AN ANALYSIS OF THE DARTMOUTH COLLEGE CASE WITH RESPECT TO ITS IMPACT UPON THE EVOLUTION OF HIGHER EDUCATION

DISSERTATION

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By

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The problem with which this study is concerned is that of determining the effect of the Dartmouth College case on the evolution of higher education.

The purpose of the study is to investigate the impact of the Dartmouth College decision upon the evolution of higher education by (1) the investigation of the historical sequence of events leading up to the decision, (2) the study of the legal proceedings as they led to the actual decision in 1819, (3) the inspection of subsequent court decisions involving higher education which have cited the Dartmouth case as a point of reference, and (4) the organization of this information into an analysis of impact to show the probable effect upon higher education.

The study is presented in five chapters. Chapter I consists of the introduction, statement of the problem, and background information of the study. Chapter II presents a detailed account of the events leading up to the filing of the suit. Chapter III narrates the facts involved in the litigation from the time the original court action was filed until

the actual judgement was handed down. Chapter IV examines the cases listed in Shepard's Citations under 4 Wheaton (17 US), 518 to assess the influence of the Dartmouth decision upon each case pertaining to higher education. Chapter V summarizes the information related in the preceding chapters in the order of the guideline questions and presents the analysis of the impact and the recommendations of the study.

The dicta of the Dartmouth decision and the subsequent cases, which have cited it as a source of authority, have served as a foundation for the growth of private education, without fear of confiscation by some governmental body. The dicta have also provided the basis for determining what constitutes a public college corporation and what requirements are necessary to be classified as either a public or a private institution. They have also supplied the groundwork for the relationship between an institution, public or private, and its chartering authority. The case has allowed higher education to pursue its destiny as a dual system, one public and one private.

Much of the criticism of the decision centers around the fact that the dicta of the case cover all charters and all corporations. The research of this study has verified that this objection is valid. If the case is ever qualified, it will probably be due to the fact that it covers such an extremely broad range of law and not because of its relationship to higher education.

The study concludes with the recommendation that other studies be made on landmark decisions similar to that of the Dartmouth decision. It is suggested that these studies can be gathered into a data bank of legal information which can be organized into a computer data retrieval system. This system could be of great value to administrators and their legal counsel when confronted with legal problems or decisions.

TABLE OF CONTENTS

LIST OF TABLES

CHAPTER I

BACKGROUND

A decision was handed down during the February, 1819, term of the United States Supreme Court, which has apparently had a great impact on higher education. That case is frequently referred to as "the great case of Dartmouth College v. Woodward," or "the celebrated Dartmouth College Case." Officially, the case is known as The Trustees of Dartmouth College v. William H. Woodward, and can be found in its entirety in Volume 17 (4 Wheaton) of the United States Supreme Court Reports, page 518.

The facts surrounding the case are stated in a headnote from the United States Court Reporter:[1]

> The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in the year of 1769, is a contract within the meaning of that clause of the constitution of the United States, art. 1, s. 10, which declares that no state shall make any law impairing the obligation of contracts. The charter was not dissolved by the revolution.
>
> An act of the state legislature of New Hampshire, altering the charter, without the consent of the corporation, in a material respect, is an act of impairing the obligation of the charter, and is unconstitutional and void.
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> Under its charter, Dartmouth College was a private and not a public corporation. That a corporation is established for purposes of general charity, or for

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[1] Dartmouth v. Woodward, 4 Wheaton (17 US), 518 (1819).

> education generally, does not, per se, make it a public corporation, liable to the control of the legislature.
>
> Error to the Superior Court of the state of New Hampshire.

The decision of the Supreme Court in this case has been the genesis of much case law, and as a consequence has exerted a profound effect on our society. The sources of law in any given state consist of the United States Constitution, the state constitution, Acts of Congress and the state's legislature, the constitutional decisions of the United States Supreme Court, and the decisions of the state's own higher courts.[2]

The importance of Constitutional and Statute Law is clear, but the vast majority of our laws exist as the result of court decisions. As Clark states,[3]

> In spite of the large amount of legislation in recent years, the bulk of our law is found in the reported decisions of our higher courts, which are used as precedent for future decisions.

The impact of these court decisions can have far-reaching consequences. The extent of these consequences is not always apparent immediately, and is only infrequently considered when the decisions are rendered.[4]

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[2]George L. Clark, Summary of American Law (Rochester, N. Y., 1947), p. ix.

[3]Clark, p. ix.

[4]Theodore L. Becker, The Impact of Supreme Court Decisions (New York, 1969), p. 9.

When the impact of these court decisions is considered it becomes apparent that the analysis of them is important. Such an analysis should attempt to ascertain how a particular decision affects the conduct and attitudes of persons or organizations located within the jurisdiction of the decision. Any decision handed down by the Supreme Court of the United States would have far-reaching effects since that court only considers major issues, and since the resultant decision can affect the entire nation. The impact of the Dartmouth case upon the evolution of higher education must be placed in that category.

According to Good, many writers have attempted to relate the course of higher education to the Dartmouth case, and have often made statements which were startling, but which offered little substantiating evidence to support their views.[5]

It was proposed that evidence existed in the background of the case, the decision, and subsequent litigation citing 4 Wheaton (17 US), 518 as a point of reference, and that this evidence could contribute to an understanding of the impact of the Dartmouth decision upon the evolution of higher education.

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[5]Harry G. Good, A History of American Education (New York, 1962), p. 99.

Statement of the Problem

The problem of the study is an analysis of the Dartmouth College case with respect to its impact upon the evolution of higher education.

Purposes of the Study

The purposes of the study are to investigate the impact of the Dartmouth College decision upon the evolution of higher education by (1) the investigation of the historical sequence of events leading up to the decision, (2) the investigation of the legal proceedings as they led to the actual decision in 1819, (3) the examination of subsequent court decisions involving higher education which have cited the Dartmouth case as a point of reference, and (4) the organization of this information into an analysis of impact to show the probable effect upon higher education.

Guideline Questions

To carry out the purposes of this study, the following guideline questions were formulated:

1. What were the circumstances leading up to the Dartmouth decision?

2. How did politics influence the Dartmouth College Decision?

3. What were the circumstances of the legal proceedings leading to the Dartmouth decision?

4. How did the Dartmouth decision influence subsequent court cases involving higher education?

5. What has been the consistency of the application of the decision to higher education?

6. What has been the impact of the Dartmouth decision upon public higher education?

7. What has been the impact of the Dartmouth decision upon private higher education?

8. What has been the impact of the decision upon the evolution of higher education?

9. How might the decision influence the future of higher education?

Definitions

For purposes of the study the following definitions should be considered:

Analysis of the impact.--The tracing of the consequences of decisional outcomes, within the legal process, upon the values and institutions of society.[6]

Ideally, an analysis of this type would be longitudinal in design, ranging from conditions immediately preceeding the decision, to conditions at some point in time subsequent to the decision. The design would take the characteristics of

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[6]Ernest M. Jones, "Impact Research and Sociology of Law: Some Tentative Proposals," Wisconsin Law Review, XXXIII (Spring, 1966), 332.

an O x O study, with some provision for a pre-test and for a post-test. It would be difficult to maintain any type of control group since the decision would concern the entire population. If an analysis is made without provisions for a pre-test, it would require some systematic method of analysis.[7]

Law.--A rule of human conduct enforced by the state through its courts.

Assumptions

It is assumed that the various court reporters consulted in the study are as accurate as the original court reporters which contain the history of the case and its result. Primary examination of original documents would be difficult since the original reporters are located in the archives of the various courts of record where the hearings were held. The accuracy of these reporters is accepted by the legal profession, and they are used in the preparation of legal briefs and in research for decision making.

Limitations

Legal research into the impact of the Dartmouth decision was carried out only to the depth required to show the relationship of the case to higher education.

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[7]Richard Lempert, "Strategies of Research Design in Legal Impact Study," Law and Society Review, I (November, 1966), 111-124.

The historical segment of the study is included to provide a background of persons and places involved in the case and is not intended to be primary historical research.

Procedures

The study consists of three primary divisions, namely the circumstances leading up to the decision, and the decision itself; the investigation of subsequent citations of the Dartmouth case; and an analysis of the impact. Each of these divisions will be developed separately.

The Decision

It is the intent of this division to reconstruct as much of the web of history as possible. This was accomplished by the examination of source material from such documents as the Dartmouth Charter,[8] the records of the Superior Court of New Hampshire,[9] and the records of the Supreme Court of the United States.[10]

In addition, research into the facts as presented by other authors was studied, investigated, and recast to bring to bear the facts as they pertained to the evolution of higher education generally, and the Dartmouth decision specifically.

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[8] 4 Wheaton (17 US), 519.

