

THE CHARITY OF EDWARD HOPKINS: THE HAZARDS OF CHARITABLE TRUSTS IN COLONIAL AMERICA

The tangled history of the charitable bequest left under the will of Edward Hopkins (1600-1657) illustrate the difficulties faced by Puritan philanthropists as they tried to negotiate the conflict between the well-established legal system of the Old World and the experimental one of the New.

Born in near Shrewsbury 1600, Hopkins became a prosperous merchant in London. In 1637, he migrated to New England in company with Theophilus Eaton and John Davenport, the founders of the New Haven Colony. He eventually settled in Hartford, where he quickly became a leader, serving as Governor and Deputy-Governor between 1640 and 1654. He also built a prosperous business, with trading posts along the length of the Connecticut River.

In 1653, Hopkins returned to England to settle the affairs of his brother, who had been Lord Protector Cromwell's Warden of the Fleet. He had expected to return to America, but succumbed to the urging of the government to replace his brother. He was subsequently chosen Commissioner of the Admiralty and Navy and was elected to Parliament. He died in 1657, leaving a substantial estate on both sides of the Atlantic.

Hopkins will directed that his residuary estate in New England be given in trust to his father-in-law, Theophilus Eaton, and a group of three other Connecticut leaders "in full assurance of their Trust and Faithfullness in disposing it according to the intent & purpose of me Edward Hopkins" for the purpose of giving "Encouragement unto those forreign Plantations for the breeding up of Hopefull youth in the way of Learning both at y^e Gramar School & Colledge for the publick Service of the Country in future times." He further provided that following the decease of his wife, an addition 500 pounds be conveyed "into the hands of the Trustees before mentioned . . . for the upholding & promoting of the Kingdom of the Lord Jesus Christ in those parts of the earth." From these simple open-handed gestures ensued a series of litigations between that would last for 135 years!

The fundamental problem with Hopkins' charitable gesture was that it failed to take into account the either importance of a juridical infrastructure to the enforcement of trusts or the lack of sophistication of the colonists with regard to the concept of a charitable trust. Trusts involve coextensive property rights which are divided between the trustee, who is the *legal* owner (and who has the right to buy, sell, or rent the property, as if it were his own), and the beneficiary, who is the *equitable* owner (and who has enforceable claims on the use of the trust property). The problem was that legal rights and equitable rights were not enforceable by the same courts. And, indeed, most courts in early New England did not see themselves as possessing the equity jurisdiction which would permit them to enforce trusts. (Massachusetts courts did not receive equity powers until 1819; Pennsylvania courts did not receive them until the 1870s).

Thus, while testators and others were free to create trusts, they had no assurance until well into the nineteenth century that such trusts would be enforced. The fate of Hopkins' bequest to his Connecticut trustees is illustrative of what could happen under such circumstances.

The broad issue of jurisdiction and enforceability was only one of many problems not envisioned by the charitable Mr. Hopkins. Other matters, such as a clearly defined set of beneficiaries, specifying the mode of succession of trustees, accountability to beneficiaries for the management of trust assets, were similarly neglected. While it may in retrospect seem a narrowly technical matter, the questions raised by the Trust's ownership and rental of land (in this case, a whole township in central Massachusetts) were considered to be of burning importance at the time. The notion that absentee owners could possess huge tracts and rent them out on leases that ran for a century seemed to Americans in the post-Revolutionary era an intolerable hangover of feudalism. Many states -- including New York and Connecticut -- forbade or severely limited such arrangements for just that reason.

Finally, it should be noted that, as with the Keayne bequests, the beneficiaries of charitable trusts were not exclusively private bodies: from 1715 to 1839 and again, from 1854 to the present, a quarter of the Hopkins fund went to support the public school in Cambridge. Similarly, though styled as a corporation, Harvard was, until the 1820s, universally conceded to be a public institution. This public side of private philanthropy is little understood.

The history of the Charity of Edward Hopkins from the time of his death in 1657 through the mid-nineteenth century, when this account was written, provides an historical microcosm of the complexities affecting charitable trusts in the American legal system.

