W. Farley (who had jointly been counsel for the Visiting Committee in relation to the application of the so-called Bailey Plan to the Arboretum) to advise whether the carrying out of certain features of the Plan set forth in the January 19 vote would or might involve a breach of trust and whether the Courts of Massachusetts might so determine, if the matter were litigated. After very careful inquiry, including consultation with some fifteen leading authorities throughout the country in no way connected with Harvard, counsel advised that the Courts would very possibly so hold. On this basis the group, being previously convinced that the carrying out of the vote would in fact gravely injure the Arboretum, asked counsel to make this application for leave to bring a suit to test the legal issues.

II. The main question, I assume, is whether there is a reasonable possibility that the Courts would hold that the carrying out of the January 19 vote would involve a breach of trust, — especially in that feature of the vote (Par. 10) which calls for the removal from Jamaica Plain to Cambridge of the "main body of the library and herbarium of the Arboretum related to research . . .".

III. In my judgment there is much more than a reasonable possibility that a judicial tribunal would find that the carrying out of the vote would involve a breach of trust. I was a member of the Harvard Corporation at the time the Bailey Plan was approved in 1946 and until November 27, 1950. I am very familiar with the circumstances under which the Bailey Plan was originally approved by the Corporation in 1946; and ever since the Visiting Committee in 1949 — '50 raised serious questions about the application of the Bailey Plan to the Arboretum, I have thoroughly studied the facts and the various opinions of counsel. On this basis, together with my experience as a practicing lawyer in New York 1906 — '46 (during which I had experience in questions relating to

the duties of trustees), my judgment is that it is very likely that an experienced and impartial tribunal would decide that the carrying out of the vote would not be in the interests of the Arboretum and consequently would forbid it as a breach of trust.

IV. The reasons for my conclusion include the following:

Although by Paragraph 1 of the vote the applicable principle of law is no longer in dispute, i.e. that the Corporation holds the Arboretum's property and endowment on a special trust to be administered "with a view to the best interests of the Arboretum", this admitted principle is contradicted in practice by Paragraph 10 which purports to "determine" that the removal to Cambridge of the main body of the library and herbarium related to research will be in "the best interests of the Arboretum and will promote the purposes of its endowment".

This contradiction is because, in the practically unanimous opinion of the impartial authorities who were consulted, the removal of most of the library and herbarium from the headquarters in Jamaica Plain would break down the integrated character of the institution. And, whether or not the removal would help botany at Harvard or elsewhere, their virtually unanimous opinion was that this would clearly be adverse to the Arboretum as an institution. This opinion rests on the proposition that a distinguished horticultural-botanical institution like the Arboretum needs to *have together* in one location the three main elements requisite for a well-rounded institution of this character, namely: (a) An excellent horticultural-botanical library; (b) an excellent herbarium of dried specimens; and (c) an excellent collection of living trees and shrubs. The Arboretum now has all three of these. Its library has 60,000 books and 20,000 pamphlets and is nearly, if not quite, unique. Its herbarium has 600,000 specimens and is of great value. Its living collection, containing some 6,000 species and varieties, is probably the most complete and famous American collection of this sort. The conjunction of these three elements in one place is what has given the Arboretum a world-wide status and reputation. To break up this integration by removing the major part of its library and herbarium to Cambridge may or may not benefit botany. But a very powerful weight of opinion can be produced to the effect that it can do nothing but damage to the Arboretum as a scientific institution.

A considerable number (some fifteen in all) of the best authorities in the United States outside of Harvard have been consulted by personal interview on this question. They include men of long experience and great distinction in this field.

The virtually unanimous opinion of these authorities is that the break-up of the present integrated character of the Arboretum would injure the morale of the Arboretum's staff, reduce its usefulness and prestige and would, consequently, be against its interests. There is no doubt in my opinion that the number of impartial authorities who would hold the same opinion could be largely increased and that on the trial of a litigation a very weighty body of testimony could be adduced to this effect. It may or may not be that important

testimony to the contrary could be brought forward, but it is certain that no Court could lightly dismiss the body of impartial and authoritative professional opinion which could and would be marshaled to show that the carrying out of the removal feature would be destructive of the Arboretum's interests.

My opinion is that after hearing the testimony and notwithstanding any presumption that might exist in favor of the Corporation's "determination", an experienced Master or Judge would find it difficult to avoid the conclusion that a breach of trust would be involved.

V. Apart from the opinion of the above-mentioned professional authorities, the strong conviction of the persons making this application ought to have weight. They are united in the belief that the carrying out of the January 19 vote would very gravely damage the Arboretum and, far from being in its interests, would be precisely the opposite to a serious extent. All of the ten persons here applying have had a long and close association with the Arboretum and a number of them are themselves highly qualified to give opinions of importance on the issue involved. For example, John S. Ames is President of the Massachusetts Horticultural Society and is well known in the horticultural world. Henry F. duPont has himself one of the best American collections of plants and shrubs; and is a Director of the New York Botanical Garden and other horticultural-botanical organizations. Childs Frick has his own arboretum at Roslyn, N. Y., which he has personally supervised for many years; has been in close touch with the Arnold Arboretum for a generation; and has studied this issue with the utmost care. Mrs. McKelvey is really a professional herself; she is the author of excellent horticultural-botanical books and has been a member of the Visiting Committee for many years. There are others of the group such as Mr. Cabot and Mr. Sedgwick whose opinions are entitled to weight. Altogether the united judgment of these ten persons that the carrying out of the January 19 vote would gravely injure the Arboretum ought not to be ignored; on the contrary, it should be given substantial weight.