[9] Dartmouth v. Woodward, 1 NH, 111 (1817).

[10] 4 Wheaton (17 US), 518.

Initial research indicated additional sources of information which was examined in turn, providing information which led to a more accurate and precise description of the facts as they occurred.

Subsequent Decisions

To determine the impact of the Dartmouth case upon the evolution of higher education, investigation of subsequent cases which have used the Dartmouth decision as a point of reference was carried out. Since common law is derived from court decisions,[11] the cases cited have been decided, at least in part, by consideration of 4 Wheaton (17 US), 518 as a point of reference. A case so decided becomes a reinforcement of the original decision. It is submitted then, that the investigation of each case involving higher education, referring to 4 Wheaton (17 US), 518, allows an accurate descriptive analysis of the impact of the original decision.

The cases which have referenced 4 Wheaton (17 US), 518 are listed in cumulative total in Shepard's United States Citations.[12] Each case listed was inspected to determine if it pertained directly to higher education. A case falling into this category was examined to determine its possible immediate impact, and any potential subsequent influence that might have occurred as a result of the action. Each case is

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[11] Clark, p. ix.

[12] Shepard's United States Citations, Vol. 1-313, (San Francisco, 1943), 103-106.

identified by name, reference volume, and page. In addition, a brief summary of the facts of the case is given, and the point of law used to cite 4 Wheaton (17 US), 518 examined as a source of potential impact.

The Analysis of the Impact

Many scholars have suggested that the Supreme Court in the Dartmouth decision delayed public higher education by at least fifty years,[13] while others have said that it merely enhanced the future of private education.[14] The intent of this study was to arrive at a logical analysis of the impact of the decision and to provide an explanation of how the Dartmouth decision might have influenced higher education.

The analysis of the impact will be derived from the investigation of the cases listed in Shepard's Citations in chronological order. This investigation should identify the probable immediate impact and possible future implications of the decision. The information obtained from this investigation, when combined with other information from American Jurisprudence, Corpus Juris, Decennial Digests, and relevant law reviews should make this analysis possible.

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[13] Good, p. 99.

[14] Ellwood P. Cubberley, The History of Education, (Cambridge, Mass., 1920), pp. 706-707.

Summary

The study is presented in five chapters. Chapter I presents the background and introduction to the study. Chapter II presents a detailed account of the events leading up to the filing of the court action. Chapter III presents the facts of the litigation from the time that the suit was filed until the actual judgement was handed down. Chapter IV examines each case on higher education listed in Shepard's Citations which has used 4 Wheaton (17 US), 518 as at least a partial basis for reaching a decision. Chapter V summarizes the information, presents the analysis of the impact, and makes recommendations which appear to be appropriate.

CHAPTER II

EVENTS LEADING TO THE DARTMOUTH CASE

The institution of Dartmouth College was founded in 1755, when Joshua Moor deeded to Eleazar Wheelock real property with which to establish a charity school, for the education of Indian youth. The school was named the Moor Indian Charity-School.[1]

Through excellent advice, Wheelock petitioned the crown for a royal charter. He was unsuccessful in an earlier attempt but was finally awarded the charter by Governor John Wentworth, in the name of King George III of England, on December 18, 1769. The petition named Wheelock as the founder of the school, which was to be called Dartmouth College.[2]

In keeping with the provisions of the charter, the corporation was duly organized, October 22, 1770, with Eleazar Wheelock becoming its first president. He held this position until his death on April 24, 1779. In his will, Wheelock named his son, John Wheelock, to succeed him as president.

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[1]John M. Shirley, The Dartmouth College Causes (Chicago, 1879), pp. 21-22.

[2]Edward C. Elliot and M. M. Chambers, editors, Charters and Basic Laws of Selected American Colleges and Universities (New York, 1963), pp. 175-176.

At first Wheelock was reluctant to accept the job but finally accepted after being urged to do so by the Trustees.[3]

John Wheelock served as president from 1779, until he was released by the Trustees in 1815. During his tenure as president the makeup of the board underwent a considerable change and by 1803, contained only one pre-1800 trustee. The composition of the board during the controversy period was made up as shown in Table I.[4]

TABLE I

TRUSTEES OF DARTMOUTH COLLEGE (1813-1817)

Name	Born	Trustee From---To	Died	Age
John Wheelock	1754	1779-1815	1817	63
Nathaniel Niles	1741	1793-1821	1828	86
Thomas W. Thompson	1766	1802-1817	1817	51
Stephen Jacob	1756	1802-1817	1817	61
Timothy Farrar	1747	1804-1826	1849	101
Elijah Paine	1757	1806-1828	1842	85
John Taylor Gilman	1753	1807-1819	1828	74
Charles Marsh	1765	1809-1822	1849	83
Rev. Asa McFarland	1769	1809-1822	1827	57
Rev. John Smith	1766	1811-1820	1831	36
Rev. Seth Payson	1758	1813-1820	1820	62
Rev. Francis Brown	1784	1815-1819	1820	44

The underlying conflict between the Trustees and Wheelock began in 1783, with a dispute between two parishoners of the

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[3]John King Lord, A History of Dartmouth College, II, (Concord, N. H., 1913), pp. 1-6.

[4]Lord, pp. 62-64.

local church congregation in Hanover. The decision of the pastor was appealed to the Grafton Presbytry, where it was upheld, but the penalty was reduced. This dispute widened in scope, and spread to the Dartmouth community, where the Trustees took one side and the president the other.[5]

This clash was further intensified when the need arose for a new church building, the existing building being too small for the needs of both the Hanover congregation and the College community. Unfortunately, the College was too poor to gain funds for the new building. Wheelock entered into an agreement with the Hanover congregation to build the new church. The agreement proved to be totally unsatisfactory, and was rescinded by the Trustees.

This blow to Wheelock's authority was followed by further disagreements about the pastor of the congregation, who was usually the professor of Theology at the College. Wheelock wanted a man in this position who was subject to his will. In attempting to accomplish this, Wheelock became involved in satellite conflicts with the congregation in Hanover. Wheelock's actions served as a source of irritation to the Trustees who began to resist his wishes, and refused to allow him to use College funds in his quarrels with the local townsmen. This breach between the board and Wheelock became common knowledge with the publication of the Boston Repertory of April 26, 1815. An article in this paper candidly stated that a vacancy

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[5]Shirley, pp. 67-68.

in the office of president was expected soon. The Dartmouth Gazette of May 3, denied any truth to the rumor, but the dispute was out in the open.[6]

Sensing that he was losing control, Wheelock decided to appeal to the legislature for aid. At this time the legislature had a Federalist majority but did not wish to create problems for itself since elections were near. It does not appear that Wheelock was motivated in this action by political reasons; it is more likely that he only sought to gain the sympathies of powerful men in the legislature. In making this appeal, he enlisted the aid of his friend, Elijah Parish, who assisted him in writing and publishing an eighty-eight-page pamphlet entitled, Sketches of the History of Dartmouth College and Moor's Charity-School With a Particular Account of Some Late Remarkable Proceedings of the Board of Trustees from the Year 1779 to the Year 1815. The publication of this pamphlet attracted much attention and drew a number of people who felt that they could use the Dartmouth controversy for political gain. One of these people was Isaac Hill, the editor of the New Hampshire Patriot, an anti-Federalist newspaper. Hill took advantage of the conflict to blame the Federalists for all of the problems of the government. He hoped to use

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[6]Lord, pp. 11-64.

the situation to help to bring the Democrats to power in the 1816 elections.[7]

The Trustees decided that they could no longer condone Wheelock's actions and dismissed him as president of the College on August 28, 1815, and appointed Francis Brown in his stead.[8]

The state elections took place on March 5, 1816. In this election, New Hampshire elected William Plumer as governor and the Democrats gained a majority in the state legislature. In his inaugural address, Plumer brought the Dartmouth controversy to the legislature when he challenged the legality of the Dartmouth Charter and implored the legislature to take steps to correct an intolerable situation and to " . . . make further provisions as will render this important institution more useful to mankind."[9]

The legislature heeded Plumer's appeal and passed a statute which effectively passed control of Dartmouth College from the Charter Trustees to a board appointed by the governor, and changed the name of the school to Dartmouth University. The bill was passed along party lines and became law on June 27, 1816.[10]

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[7]William Gwyer North, "The Political Background of the Dartmouth College Case," New England Quarterly, XVIII (March, 1945), 181-192.

[8]Lord, pp. 70-77.

[9]William Plumer, Jr., Life of William Plumer (Boston, 1857), pp. 436-438.

[10]Lord, pp. 86-90.