The Charity of Edward Hopkins

The Trustees named in the will were however prevented from receiving the property in New England left them under the first bequest, owing to the action of the General Court at Hartford, which sequestered the estate and ordered that it should be secured within the Colony until an inventory of the estate was presented and the administration was "granted according to law." And later Edward Stebbing and Lieut. Thomas Bull were ordered by the General Court to take charge of the estate, and to collect debts due to it. This and the subsequent disreputable action of the Connecticut Colony were apparently caused by the dissensions which arose in the church at Hartford, in which the pastor took one side, and William Goodwin (with whom Mr. John Cullick sympathized) took the other). [Both Goodwin and Cullick were trustees of the Hopkins Trust]. These dissensions grew so bitter, that a large number of the church members, including Mr. Goodwin, went to Hadley and settled there. With one Trustee in New Haven, and the other residing in Hadley and embittered against Hartford, (the other Trustees having died,) the General Court apparently thought that their best course would be to hold fast to the estate. Correspondence passed between the Trustees and the authorities in Hartford for several years, until on February 1, 1663/4, William Goodwin wrote to "The Honorable Court at Hartford," offering to give them £350 provided they would remove all obstructions to the settlement of the estate and threatening to take the matter before the authorities in England, if Hartford declined this proposal. This letter produced an effect, for

in the following month the restraint laid upon Mr. Hopkin's estate was removed, and the Trustees apparently took possession of what was left of it.

This being done, the surviving Trustees, Rev. John Davenport and Mr. William Goodwin, one living at New Haven, and the other at Hadley, by a paper dated April 30, 1664, divided the estate as follows: four hundred pounds to Hartford (an increase from the amount stated in Mr. Goodwin's letter of the previous year); and the balance, including five hundred pounds to come from the estate in England, to be divided between New Haven and Hadley, "only provided that one hundred pounds shall be given and paid to Harvard College out of that half of the estate which Hadley hath. . . .

Thus the first bequest for "the breeding up of Hopefull Youth in the way of Learning both at y^e Gramar school and Colledge" was practically all divided among three towns in the Connecticut Valley, no one of which had the least pretence to the college, or had even advanced so far towards the establishment of the grammar school as to own a school building.

The second bequest, being dependent on Mrs. Hopkin's life, was of course still unpaid at her death, on December 17, 1698. At this time all the original Trustees were dead, as well as Robert Thompson and Francis Willoughby, the overseers, and Henry Dally, the executor and residuary legatee under Governor Hopkin's will. It seemed for a time as if the legacy had been absolutely forgotten by those for whose benefit it was intended, while those who had possession of the money were well content to retain control of it.

Finally, in 1708, "The Case on Edward Hopkins Bequest of 500^{lb} for Propagation of y^e Gospell" was submitted, probably by the Society for the Propagation of the Gospel in New England, to Sir Peter King and Mr. T. Vernon, for their opinion on the two questions, 1st, to whom the five hundred pounds belonged; and 2d, how to recover it. Both these lawyers gave it as their opinion, that the proper method of recovering the legacy would be by "an Information in Chancery" brought by the Attorney General against the executor Henry Dally; that the Crown should dispose of the legacy according to the intention of the testator, either by decree or by the appointment of new Trustees to "execute and perform this charity."

Accordingly, in 1708, at the Michaelmas Term of the Court of Chancery, the Attorney General brought a bill of complaint against Exton, the executor of Henry Dally, and a number of the legatees under Dally's will. . . . On July 9, 1709, the cause came on to be heard, and the matter was referred to Thomas Gery, a Master of the Court of Chancery. . . . And in case the money should be recovered, it was to be applied to the "school or college in New England for the breeding up of scholars in the study of Divinity." The Master was also to inquire, through witnesses or by writing to the Governor of New England, whether there be such a school or college as was prescribed or mentioned in the testator's will; and if no such school or college was there, he was to inform himself whether there was any other school or college there.