VI. It may be argued that the removal of most of the library and herbarium to Cambridge would meet a problem of safe housing for these valuable books and specimens and that this may offset the argument that the separation of the library and herbarium from the living collections is contrary to the Arboretum's interests and therefore a breach of trust. It is true that the library and herbarium need safer and better housing in Jamaica Plain. But it is also true that this problem has been carefully considered and that there is a perfectly feasible solution for it if there is no removal to Cambridge. This solution is to build a new fireproof and air-conditioned wing on the Arboretum's headquarters building in Jamaica Plain, transfer the herbarium to it and house the library in the present fireproof quarters which now contain the herbarium. The cost of this is estimated at not over \$200,000 which could be financed in various ways. One feasible method would be: (a) To use the Arboretum's "building fund" established in 1892 amounting to \$91,223; (b) to apply the Arboretum's "credit balance" with the University which amounted as of June 30, 1952 to \$63,495; and (c) to obtain the needed balance of, say, \$50,000 by subscription from

friends of the arboretum. As to the last, there could be no doubt of the ability to raise the needed amount since the many friends of the Arboretum would be so relieved by the cancellation of this threat to its future that they would undoubtedly subscribe this amount, or even more, to meet the housing problem once it were known that the Bailey Plan had actually been withdrawn in all its features as applied to the Arboretum.

In this connection it must be remembered that Paragraph 10 of the January 19 vote calls not only for the removal of most of the library and herbarium to Cambridge, but also for the use of a substantial amount of the Arboretum's income (estimated at \$12,000 per annum for the present) for "the annual maintenance and operation of the central building" to which the Arboretum's books and specimens would be moved. The minimum cost of this maintenance would require the income of \$250,000 of the Arboretum's endowment and this might run much higher in later years.

VII. There are the strongest practical reasons why the clearing up of this legal issue through a decision of the Supreme Judicial Court is advisable.

The Arboretum has many friends not only in Massachusetts, but elsewhere. It has an endowment of over \$4,000,000. It has taken the lead in the development of horticulture in this country. It is one of the most distinguished, if not the most distinguished, horticultural-botanical institutions in the country. It is a credit to Boston and Massachusetts. It has a great field of future usefulness; and its future could be as distinguished as its past. It is, however, dependent on continued support, moral and financial, of a considerable number of people of both large and small means. Confidence has now been widely shaken because of the doubt as to whether money given to the Arboretum will be used for the purposes for which the Arboretum primarily exists or whether its funds and property will be diverted to other purposes which, however worthy, are not the purposes of the Arboretum. There is little or no prospect that substantial gifts can be obtained unless and until this situation is cleared up.

This lack of confidence has been accentuated by the refusal of the Harvard Corporation voluntarily to seek the Court's instructions in accordance with the almost invariable practice of a responsible trustee, where a question is raised by responsible people as to whether the trust is being carried out. This refusal has made a painful impression in many quarters.

A judicial determination is therefore necessary in order to clear up once and for all the question whether a breach of trust is involved. If the Court's ruling is that the carrying out of the January 19 vote would involve a breach of trust the way would be open to solve the housing problem and to obtain new and large gifts which it is now impossible even to solicit. If, on the other hand, the decision is that no breach of trust would be involved, that cloud would at least be lifted.

E.

Mr. Booras' Decision.

Application has been made to the Attorney General for the filing of an information against the President and Fellows of Harvard College as Trustees of the Arnold Arboretum, alleging, in substance, that the proposed removal of the major part of the library and herbarium of the Arboretum to a central botanical building in Cambridge is inconsistent with the terms of the Arboretum endowment and constitutes a legal breach of trust.

I was assigned by the Attorney General to hear all parties in the dispute and resolve upon a decision in the matter. In addition to my inspection of the Arboretum and the present edifice in which the library and herbarium are now housed, as well as the building now under construction in Cambridge where they are proposed to be transferred, I have given full and deliberate consideration to all arguments advanced for and against the transfer and to all documents and briefs filed with me.

The Arboretum Trust was created by an Indenture of 1872 under which its purposes were declared:

"... 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 of which shall be raised or collected as fast as is practicable, and each specimen thereof shall be distinctly labelled, 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."

All subsequent gifts to or for the Arboretum came under the terms of the original trust.

Thus Harvard as trustee was not only vested with the responsibility of control, management and development of an Arboretum, but also with that of teaching "the knowledge of trees in the University" and with the giving of "such other instruction therein as may be naturally, directly, and usefully connected therewith." In short, the trust had a double aim: establishment of an Arboretum and instruction at the University.