The College Trustees at this time were unsure of what procedure they might follow, but it appeared that they wished to resist the enforcement of the statute. At their next scheduled meeting they adopted a resolution accordingly, which stated:[11]

> Resolved, that we the Trustees of Dartmouth College do not accept the provisions of an act of the Legislature of New Hampshire approved June 27, 1816 entitled "An act to ammend the charter and enlarge and improve the corporation of Dartmouth," but do hereby expressly refuse to act under the same.

This resolution and the Trustees' unwavering adherence to its principles became a key point in the eventual Supreme Court decision.

The College meeting continued until September 27, 1816, and during this period they voted to vacate the office of Secretary-Treasurer. This office was held by William H. Woodward, who had sided with the University Trustees. The Trustees then named Mills Olcott to fill the vacancy.[12]

The resistance of the College officials gave the governor cause to examine the state's legal position, and appealed to the Superior Court of New Hampshire for an opinion concerning legality of the act of June 27, and whether or not action could be taken under its authority. The court suggested that action could be taken under its authority. The court suggested that

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[11]Lord, p. 95.

[12]Lord, pp. 98-99.

action under the present law was unwise and demurred on giving constitutional advice in the face of possible future litigation.

It was during this period that Mills Olcott took action to recover property which had been retained by William H. Woodward when he was dismissed. Woodward refused to give up the property, stating that he did not believe that Olcott was operating under legally vested authority. The action of attempted recovery was taken and resisted on October 7, 1816.[13]

The University Trustees were frustated since they were unable to function under the law of June 27, as it was written. To remedy this situation, two new statutes were passed on December 18, and December 26. The first law allowed the University officials to act without the presence of a quorum, and the second assessed a $500 penalty for obstructing the University Trustees in the performance of their duties.

As a result of the new acts, the University officials met and adopted a show cause action, ordering each of the Trustees, the president, and certain professors to show cause why they should not be removed from their respective offices. The president and the professors replied, stating that they believed the legislative acts of 1816 to be illegal, and that as a consequence it was their duty to await the outcome of the litigation underway by the Charter Trustees.

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[13]Shirley, pp. 116-118.

The acts also generated action among the College Trustees. This action took the form of communications to determine possible courses which they might follow. In one of these letters Olcott requested advice on how he might recover the College's property from Woodward. He was advised that the proper action would be a suit to recover the property through the courts. Armed with this advice, Olcott filed suit to recover these properties of the College. The basis for the suit was Woodward's refusal to surrender these properties on October 7, 1816. This action was filed in the Common Pleas Court of Grafton County on February 8, 1817, and set damages at $50,000.

CHAPTER III

THE DECISION

The transition of the College problem from confused disagreement to the more orderly process of the law occurred after Olcott filed his court action. This change was not immediately apparent since both sides were still maneuvering for control of the College.

When neither the College Trustees nor the officers answered the show cause order, resulting from the February 4th meeting of the University officials, their offices were vacated and other men were appointed to replace them.[1]

John Wheelock was appointed in place of Francis Brown as President; however, due to Wheelock's ill health, his son-in-law, William Allen, was charged to act for Wheelock until such time that Wheelock could assume the duties himself. Allen was also named to serve as the Phillips Professor of Theology in place of Shurtleff; Nathaniel H. Carter was named as Professor of Languages; and James Dean was named as Professor of Mathematics and Philosophy in place of Adams.[2]

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[1]John King Lord, A History of Dartmouth College, II (Concord, N. H., 1913), 112.

[2]Richard W. Morin, "Will to Resist," Dartmouth Alumni Magazine, (April, 1969), p. 27.

This organizational arrangement did not remain static for long, due to the death of John Wheelock on April 4th at the age of sixty-three. His death moved Allen into the presidency at a meeting of the University officials on June 12, 1817. At this same meeting Thomas C. Searle was named Professor of Logic and Metaphysics. This was the organization of Dartmouth University as the controversy proceeded into its legal phase.[3] The organization of the College remained unchanged, except for the addition of Moses Payson to the Board in place of Jacob, who died in February.[4]

When Olcott filed the suit in the Common Pleas Court of Grafton County, an immediate problem was created, since William H. Woodward, the defendant, was the judge of this court. This situation forced the case to be moved to the Superior Court of New Hampshire. The docket of this court was normally filled with cases brought up on appeal; however, due to prearranged agreement, the case was assigned a hearing at the May session of the Court at Haverhill. At this hearing the case was argued by Jeremiah Mason and Jeremiah Smith for the plaintiffs, and George Sullivan, the Attorney-General of New Hampshire, aided by Ichabod Bartlett for the defense.

No verdict was rendered, and Bartlett drew up an agreement requesting " . . . that the case be stated in a special

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[3]Lord, p. 115.

[4]Lord, p. 119.

verdict to be drawn up (before the opinion of the court should be delivered) by counsel under the direction of the court." This verdict was to cover all points necessary to raise questions concerning the validity of the June and December acts of the Legislature and, if found for the plaintiffs, award proper damages which would be discharged by the return of the property in the possession of the defendant. The counsel for the Trustees rejected this agreement and offered a counter proposal. Agreement was finally reached on the day after the close of the May session and read as follows:

> Trustees of Dartmouth College vs. W. H. Woodward. It is agreed by the counsel for both parties that the case be stated in a special verdict, to be drawn up (before the opinion of the court shall be delivered) by the counsel, under the direction of the court.
>
> The verdict shall contain all things necessary and proper in the opinion of the court to raise the question on the validity of the acts of the Legislature on the subject of the College or University
>
> Jeremiah Smith)
> J. Mason) For Plfs.
>
> 25 May, 1817
> Sup. Court
> Grafton
>
> George Sullivan)
> Icha. Bartlett) For Dfts.

The difference in the wording of the two agreements is found in the method used in satisfying the award of damages. It does not appear that counsel for the plaintiffs would be satisfied with the mere return of the College property, but due to the time consumed in reaching the agreement, the

decision had to be delayed until the September session of the court at Exeter.[5]

Supporters of the College were elated at the results of the hearing at Haverhill, but these were people untrained in the legal profession. Those persons who knew the real meaning of the situation were considerably more skeptical. This pessimism was shared by the famous Daniel Webster, who said, "It would be a queer thing if Gov. P.'s court should refuse to execute his laws." These words also summed up Webster's thoughts on the probability of winning the case in the state courts, since he felt that their only chance existed with the Supreme Court of the United States.[6] In this respect Webster was a realist, since all of the judges of the Superior Court had been appointed by Plumer, and of these men only Richardson was a Federalist.

This situation was not entirely the fault of the Governor, since several judgeships, including one other place on the bench of the Superior Court, had been offered to Federalists, and all but Richardson and Woodward had refused. This puzzled Plumer, since he felt that the Federalists, who were rapidly losing their power, should take every opportunity to acquire influence where they could. Plumer finally nominated William Merchant Richardson, Chief Justice, and Samuel Bell and Levi Woodbury,

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[5]John M. Shirley, The Dartmouth College Causes, (Chicago, 1879), pp. 142-145.

[6]Lord, p. 124.

Associate Justices, to the bench of the New Hampshire Superior Court. All were men of unquestioned character and ability.[7]

During the summer of 1817, the dispute at Hanover assumed physical proportions, with various rock-throwing and club-wielding incidents among the students and faculty. The situation became even more strained at the August Commencement, both sides planning ceremonies at the identical time and location. Fortunately, a major crisis and monumental embarrassment were averted at the last minute when the University agreed to hold their ceremonies at 11:00 AM, the College holding theirs at the regular time of 9:00 AM.[8]

The following month the hearing was begun at Exeter. Representing the plaintiffs was an awesome array of legal talent consisting of Jeremiah Smith, Jeremiah Mason, and Daniel Webster. Not many would have disagreed that these were among the elite of the legal profession at that time. Without exception authors who refer to these men do so with praise and respect. It was the task of the Attorney-General, George Sullivan, and Ichabod Bartlett to face these men at the bar of justice.

Unfortunately, an exact account of the record of the proceedings at Exeter do not exist. It was the custom of the

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[7]William Plumer, Jr., Life of William Plumer, (Boston, 1857), pp. 442-447.

[8]Morin, p. 30.

times that the judges and attorneys would make such information available to the press from their notes written during or subsequent to the hearings. In this particular instance, and throughout the Dartmouth proceedings, posterity was fortunate to have Timothy Farrar, Jr., the son of one of the Trustees, and a fine attorney in his own right, amass the notes and put them together in an accurate account of the case. The correctness of Farrar's[9] account is verified as follows:

> DISTRICT OF NEW HAMPSHIRE, TO WIT--
> BE IT REMEMBERED, That on the 9th day of August, 1819, and in the forty-third year of the independence of the United States of America, TIMOTHY FARRAR, of the said district, hath deposited in this office the title of a book, the right he claims as Author and Proprietor in the words following, to wit:--
> "Report of the Case of the Trustees of Dartmouth College against William H. Woodward,--Argued and determined in the Superior Court of Judicature of the State of New Hampshire, November 1817. And on Error in the Supreme Court of the United States, February, 1819. By TIMOTHY FARRAR, Counsellor at Law."
> In conformity to the act of the Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned.
>
> PEYTON R. FREEMAN,
> Clerk of the District of New Hampshire
>
> A true copy of Record,
> Attest, PEYTON R. FREEMAN, Clerk

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[9]Timothy Farrar, Of the Case of the Trustees of Dartmouth College Against William H. Woodward, (Portsmouth, N. H., 1819), p. ii.