On February 10, 1710/11, . . . the Master reported that there were sufficient assets . . . to pay the legacy; and that there was a grammar school in Boston, and a school and college in Cambridge called Harvard College. Accordingly, the Master issued an order directing Exton to bring before the Master five hundred pounds, with interest at five per cent. . .; and instructing the Master to lay out the money in a purchase of land in New England in the name of the Corporation for the Propagation of the Gospel; but the trust was to be declared for the benefit of the college and grammar school at Cambridge in New England. . . .

While the suit had been progressing, the President and Fellows of Harvard College appear to have become aware of the facts regarding the legacy, and on March 20, 1710/11, Henry Newman petitioned the court on their behalf; and the court modified its order of the fortnight previous, and instructed the Master to lay out the money in the purchase of lands. . .; and the parties concerned for the grammar school and the college were directed to suggest names for Trustees to the Attorney General, and he was instructed to determine whether the lands should stand in the name of the Society for the Propagation of the Gospel, or in that of the President and Fellows of Harvard College, or in the names of the Trustees.

Nearly a year later. . ., the Attorney General reported that he had been attended by agents of the Society for the Propagation of the Gospel, by Jeremy Dummer, agent for New England, who also appeared on behalf of the school, and by Henry Newman, agent for Harvard, all of whom agreed to the following settlement. . . . [three-quarters of the fund, amounting now to 800 pounds, was to go to Harvard; the remainder was to go to the "Gramar School at the Town of Cambridge for the bringing up of youth to be sent to said College." The fund was to be invested "in a purchase of houses or Land in the said Province To the End that the rents and profitts thereof may be perpetuated to the benefit of y^e said Colledge and School." The fund was to be entrusted to a group of 22 Boston area merchants and clergymen. The Trustees were to meet annually "to Consider on the Affairs of their Trust, and at other times pro Re nata as the Treasurer shall give notice." The agreement further empowered the Trustees to "Chuse such persons to compleat their number as a Majority of them shall agree upon" in case of death or resignation. In addition, the agreement spelled out in great detail the amounts and conditions under which students were to receive aid from the Trust.]

The Trustees had been looking about them for a fit purchase of land, and finding that the Natick Indians owned a tract suitable for their purpose, in July 1715, they procured the passage by the General Court of an act authorizing the purchase by them from the Indians of a tract of land "commonly called by the name of Maguncoog."

. . . The lands thus purchased, together with other small lots bought at a later period and the adjoining lands belonging to the Province, were erected by the act of December 13, 1715, into the town of Hopkinton, and in the next year the Province land within the town limits were turned over in fee to the Trustees.

The troubles of the Trustees as landowners began at once, and their records for the next few years show the appointment of committees to consider questions of title, to run lines between the Trustees' lands and those of their neighbors, and to prosecute trespassers for cutting timber and similar depredations.

The question of disposing of their lands so as to produce some income soon arose, and in April, 1716, the Trustees decided to lease the lands at a yearly rental of threepence an acre for the term of ninety-nine years, and at a rental not exceeding ninepence an acre to the heirs and assigns of the same lessees, after that time. Having some doubts, however, as to their power to execute such long leases, they asked the General Court to grant them the needed authority; and accordingly a law was passed, December 3, 1719. . . .

Objections were offered to the terms of the proposed leases by the inhabitants of Framingham, who notified the Trustees that they would not lease the Hopkinton lands for ninety-nine years, because, 1st, the land is "spacious" enough to enable them to hold lands in freehold; 2d, tenants have not the privileges of freeholders; 3d, there will be the cost of subduing the wild land, besides that of settling the town; and 4th, we should provide lands that will go to our posterity. But these reasonable objections did not prevent the Trustees from leasing their lands for the ninety-nine year term. . . .

These leases did not prove satisfactory to either party, for it was soon found that, while the tenant had no certainty of holding his land after the passage of ninety-nine years, the Trustees were liable to lose all their rents through the promise to relieve the tenant from the payment of three fourths of the Province tax. . . .