Under the trusteeship of Harvard the Arboretum has attained world-wide status and reputation and is considered one of the most distinguished horticultural-botanical institutions.

The Harvard Corporation has now decided by its vote of January 19, 1953, to remove the major part of the library and herbarium from the Arboretum to a

new building in Cambridge and for the retention at Jamaica Plain of such books and specimens as may be required there for a working library and herbarium. Just what books and specimens are to be retained at the Arboretum will be determined upon the recommendation to be made by committees, of which the Arnold Professor will be a member. Thus, there will continue to be a library and herbarium at Jamaica Plain adequate for Arboretum activities there; and there will also be an arboretum library and herbarium in Cambridge where many Arboretum activities, such as "teaching in the University" and research in the horticultural-botanical science, will be conducted.

Indeed, neither express directives are found in the trust indenture for a library and herbarium at the Arboretum nor restraints as to their location or relocation when established. Even if any doubt existed in the matter, the practical construction and decision of the University, which has been administering the endowment through so many years, is to be given great weight and consideration.

The proposed relators have contended that the transfer will not only be against the best interest of the Arboretum but that it would cripple the Arboretum as an institution. They have cited many professional authorities in support of this contention. On the other hand, the University maintains that the transfer would be solely for the best interest of the Arboretum and will more greatly promote the purposes and aims of the trust. Equally significant professional authorities approve and highly recommend the action.

The decision of a trustee "cannot be overridden by the courts unless the trustees decide arbitrarily, capriciously or in bad faith." *Holmes v. Welch*, 314 Mass. 106. There is not the remotest evidence here that Harvard has reached its decision in any manner other than honestly, faithfully and for what it considers to be the best interests of the Arboretum.

There is no legal breach of trust. To permit the use of the name of the Attorney General in cases like the present, where it is clear to him the trustee is acting in good faith and within the bounds of reasonable judgment and sound discretion, simply because others, equally in good faith, differ with the decision of the trustee, would open the door to unreasonable and vexatious litigations. Accordingly, by direction of the Attorney General, the application is denied.

July 2, 1953

(sgd.) HARRIS J. BOORAS
Assistant Attorney General

In the Supreme Judicial Court,

Suffolk, ss.

John S. Ames of Easton in the County of Bristol, Benjamin S. Blake of Weston in the County of Middlesex, Grenville Clark of Dublin in the State of New Hampshire, Godfrey L. Cabot of Boston in the County of Suffolk, Henry F. duPont of Winterthur in the State of Delaware, Childs Frick of Roslyn Harbor in the State of New York, Ellery Sedgwick of Beverly in the County of Essex, Fanny D. Clark of said Dublin, Louise duPont Crowninshield of said Boston and Susan Delano McKelvey of said Boston

v.

The Honorable George Fingold, as he is Attorney General of the Commonwealth of Massachusetts

Petition for Writ of Certiorari.

To the Honorable the Justices of the Supreme Judicial Court:-

The petitioners above named respectfully represent as follows:-

I. The petitioners are desirous of obtaining a judicial determination of the question whether certain action taken or proposed to be taken by the President and Fellows of Harvard College (hereinafter referred to as "the Corporation") is or would be in the best interests of the Arnold Arboretum and consistent with the terms of an indenture of trust entered into under date of March 29, 1872, by George B. Emerson and others, trustees under the will of James Arnold, parties of the first part, and the Corporation, party of the second part, transferring a fund to the Corporation as trustee for the purpose of establishing and maintaining an Arboretum (to be called the "Arnold Arboretum") on over 200 acres of land in West Roxbury, Massachusetts, then belonging to the Corporation, and for the support of a professor who should be called the Arnold Professor and should have the care and management of the Arboretum. To this end the petitioners have applied to the respondent for the use of his name in bringing proceedings to determine whether the trust is in prospect of abuse. This application was, however, denied in a decision of Assistant Attorney General Booras.

II. The petitioners are advised that this denial of their application was improvident and erroneous as matter of law, and was made without any proper hearing and as a result of the improper delegation of the respondent's authority to the Assistant Attorney General. They have accordingly filed in this court a petition (No. 53611 on the law docket) for a writ of mandamus commanding the respondent to vacate the said denial of their application, to grant a hearing thereon and to decide the matter according to correct principles of law.

III. Being uncertain whether their remedy is a petition for mandamus or a petition for certiorari, the petitioners (not waiving their said petition for mandamus, but insisting thereon) bring the present petition as an alternative means of attaining the desired relief, incorporating herein by reference Paragraphs 1 to 16 inclusive of their petition for mandamus and adopting all the allegations of said paragraphs as if set forth verbatim herein.

Wherefore the petitioners pray that there be issued a writ of certiorari to set aside and quash the said denial of their application for the use of the respondent's name and that the respondent be required to grant a hearing on said application and to decide the matter in accordance with correct principles of law.

ROBERT G. DODGE

J. W. FARLEY

ENDICOTT PEABODY

Attorneys for the Petitioners.

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