This report, when used in conjunction with the report of the decision by Wheaton, the Court reporter of the Supreme Court of the United States, presents a concise account of the legal proceedings of the Dartmouth Case from February 8, 1817, through February 2, 1819. Another valuable source of legal information is a somewhat biased account by John M. Shirley entitled, "The Dartmouth College Causes," which was copyrighted in 1879, sixty years after the decision, and published as a book in 1895.

Some accounts of the hearing at Exeter suggest that only two of the justices were present. This does not agree with Farrar's account, which opens with the statement, "At the September Term in Rockingham County, present all the judges, viz., Hon. William M. Richardson, Chief Justice, Hon. Samuel Bell, and Hon. Levi Woodbury, justices."[10]

Mason opened the arguments for the plaintiffs, and his presentation covers forty-two pages in Farrar's report. He began his argument by stating that the acts of 1816 were not binding because the legislature over-extended its power in their passage, and they were unconstitutional for this reason. He also pointed out that, as an eleemosynary corporation, the College had the privileges and benefits of a private corporation, and therefore should not be treated as a public corporation. He conceded that the British Parliament did, in

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[10]Farrar, p. 28.

fact, have the power to dissolve a corporation, but that the power of Parliament was supreme and not comparable to that of the legislature. He pointed out that the King, who granted a corporate charter, could not dissolve such a corporation without its consent, and that as successor to the King, the legislature had no power to act in the manner which it did. He then called the attention of the Court to Articles XV, XXIII, and XXXVII of the New Hampshire Bill of Rights, which pertained to the power of the legislature with respect to the people of the state. His final but most important point applied to his belief that the College Charter was a contract under the Federal Constitution. This meant that the acts would have been passed in violation of Article I, Section 10, Paragraph 1, of the Federal Constitution. He concluded by noting that the magnitude of the case at hand was much more than a local issue, and that it would be well to consider the impact on the country if a legislature were allowed to pass such statutes. His closing statement was most profound:[11]

> If these acts are held to be valid not only this College but every other literary and charitable institution must become subject to the varying, and often capricious will of the legislatures. Their revenues will be blended with the publick revenues, and liable to be applied to any use, which the emergency of occasions may in the opinion of the legislatures, require. The liberal and benevolent, when disposed to aid such institutions, can have no security, that their donations will be applied, to the objects intended . . . If our seminaries of

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[11] Farrar, pp. 28-70.

> learning are to be reduced, to a state of servile dependence on the legislatures, and are to be modelled, to answer the occasional purposes of prevailing political parties, all hopes of their future usefulness must be abandoned . . . The present bold experiment, if carried into effect will probably terminate in their final destruction.

Mason was followed by Sullivan for the defense. Sullivan opened his argument by making the point that the institution was not, in fact, a private corporation, but rather it was a public corporation created expressly to serve the public. He conceded that an ex post facto law[12] should cause the court to pronounce any actions contrary to that law null and void, but when these judicial decisions involve the constitutionality of a statute, the courts should proceed with extreme caution.

Sullivan then made the point that Dartmouth College was a public corporation. To show the reasoning of his logic, he considered the objects of the benefits of the operations of a corporation. If the members of the corporation are the objects of the benefits of the corporation, then it would be classed as a private corporation; if, however, the public receives the benefits, then the corporation should be classed as public. To enforce this point he cited many cases where the charters of towns had been altered by the legislatures and the courts.

He next suggested that even if the Dartmouth Charter placed it in the category of a private corporation, the legislature still had the right to modify the Charter. In support

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[12]The legal status of an action, undertaken prior to legislative action, which would render it illegal.

of this point he referred to the right of a government to claim the property of a private person when it is needed for the public good. To enforce his point he cited the case of the New Hampshire Bank, which had had its charter revised by action of the General Court. He then cited several other banking incidents, which he felt supported his point.

Sullivan's next major point referred to the impairment of the obligation of contract. In this respect, he completely denied that the granting of a charter by a government constitutes a contract which cannot be altered by the government. He conceded that the Supreme Court of the United States had decided cases by declaring that states, as well as individuals, fall within the meaning of Article I, Section 10 of the Federal Constitution, but that these cases, Fletcher v. Peck[13] and the State of New Jersey v. Wilson,[14] bore no parallel to the case of Dartmouth v. Woodward.

The balance of his argument related these general points to the specific circumstances of the College case. He questioned that Eleazar Wheelock was, in fact, the founder of the school, and also that he had the authority to transfer the right of visitation[15] to the Trustees, when it did not appear that

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[13] Fletcher v. Peck, 6 Cranch (10 US), 87 (1810).

[14] New Jersey v. Wilson, 7 Cranch (11 US), 164 (1812).

[15] The ability to examine the affairs of a corporation. The right of visitation is usually applicable only to religious or eleemosynary corporations.

the Charter granted him that right originally. He conceded Mason's points with respect to the authority of the King and Parliament, and the relationship of these authorities to that of the legislature, but he believed that the legislature possessed power equal to that of the Parliament and, as a consequence, had the right to unilaterally dissolve or amend a charter.

Sullivan[16] closed his argument with the observation:

> Knowledge and virtue are the main pillars, on which the fabrick of our freedom rests. Destroy these, and the tottering edifice must fall to the ground, and we must be crushed beneath the ruins. Then would the last hope of liberty expire . . . These objects, so important to the happiness of our country, and the promotion of which is among the most sacred duties of the legislature, it was the professed design of this charter to attain. This corporation, being a mere instrument to effect these objects, it was both the right and duty of the legislature to alter and amend its charter in such a manner, as would, in their judgement, be calculated to obtain them. . . .

Following Sullivan at the bar was Jeremiah Smith for the plaintiffs, who began his argument by stating, "The question to be discussed is whether, on facts stated, the acts of the legislature of this state . . . are valid in law and binding on the Trustees of Dartmouth College, without their assent."

He then attacked the reasoning of the counsel for the defense, which suggested that the alterations to the charter were immaterial, attempting to undermine the defense argument on a point by point basis. He began with the involuntary

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[16]Farrar, pp. 70-104.

change of the school name, and suggested that the change of the name itself is insignificant, although a name is a very personal thing and one which should be controlled by the person who owns the name.

He passed from this point to consideration of the size of the board. In this part of his argument, he showed how the change in size will alter the character of the Board and, as a consequence, the institution. He then took issue with the manner in which the University Trustees would be chosen; this is, by appointment through people whose authority was political in nature. He suggested that this would mean that the property held in trust by the College Trustees would be transferred to trustees whose authority was primarily political. He then speculated how anyone could say that the institution was unchanged.

He contended that " . . . these acts are not binding on the plaintiffs, without their assent;--and that they violate the constitution of the United States." To support this thesis he discussed corporations, calling attention to the fact that civil corporations are not the same as those corporations incorporated as towns, counties, and school districts. He declared that private civil corporations, such as banks, are different from eleemosynary corporations. He conceded that it is difficult to differentiate between these various types of corporations in legislative matters, but that such differentiation must be made. In this differentiation, he

believed that legislative power over eleemosynary corporations should closely parallel its power over private persons and private property.

In support of his contention that the acts were unconstitutional, he declared that Amendment V of the United States Constitution states " . . . that no private property shall be taken for publick use without just compensation"; although he conceded that should the public welfare require it, the plaintiffs should be treated like any other private individual. As further support for this point, he restated that the acts also violate Articles XV and XXIII of the New Hampshire Bill of Rights.

His last point considered the aspect of a charter being a contract within the meaning of the constitution, and he held that the Charter was a good contract on both sides and declared that such a contract would be entitled to protection under the Constitution.

Smith[17] closed his argument with a statement concerning the magnitude of the case:

> In advocating this cause, I have not for a moment been relieved from a most oppressive sense of its importance,--to the literary institution whose rights have been prostrated and to all our charitable establishments for the promotion of religion or literature; the cause for one is the cause for all . . . The plaintiffs have discharged a necessary duty on their part,--that of bringing

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[17]Farrar, pp. 104-161.

> this cause where relief can be obtained. Nothing remains, but to expect that impartial judgement which the law is bound to pronounce on the facts of the case.