The Trustees evidently did not consider that the purchase of the Hopkinton lands, and the subsequent lease to tenants, was merely a business affair, and that they were absolved from all responsibility for the moral and intellectual well-being of the community which they had collected together upon the lands of the Natick Indians. Especially they recognized that they were bound to see that the inhabitants of Hopkinton were not left destitute of spiritual care. In addition, therefore, to the land which was set apart for the ministry, the Trustees continually appropriated a part of the fund which they had received from England towards building a meeting-house, and towards the support of Rev. Samuel Bartlett, who was settled as minister at Hopkinton. . . . The Trustees continually received most piteous letters from Mr. Barrett, in which he very feelingly set forth his troubles and necessities, arising from losses by storms, from the difficulty of collecting his salary, which had been diminished on account of the wars, from the rise in prices of all commodities, and from the sickness and death of one of his negroes. . . . It is needless to say that these appeals were generally met by the Trustees in a very generous spirit.

The agreement adopted by the Trustees and tenants, and approved by the General Court in 1741, appears to have worked smoothly for over forty years, disturbed only by the usual trouble with slow payments common to the relation of landlord and tenant. . . . The General Court, on joint application of the

Trustees and tenants, passed a resolve, in 1787, by which the lands held by tenants were to be taxed as if held in fee simple, and the taxes collected were to be paid to the Treasurer of Massachusetts, who in turn was directed to pay the quitrents on each 25th day of March in gold or silver into the hands of the Trustees. This was not a particularly profitable arrangement for the Commonwealth, whose Treasurer had some scruples about paying money out of the Treasury when nothing came into it, as was the case in these years, when no Province or State tax was laid. But the Trustees did not take the same view of the case as did the Treasurer, and on their petition the General Court passed, in February, 1796, a resolve taxing the lands in Hopkinton and Upton as in other parts of Massachusetts. . . . The Commonwealth was to collect from tenants no greater taxes than she did from the rest of her citizens, and yet was to hold herself responsible to the Trustees for the payment to them of a sum equal to the amount of their quitrents. . . .

. . . But in March, 1823, the term of ninety-nine years expired for which the rental was fixed at one penny per acre, and now the new rental of threepence per acre began to run. The Commonwealth refused to pay any larger sum than it had been accustomed to pay. . . . In this state of affairs the Trustees applied to the Legislature, and in 1825 a resolve passed the Senate authorizing the payment of the increased rent, but the House of Representatives failed to concur. Indeed, the House went further, and asked the Justices of the Supreme Court for their opinion as to the liability of the Commonwealth to the Trustees. To this question the Justices replied that the Commonwealth was under no legal obligation to pay any sum to the Trustees. . .

Finding that it was impossible to get help from the Legislature, the Trustees brought suit against a large number of their tenants, who on their part conducted the defence with great vigor; since the former occupants of the lands, relying on the fact that the State had paid the rents since 1782, had sold their lands to the present holders with covenants of warranty, and a successful prosecution of the suits meant ruin to many of the tenants.

. . . Finally, in May, 1832, the Legislature passed a resolve to pay the sum of eight thousand dollars, in full satisfaction of all claims of the Trustees for past and future rents, provided a settlement was made by them with their tenants within one year. This was done, and proper receipts were given by the Trustees to the State and to the tenants. Thus ended the dispute over the Hopkinton lands, which began almost as soon as the Trustees became land-owners, and lasted for over a century.

The Hopkins Trust's problems were not confined to the supply side of defining its responsibilities and investing its securely. The demand side -- involving beneficiaries -- proved to be equally vexing. The long-simmering conflict with the Cambridge selectmen over the town's use of the funds, which broke out into open warfare in the 1830s, brought the Trustees into the center of the struggle for school reform and ultimately resulted in the establishment of a public high school in that city. The conflict with Harvard, one of the fund's beneficiaries, over the beneficiary's right to call trustees to account for their management was a subset of a broader and more intense struggle

over the power and accountability of trustees in the early nineteenth century which will be documented *in extensio* later in this volume.