Ichabod Bartlett followed Smith and gave the final argument for the defense. He began with an unsuccessful attempt at an analogy with respect to a point of corporate law. This was said to be inapplicable by Chief Justice Richardson. Bartlett next suggested that, although the counsel for the plaintiffs were somewhat difficult to follow, he believed that they generally attempt to make the following points:

> That the legislative acts in question are contrary to the principles of natural justice.
> That corporations of this nature are independent of legislative control.
> That the provisions of these acts violate the constitutions of New Hampshire and of the United States.

Bartlett then considered these points separately with a word-by-word analysis. On the first point he weighed the legal meaning of natural law and called the court's attention to the plaintiffs' thoughts on the creation of a new corporation, which receives property belonging to an old one. He reasoned that this is perfectly legal. Next, he considered the second point of legislative control and challenged the privileged position in which a corporation would find itself if this were allowed. He asked what authority would give a corporation this right. To support this point he referred to two cases involving Yale in 1723 and Harvard in 1673, when the states of Connecticut and Massachusetts, respectively, altered those

corporate structures of those schools without their consent. He then proceeded to the final point on constitutionality, attempting to invalidate this point by citing examples of the powers granted legislatures and suggesting that the men who framed the constitution did not intend to restrict the powers of the legislatures by the Constitution itself.

Bartlett then attacked each of the constitutional points previously brought out by counsel for the plaintiffs. These points involve Articles II, XII, XV, XXIII, and XXXVII of the New Hampshire Bill of Rights, and Article I, Section 10 of the Federal Constitution, which he did not feel applied to the case at hand.

Bartlett[18] closed his argument with the following words.

> While these acts of the legislature are justified by principle and precedent, I rejoice also that the most distinguished literary institution of the nation, by its eminence and prosperity is a striking example of the salutary influence of the principles and precedents. The renowned university of Harvard, which has never been subject to legislative control, exhibits an illustrious proof, that the gloomy apprehensions of the plaintiffs in the present case are altogether imaginary. To say that such seminaries would be in danger from a design in the legislature to defeat their object or effect their destruction, is to suppose an event that can never take place till the whole community shall have degenerated to that state of barbarism when the light of such an institution could do no more than to make "darkness visible," and its existence serves no other purpose than as a monument upon the ruins of all our other civil establishments.

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[18]Farrar, pp. 161-206.

> Its dangers are from a very different source,--to avert these dangers, these legislative acts have been passed.--Soon may the opposition to them be disarmed by judicial decision and Dartmouth arises redeemed from the ruins which have been threatened by an effort to convert to private and personal interests, its publick nature and design.

After the presentation by Bartlett, the final arguments for the College were given by Daniel Webster, and with respect to his presentation, Farrar[19] makes the following observation:

> Mr. Webster closed the argument by a reply on the part of the plaintiffs; but his views of the case are more fully disclosed in his argument before the Supreme Court of the United States, it is here omitted.

Since extended coverage of the Webster argument at Washington is anticipated, Farrar's procedure will be followed here.

With the closing argument of Daniel Webster, the court began deliberations on the facts presented at Exeter. It was the Court's intention to hand down a decision during the November term, which was to meet at Plymouth, Grafton County.

There were few incidents at Hanover in the period of September to November. Life at Dartmouth, as strained as it must have been, proceeded in an orderly manner, as evidenced by a report in the Dartmouth Gazette[20] of October 15, 1817.

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[19]Farrar, p. 206.

[20]Lord, p. 129.

> In the College under the direction of the old board of Trustees there are at present ninety-five students; twenty-six of whom have entered the lower classes since Commencement. In the University there are at present fourteen students; four of whom have entered the two lower classes since Commencement. It is in fact worthy of notice that of these four not one of them belongs to this State, notwithstanding the legislature has passed several acts for enlarging and improving the corporation. Between fifty and sixty students, exclusive of the members of the College are attending the lectures of the Medical School.

On November 6, 1817, the Superior Court of New Hampshire reconvened at Plymouth. Lord's account suggests that, although Woodbury participated in the decision, he did not sit at Plymouth.[21] This is in disagreement with Timothy Farrar's account, which reads, "Afterwards at the November term in Grafton County, present all judges, the opinion of the court was delivered by Mr. C. J. Richardson."

In his opinion, which many legal minds, including Webster, have referred to as " . . . able, ingenious and plausible,"[22] Richardson ruled against the College. He began his assertion by stating that the action of trover, clearly, must be decided for the plaintiffs " . . . unless the facts, upon which the defendant relies, constitutes a legal defense." He then agreed that the parties involved have, thus far, behaved in a legal manner, and proceeded to the points of law involved. He considered the definition of public and private corporations,

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[21]Lord, p. 131.

[22]Shirley, p. 192.

which he discussed on an individual basis. In a logical step-by-step process, he concluded that if Dartmouth, " . . . is not to be considered as a publick corporation, it would be difficult to find one that could be so considered." With this conclusion Richardson ruled out all arguments of the plaintiffs, which consider Dartmouth as a private corporation. He then covered the cited articles of the New Hampshire Bill of Rights as being inappropriate, since most of these were framed to protect only private rights, and as a consequence, public interests are subject to legislative action.

He suggested that the real question to be determined is whether or not the act of June, 1816, violated the rights of the Trustees. He decided that they did not and cited Terret et al. v. Taylor[23] and the King v. Passmore,[24] which hold that old board members do not have any complaint about reorganization by some government authority if they are included in the new organization. If they do not choose to join the new organization, it is their own fault.

Richardson pointed out that the addition of new board members to a corporation does not dissolve the corporation, and neither does it change the objective of the corporation nor damage the individual interests of the stockholders. He

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[23]Terret et al. v. Taylor, 9 Cranch (13 US), 43 (1815).

[24]The King v. Passmore, 3 Dunsford and East, 244 (1789).

suggested that the acts of June and December, if valid, do not dissolve or change the corporation in any real way, and the benefits that the corporation offers the public remains unchanged.

He then undertook a study of the acts, which he found do not compel the Trustees to forfeit any private interests but rather offer them the aid of others. The point made by the plaintiffs with respect to the fact that the increase of the size of the board will change the character of the board, he dismissed as being something that would be expected under the circumstances. His citations on this point referred to municipal and English law.

He then considered the point that the Charter is a contract and, as such, is due the protection of the Federal Constitution, Article I, Section 10. He noted that it has not been decided, legally, whether or not this type of charter is a contract within the meaning of this section of the Federal Constitution. In considering previous citations, he noted that none of these cases, previously decided, were similar to the case at hand. He referenced Fletcher v. Peck[25] and New Jersey v. Wilson,[26] which he did not feel applied, since they involved private individuals and private purposes.

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[25] Fletcher v. Peck, 6 Cranch (10 US), 87 (1810).

[26] New Jersey v. Wilson, 7 Cranch (11 US), 164 (1812).

It is clear that Richardson felt that this clause of the Constitution was framed to protect the rights of private persons; and therefore, contracts could only exist between private individuals. Contracts would lose their validity when they were undertaken by public organizations, and Richardson cited many cases where this had been the case. He reasoned that public corporations such as Dartmouth, if allowed such protection under the Constitution, would usurp virtually all of the related power of the legislatures. He concluded, therefore, that the Charter is not a contract within the meaning of that clause of the Federal Constitution and, consequently, is not entitled to its protection.

Richardson, thoughtfully, considered the consequences of the decision, making the observation that, "I am aware that this power in the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged?"

His concluding paragraph shows the attitude and feeling that a man in this position must have in reaching what he believed to be a decision of great magnitude.[27]

> In forming my opinion in this case, however, I have given no weight to any consideration of expediency. I think the legislature had a clear constitutional right to pass the laws in question. My opinion may be incorrect, and our judgement erroneous, but it is the best opinion, which upon the most mature consideration, I have been able to form. It is certainly, to me, a subject of much consolation to know that if

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[27]Farrar, pp. 206-235.

> we have erred, our mistakes can be corrected, and prevented from working any ultimate injustice. If the plaintiffs think themselves aggrieved by our decision, they can carry the case to another tribunal, where it can be re-examined and our judgement be reversed, or affirmed, as the law of the case may seem to that tribunal to require.
>
> Let judgement be entered for the defendant.

After the decision was given and a judgement entered for the defendant, the plaintiffs filed an action to remove the case to the Superior Court of the United States on a writ of error.[28]

This writ cited several points, which the plaintiffs considered to be in error. The source of these errors were alleged to be the constitutionality of the acts of June 27, December 18, and December 26, 1816, which were passed by the New Hampshire Legislature, as well as four other points of law. In addition, there was also an agreement by both parties concerning the recovery of the College property and that neither side would benefit extraordinarily from the Supreme Court action. The final point included the stipulation that the demand, refusal, and conversion stated in the special verdict would

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[28] A writ of error, is a directive, by some appropriate authority, which directs judges of a court of record, having handed down a final judgement, to re-examine the record themselves, or forward it to a court of appellate jurisdiction for purposes of examination, with the objective of correcting some alleged error. A writ of error does not, in itself, vacate the judgement of the lower court, which continues until it is reversed.

be effective on the day preceding the commencement of the suit.[29]

The writ and agreement were not filed with the Supreme Court until December the 29th. This delay was caused by the inability of counsel to reach an agreement satisfactory to both.

Almost immediately after the decision was announced, the static situation at Hanover began to change. Tempers and feelings, seemingly held in check for months, began to erupt. Probably the most serious conflict involved two literary groups known as the Social Friends and the United Fraternity. These organizations were popularly known as the "Socials" and the "Fraters," respectively.

These two societies had been assigned two rooms to house their individual libraries. After the University had taken over the College library in the early spring of the year, these two groups organized to protect their own libraries from a similar take-over. After the decision at Plymouth, the two groups began to remove their books from the rooms assigned for their use to a safer place because they feared for their property. Their fears were not unfounded, and on November 11, 1817, a group of faculty and students from the University went to the Socials' clubroom and proceeded to chop down the door. The din created by this attack aroused other

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[29]Farrar, p. 235-237.

College students sleeping nearby. Upon finding that they were being attacked, the College students picked up such weapons that they could find and counterattacked. The University group, by then, had entered the clubroom and were defending their position from that point. After a short siege, the University group, realizing that they were hopelessly outnumbered and that their cause was lost, surrendered. They were held captive while the members of the two societies removed their books to a safer place. The University group was then searched and allowed to leave.

Unfortunately, this was not the end of the encounter, since both sides continued the controversy by writing and distributing their accounts of the fracas. A minor legal action was taken, but nothing serious resulted from the incident. It was generally agreed that the University cause suffered more than that of the College from the incident and that the tide of public opinion was beginning to turn in favor of the College. After this episode the environment at Hanover returned to one of relative calm.[30]

The action against Woodward was proceeding in the specified manner. The Washington hearing was to be presented by Webster, since neither Smith nor Mason was in a position to pursue the case that winter. In a letter to Mason dated December 8, 1817, Webster asks Mason to " . . . try to get a

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[30]Lord, pp. 131-138.

copy of Richardson's opinion, as soon as possible, so that he might determine what the weak points were." He also mentioned that he would like to have Joseph Hopkinson assist him in Washington and would appreciate having a copy of Smith's argument to use in the preparation of his own presentation.[31]

The University Trustees agreed to retain counsel for the case in the person of John Holmes and, in addition, hoped that they might retain the United States Attorney-General, William Wirt, to assist Holmes. It is not clear why Sullivan and Bartlett did not pursue the case in Washington. Some suggest that the University Trustees were over-confident of their eventual victory and felt that the added expense was not necessary.[32]

In a letter to Smith, on December 8th, Webster deplored the thought of going to Washington on only one point of law, a writ of error, and thoughtfully wished that it were possible to raise other objections of a constitutional nature. He suggested that the Wheelock College holdings in Vermont might be grounds for inclusion on the docket of the circuit court and subsequent action in the Supreme Court.[33]

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[31]Daniel Webster, The Writings and Speeches of Daniel Webster, National Edition XVII, (Boston, 1903), 266-267.

[32]Lord, pp. 139-140.

[33]Webster's Speeches, pp. 267-268.

In many instances, it appears that when Webster suggested something it was tantamount to action. Such was the case of the circuit court action, for this was the course of action chosen by Webster in the hope of obtaining a more favorable position in Washington. In this case Webster filed three actions, all based on the interstate holdings of the College. These actions were filed in January, but were unable to be forwarded to Washington in time for the February, 1818, term.[34]

Since Webster was unsuccessful in bringing the additional actions before the court in time, the case came before the Supreme Court on March 10, 1818, on a writ of error.[35] The members of the court[36] at this time were as follows:

The Hon. John Marshall, Chief Justice
The Hon. Bushrod Washington, Associate Justice
The Hon. William Johnson, Associate Justice
The Hon. Brockholst Livingston, Associate Justice
The Hon. Thomas Todd, Associate Justice
The Hon. Gabriel Duvall, Associate Justice
The Hon. Joseph Story, Associate Justice
William Wirt, Esq., Attorney-General--Appointed November 13th, 1817

The court reporter during this period was Henry Wheaton, whose name appears as a part of the volume identification. Depending upon the source, this volume may be referred to as either 3 Wheaton, or 16 US; either of these designations is

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[34]Claude Moore Fuess, Daniel Webster, (Boston, 1930), p. 225.

[35]Shirley, p. 200.

[36]U. S. Supreme Court Reports, 3 Wheaton (16 US), p. i.

correct to use. The actual report of the case is carried in 4 Wheaton (17 US) of the Supreme Court reports, even though the case was heard in 1818. This is due to the fact that the decision was not given until the 1819 session.

Wheaton began his account of the case by citing a brief account of the case and giving a quotation of Dartmouth's Royal Charter.[37] Wheaton then recounted the acts of June 27th, December 18th, and December 26th, which were passed by the New Hampshire Legislature.[38] Following this account, he gave a brief account of the circumstances, which brought this case to the Supreme Court.[39] He then gave an account of the arguments of counsel, beginning with Webster.[40]

Webster began his argument with a general query concerning the validity of the acts in question and whether or not they are binding on the Trustees without their consent. Webster gave a brief history of the institution, highlighting incidents which would point to Eleazar Wheelock as the founder, using funds for this purpose which he had solicited of his own volition. He noted that the institution proceeded without interruption for nearly fifty years before the acts of the

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[37] The Trustees of Dartmouth College v. William H. Woodward, 4 Wheaton (17 US), 519.

[38] 4 Wheaton, 537.

[39] 4 Wheaton, 549.

[40] 4 Wheaton, 551.

Legislature created a new corporation, which was to become the owner of the assets of the old corporation. He then showed how the two corporations differed, citing the name as well as different rights, powers, and duties. He called attention to the fact that the powers are vested in different hands and, in fact, two boards instead of one. He suggested that the acts, while professing to include the old Trustees, did, in fact, exclude them, since they did not have a voice in framing the new corporation. These acts, therefore, did infringe upon the rights of the Trustees as individuals and as corporate instruments. He concluded this segment of his argument with the contention that the acts are not binding upon the plaintiffs, because they are against common right and are repugnant to the United States Constitution.

Webster then called the attention of the Court to the fact that even if the acts were not repugnant to the respective constitutions of New Hampshire and the United States, they would be illegal in any case, since they were beyond the scope of the legislature's power. To reinforce this point Webster cited Calder et ux. v. Bull, which was tried before the Supreme Court in 1798.[41]

Webster next considered the fact that there are various and diverse types of corporations, and that the legislatures have more power over some of these than others. The corporations subject to legislative control are civil corporations,

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[41]Calder et ux. v. Bull, 3 Dallas (3 US), 386 (1798).

and he cites cities, counties, towns, banks, insurance companies, and other corporations with business interests as examples. A corporation of this type, he reasoned, is entitled to only that authority which its creating agency is willing to give. He said that Dartmouth did not fall into this category, because it was an eleemosynary corporation and was founded and endowed for the perpetual purpose of distributing gratuities to such persons that the founder had named. He suggested that hospitals, colleges, and universities fall into this category and are private corporations rather than civil.

The next point taken up by Webster involved visitation, which he held is vested in the founder and is passed on to descendants in ensuing years. The right of visitation is inherent in the original endowment and, as such, is possessed by the founder to do with as he sees fit. He is free to vest this right in heirs, trustees, overseers, or whomever he feels might function best as a visitor. This right, Webster decided, is a private right, and because of this the visitors have all rights due any private person. To support this point, he cited a case at Exeter College, in Oxford, and pursued the point further by noting that even though the King should be the founder, and subsequently grant a charter incorporating the Trustees, the King could no longer visit.[42] Should the King,

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[42] Phillips v. Bury, 1 Lord Raymond, 5 (1792).

or his government, have made a gift, grant, or donation, the situation would remain unaltered, since this gift would be no different than any other gift from some other donor who might befriend the institution. Any such gift given to an eleemosynary corporation must take the character of that organization, assuming that no conditions are attached to their offer and acceptance. He suggested that it followed that since eleemosynary corporations are private corporations, any unrestricted gift, either from a public or private source, became subject to the private will of that organization. The visitors of these organizations have private rights and liberties and other privileges of a similar nature. To support the concept that franchise and liberty are synonymous terms, Webster cited Blackstone,[43] who said,

> . . . it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom.