The Trustees have always been very tenacious of their rights, and when, in 1803, some question arose in regard to the payments to the Cambridge schoolmaster, they declared that the Selectmen of the town of Cambridge had no interest in the income of the trust fund; that the master of the school could not have his full stipend paid to him unless he had instructed five boys throughout the year, and unless the boys presented themselves for examination before the Visitors, or properly accounted for their absence; and that the boys so instructed must intend to enter Harvard College. . . .

The school continued, with varying success, for many years. Complaints were made at times that the teaching was not of the high character that should be required, and committees were appointed to consider what action should be taken in the premises. At last, in 1837, the Board of Visitors reported that, in their opinion, there was no school in Cambridge which satisfied the terms of the decree; and that they had voted to make no payment to the schoolmaster until the Trustees shall have taken measures to remedy the trouble. The reasons given by the Visitors for this action on their part were, that a Grammar School means a school where the Classics are taught principally or exclusively; that there were no classical scholars in that school, except those on the Hopkins foundation; that the town of Cambridge held out as an inducement to the master to take the position, that he would receive help from this fund, and that not more than ten boys who had been on the Hopkins foundation had entered Harvard College in twenty-five years, while some of the boys had not even gone through the school.

Thereupon, the Trustees decided to ask the Legislature for permission to establish a school of their own, and in 1839 an Act was passed authorizing them to establish a classical school in Cambridge for educating boys for Harvard College, and to buy land and erect buildings at a cost not exceeding ten thousand dollars. . . .

The Hopkins Classical School was carried on under several masters until 1854, when, upon the recommendation of the Board of Visitors, who represented that the High School lately established by the City of Cambridge was fitted to give full classical education, the Trustees voted to discontinue their school, provided satisfactory terms could be made with the city. . . . Since this time, the city of Cambridge has received its share of the income of the trust funds for the support of its High School; one of the teachers of which (at times the Head-master of the school) has had the title of the "Hopkins Classical Teacher." A large number of its pupils have entered and graduated at Harvard College, and though the question of re-establishing the Hopkins School has been considered, there has never appeared to be sufficient cause for taking advantage of the right which the Trustees reserved to themselves.

. . . An interesting question arose in the early part of this century as to the relative rights and duties of the Corporation of Harvard College and of the

Trustees of this Charity. . The treasurer of the Hopkins Fund, at the request of a committee of the Corporation, submitted to them all the securities and evidences of property in his hands. The committee thereupon reported that they considered that the Corporation held the position of *cestuis que trust* of this fund, and were bound to look at its investment and application. . . .

The Corporation . . . asked the advice of Hon. William Prescott, who gave it as his opinion: 1st. That the Corporation have a vested and equitable interest in the trust fund, and have a right to inquire into its management; and that it would be their duty to call the Trustees to account for any waste or mismanagement, through an application for relief to the Supreme Judicial Court as a court of equity. . . .

These claims were not to pass undisputed, and Judge Peter O. Thacher was selected to report thereon on the part of the Trustees. His report stated that . . . the Trustees are not mere agents of the President and Fellows, or accountable to them, but that they must act according to their sense of duty, and are accountable only to the law, before the proper legal tribunals; and finally, that, if the views of Mr. Prescott in regard to receipt of the public money by beneficiaries were accepted, the income of the Hopkins fund would practically become a part of the general income of the College, and thus would be diverted from its legal object. . . . This report and action were apparently regarded as finally settling the question at issue. . . .

Such is the history of the Hopkins trust, which, originally placed in the care of some of the leading citizens of the Massachusetts Colony, has continued for one hundred and seventy-five years to be managed by men who, though possibly not so distinguished as the original Trustees, have fulfilled their duties in the care of the property in their charge in a manner of which the present admirable condition of the trust is the best proof.

Source: Charles P. Bowditch, An Account of the Trust Administered by the Trustees of the Charity of Edward Hopkins (Boston: Privately Printed, 1889).

Additional Readings:

Austin Wakeman Scott, Trusts 4 vols. (Boston, 1939).
Michael Katz, The Irony of Early School Reform