Webster then pointed out that no precedent had been established to suggest that a private corporation, which offers benefits to the public, should lose its private rights and franchise, and that the rights of the Trustees are based on the same foundation. He concluded this section of his argument with the hope that he had offered enough evidence to show

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[43] 2 Blackstone's Commentaries, 37.

that the trustees possessed certain rights under the Charter and that these rights were permanently vested and inviolable.

If the Court would grant that the preceding facts were representations of reality, he then asked them to consider those articles of the New Hampshire Bill of Rights which were violated by the acts of the legislature. In this part of his argument he cited the article which was violated and shows how each was violated by the Acts of 1816.

The first infringement involved Article II, which gives a citizen the right to own property. This article was violated when the legislature deprived the Trustees of this right against their consent.

The Acts also violate Article XX, which grants the right of a trial to property holders when their property is appropriated. The plaintiffs were denied this right. This Article also protects persons from ex post facto laws, and he cited as authority the case of Society v. Wheeler.[44] In this judgement the opinion included the following quotation:

> Every statute which takes away, or impairs vested rights, acquired under existing laws, must be deemed retrospective.

In this respect the plaintiffs were denied this right.

The final article which he cited is Article XXXVII. This article states that the various powers of the government shall be kept separate, and was violated by the legislature

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[44] Society v. Wheeler, 2 Gal., 103 (1789).

when they usurped the powers of the judicial, by declaring the forfeiture of a franchise and reassigning it without a trial or hearing. It is his conclusion that if the constitution is not "altogether waste paper," then the acts of the legislature have been restrained by the aforecited articles.

Article XV of the New Hampshire Constitution states that no person shall be "deprived of his property, immunities, or his privileges, but by the judgement of his peers or the law of the land." In order to refute this defense point, Webster conceded that the rights of the plaintiffs are privileges within the meaning of this article, but if they were as stated by the defense, it would also follow that they possessed the same rights under Articles II, XX, and XXXVII.

Webster then reviewed his major points, showing that the acts in question are repugnant to the Constitution of New Hampshire. He suggested that the court should remember that the institution was a private, eleemosynary corporation in possession of private property, founded by a private party for charitable purposes. The institution had rights granted by a charter, which vested the rights of visitors upon the Trustees and the privilege of governing the institution according to the Charter. Since the institution was not public, nor was its use intended to be public, he pointed out that any gift to such an institution does not constitute a gift to the public. He closed this point by suggesting that the

legislative acts violated all of the aforestated rights and privileges, and thus were repugnant to the Constitution of New Hampshire.

The second main point of the plaintiffs was that the acts were repugnant to Section 10 of Article I of the United States Constitution. To substantiate his position, Webster called attention to the fact that the court had already decided this point, at least in part, through earlier decisions. In Fletcher v. Peck[45] the court decided that a grant is a contract within the meaning of this article and that the fact that the grantor is the State, rather than an individual, is of no consequence.

It was also settled that a grant by a state before the revolution was binding after the revolution.[46] The case of Terret v. Taylor[47] clearly showed the position of the court in similar matters and left "little to be argued."

Through the citation of The King v. Miller,[48] Webster showed that the Charter is a contract and could only be altered by the King through the consent of both parties. Accordingly, the Charter fulfilled all of the requirements of a contract,

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[45] Fletcher v. Peck, 6 Cranch (10 US), 87 (1812).

[46] New Jersey v. Wilson, 7 Cranch (11 US), 164 (1813).

[47] Terret v. Taylor, 9 Cranch (13 US), 43 (1815).

[48] King v. Miller, 6 T. R., 277 (1795).

and he listed these conditions one by one, concluding with the question, "Is this not a contract?"

If the Charter was a contract, he asked if it is not entitled to proper recognition as a contract and protection from the acts of the legislature. To conclude his presentation Webster pointed out that the North Carolina legislature had the wisdom to repeal a similar law, which the state courts had judged to be unconstitutional, and he suggested that the State of New Hampshire should follow suit.

This concluded Webster's formal argument, but probably the most memorable part of the hearing was not recorded formally. It was instead recorded by a Yale professor, Chauncy A. Goodrich, and later recounted to Rufus Choate to be recited in Choate's eulogy for Daniel Webster.[49] The Goodrich account of the circumstances are classic and worthy of being repeated here.

> Before going to Washington, which I did chiefly for the sake of hearing Mr. Webster, I was told that, in arguing the case at Exeter, New Hampshire, he had left the whole courtroom in tears at the conclusion of his speech. This, I confess, struck me unpleasantly,--any attempt at pathos on a purely legal question like this seemed hardly in good taste. On my way to Washington, I made the acquaintance of Mr. Webster. We were together for several days in Philadelphia, at the house of a common friend; and as the College question was one of deep interest to literary men, we conversed often and largely on the subject. As he dwelt upon the leading points of the case, in terms so calm, simple and precise, I said

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[49]Samuel Gilman Brown, The Works of Rufus Choate, I (Boston, 1862), 515-517.

to my self more than once, in reference to the story that I had heard, "What may have seemed appropriate in defending the College at home, and so on her home ground, there will be no appeal to the feelings of Judge Marshall and his associates in Washington." The Supreme Court of the United States held its session that winter, in a mean apartment of moderate size--the Capitol not having been built after its destruction in 1814. The audience, when the case came on, was therefore small, consisting chiefly of legal men, the elite of the profession through the country. Mr. Webster entered upon his argument in the calm tone of dignified conversation. His matter was so completely at his command that he scarcely looked at his brief, but went on for more than four hours with a statement so luminous, and a chain of reasoning so easy to understand, and yet approaching so nearly to absolute demonstration, that he seemed to carry with him every man of the audience without the slightest effort or weariness on either side. It was hardly eloquence, in the strict sense of the term; it was pure reason. Now and then, for a sentence or two, his eye flashed and his voice swelled to a bolder note, as he uttered some emphatic thought; but he instantly fell back into the tone of earnest conversation, which ran throughout the great body of his speech. A single circumstance will show you the clearness and absorbing power of his argument.

I observed that Judge Story, at the opening of the case, had prepared himself, pen in hand, as if to take copious minutes. Hour after hour I saw him fixed in the same attitude, but, so far as I could perceive, with not a note on his paper. The argument closed and I could not discover that he had made a single note. Others around me remarked the same thing; and it was among the "on dits" of Washington, that a friend spoke to him of the fact with surprise, when the judge remarked, "Everything was so clear, and so easy to remember, that not a note seemed necessary, and, in fact, I thought little or nothing about my notes."

The argument ended. Mr. Webster stood for some moments silent before the court, while every eye was fixed intently upon him. At length, addressing the Chief Justice Marshall, he proceeded thus:--

"This, Sir is my case! It is the case, not merely of that humble institution, it is the case of every college in our land. It is more. It is the case of every Eleemosynary Institution throughout our country,--all of these great charities founded in piety by our ancestors to alleviate human misery, and scatter

blessings along the pathways of life. It is more! It is, in some sense the case of every man among us who has property of which he may be stripped; for the question is simply this: Shall our State Legislatures be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their direction, shall see fit!

"Sir, you may destroy this little Institution; it is weak; it is in your hands! I know it is one of the lesser lights on the literary horizon of our country. You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which for more than a century, have thrown their radiance over our land! It is, Sir, as I have said, a small College. And yet, there are those who love it---."

Here the feelings which he had thus far succeeded in keeping down, broke forth. His lips quavered; his cheeks trembled with emotion; his eyes were filled with tears, his voice choked, and he seemed struggling to the utmost simply to gain that mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give you a few broken words of tenderness in which he went on to speak of his attachment to the College. The whole seemed to be mingled throughout with recollections of his father, mother, brother, and all the trials and privations through which he had made his way into life. Every one saw that it was wholly unpremeditated a pressure on his heart, which sought words in relief and tears.

The courtroom during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and his eyes suffused with tears; Mr. Justice Washington, at his side,--with his small face emaciated frame, and countenance more like marble than I ever saw on any other human being,--leaning forward with an eager, troubled look; and the remainder of the Court, at the two extremities, pressing as it were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the speakers face. If a painter could give us the scene on canvas,--those forms and countenances, and Daniel Webster as he stood in the midst, it would be one of the most touching pictures in the history of eloquence. One thing it taught me,

> that the pathetic depends not merely on the words uttered, but still more on the estimate we put upon him who utters them. There was not one among the strong-minded men of the assembly who could think it was unmanly to weep, when he saw standing before him the man who had made such an argument, melted into tenderness.
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> Mr. Webster had now recovered his composure, and fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the hearts of an audience,--
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> "Sir, I know not how others may feel," (glancing at the opponents of the College before him), "but for myself, when I see my Alma Mater surrounded, like Ceasar in the Senate house, by those who reiterating stab upon stab, I would not, for this right hand, have her turn to me, and say, Et tu quoque mi fili! And thou too my son"!
>
> He sat down. There was a deathlike stillness throughout the room for some moments; everyone seemed to be slowly recovering himself, and coming gradually back to the ordinary range of thought and feeling.

The condition of the court room can be visualized as Holmes arose to address the court in behalf of the defense.[50] It must have presented a most difficult picture.

Holmes' first point contended that Article I, Section 10, of the Federal Constitution did not extend to civil corporations, even those whose primary purpose might be classified as private. To supplement this point he used the analogy of marriage, which he suggested was a contract; and the impairment of this contract through divorce took place without the consent of both parties. He also contended that the framers of the Constitution did not intend that it should interfere with the republican form of government in each state. Holmes also

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[50] 4 Wheaton, 600.

said that the education of the nation's youth had been vested in the state by the authority of the Federal Constitution. It was within this sphere of authority which prompted the State of New Hampshire to grant the Charter to Dartmouth College.

Holmes said that the original grant was within the authority of Parliament, which could have dissolved it if they had so desired, but that this was of little consequence at this time since the revolution had dissolved the connection with the parent country. He contended that this dissolution had merely transferred the power from the Crown of Great Britain to the government of New Hampshire, not to the government of the United States. It was this authority which allowed the legislature to modify the Charter. He concluded from these points that Dartmouth was not a private corporation with private property but rather a public corporation, established for public purposes, and was therefore subject to the will of the state government and not entitled to the protection of the Federal Constitution.

For speculative purposes he assumed that the Charter was a contract, which was due the protection of the Federal Constitution, and then asked if its obligation would be impaired by the acts of the legislature. He answered his question by listing the reasons why the corporation had not actually undergone any change. He cited as authority The King v.

Passmore,[51] which says that the Trustees have no regress against such an action if they are included in the new organization.

William Wirt followed Holmes, speaking for the defense.[52] Wirt opened his presentation by considering the ex post facto point brought out by the plaintiffs. To refute this point he suggested that it is not clear that the acts were actually after the fact and cited Calder v. Bull[53] in support of this point. When that decision was rendered, the magistrate commented that, "I will not decide any law to be void, but in a very clear case." He suggested that the circumstances surrounding the Dartmouth case are not that clear.

He continued to question the existence of a contract, because he found it difficult to identify the contracting parties. He cited certain events, leading to the charter, which the plaintiffs contend showed that a contract exists; but what if the basis of this argument was removed? The College then loses any claim to be of a private nature. He further speculated that if the Charter was a contract, it was still not impaired by the acts, since nothing previously

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[51] 3 T. R., 244.

[52] 4 Wheaton, 606.

[53] 3 Dallas, 386.

vested in the corporation had been divested. He cited conditions which supported this point.

Wirt closed his argument by saying:

> These civil institutions must be modified, and adapted to the mutations of society and manners. They belong to the people, are established for their benefit, and ought to be subject to their authority.

The final argument for the plaintiffs was made by Joseph Hopkinson.[54] Hopkinson contended that the entire argument of the defense counsel was based upon an invalid assumption. The error in this assumption was the fact that the corporation was public, that the officials of the corporation derived their authority from the King, and that that authority continued after the revolution as a mandate of the State. He asked the basis for this assumption and pointed out that no case, doctrine, or book of authority had been cited in evidence. He carried this point one step further by noting that no writer of corporate law had ever identified eleemosynary corporations, particularly literary corporations founded by private persons, as being anything but private corporations. He recalled the difference between public and private corporations and suggested that even though colleges serve the public, they nevertheless remain private corporations with private interests and privileges.

Having listed the factors which qualify the Charter as a contract, he asked why, as the defense contended, it was not

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[54] 4 Wheaton, 615.

entitled to the protection of the Federal Constitution. He called the attention of the Court that it was a well settled point that a charter conceived in the manner of the Dartmouth Charter is entitled to that protection.

Next, Hopkinson attacked the defense point that Wheelock was not the founder of the College, which he maintained was of no consequence since the corporation is private in any case. He contended that regardless of who the founder might be, the Charter vested the power of governance in the Trustees, and from the instant that the Charter was accepted, the powers of visitation were vested in the Trustees and not the founder. Hopkinson suggested that there is little doubt that the acts of the Legislature impair the contract if the Court would grant that a contract exists. He then listed how the acts impair the contract.

In closing the argument for the plaintiffs Hopkinson summarized their argument, saying that Wheelock had a legal interest in the funds used to form the institution, that he made a contract with the existing government of the State, that he fulfilled the stipulations set forth in the Charter, and finally that these Charter stipulations were violated and the Charter was impaired by the acts of the legislature.

This ended the arguments, and it now remained for the Court to decide the question. Unfortunately, it was not able to do this immediately. The Court failed to reach an agreement,

and on March 13, 1818, the Chief Justice noted that the case would be continued until the next session of the Court. Since the case was to be postponed, there was much speculation on the division of the vote. Most of those connected with the case felt Marshall and Washington were inclined toward the College; Duvall and Todd for the University; and Story, Livingston, and Johnson undecided.[55]

Webster was optimistic, since he too felt that Marshall and Livingston were with them. He also felt that Story would swing to their side and that there was a better than average chance that at least one of the others would be with them in the end.[56] Viewpoints differ, however, and on March 10 one of the University Trustees, named Hale, wrote President Allen that Webster's argument had ended that day and had made little or no impression on the Court. The next day he wrote that Wirt's argument had been powerful and able and that on the third day, as the hearing closed, the majority of those present favored the view of the University.

Holmes was more cautious in a letter to Allen, written on the closing day of the hearing. In this note he complimented the arguments of Webster and Hopkinson as being very able. He also advised that Wirt had performed eloquently and was non-committal concerning his own presentation. He felt

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[55]Lord, pp. 146-149.

[56]Letter to Mason, National Edition, p. 275.

that while the outcome was difficult to predict, there was very little doubt that the final decision would be in their favor.

Allen questioned Hale's assurances and wrote him that Webster had written College President Brown that his own arguments, as feeble as they were, had contributed less to the College cause than had the arguments of Holmes and Wirt. Hale reassured Allen that Webster was being petty and that the final vote should be 5 to 2, or 6 to 1, in favor of the University.[57]

During the summer of 1818 the College cause reached a low point when the great legal authority of the day, Chancellor James Kent, visited the University officials but did not give the College officials the same opportunity. This alarmed the College people, since Kent was known to have a great influence on the thinking of Johnson, directly, and Livingston indirectly, through Governor Clinton. These jurists were the swing men in the undecided case, and the College supporters knew that they could ill afford this possible threat to the outcome of the decision. In an attempt to neutralize this newest threat to the College cause, Mason sent copies of Webster's argument, and a copy of the Dartmouth College Charter to Kent on August 22. These papers by Kent's admission gave him a much clearer view of the case.

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[57]Lord, p. 150.

The College officials agreed that Kent was a most important factor in the situation, and as a result, Brown made a trip to Albany for the sole purpose of visiting with him. The visit must have been very satisfying to the proponents of the College, since Brown learned that Kent had regretted his hastily formed opinion and had assumed a different position in light of a review of Webster's argument. Brown also learned that Johnson had requested Kent's opinion on the case.[58]

During this period the University was experiencing serious financial difficulties. Soon after the Washington hearing, Holmes wrote to Allen requesting a payment of his fee and noted that Wirt had not received payment either. The income of the University was very meager, since its student body was small and the tenants of the College-University lands were reluctant to pay anyone until the litigation had been settled.

A problem also existed for the officials and faculty of the school, since they had received no wages for over a year. The state was sympathetic, but it was not overly helpful. It did condescend to give the University an interest-bearing loan, secured by the Trustees in their corporate capacity. The amount of the loan was $4,000 and was to be repaid within one year. The sum was merely a gesture, for the amount was totally inadequate to be of any substantial assistance.

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[58]Lord, p. 153-154.

This was not to be the limit of the problems facing the University, for on August 9th, William H. Woodward died at the early age of forty-three. His death was not entirely unexpected, since the University Treasurer had been in ill health for some time.

Shortly after Woodward's death the College and University held their respective commencement exercises without incident. This was probably due to the fact that the College officials had moved their exercises ahead one week to the 17th of August, while the University held its program on the traditional date of August 26th. The academic year began for the College and the University one week later. The College counted thirty-eight new freshmen and the University four, all from Hanover.[59]

During the summer the news of the alleged ineptness of the counsel for the defense spread rapidly throughout the countryside. It reached the ear of the famous attorney, William Pinkney, of Maryland, and the case piqued his interest. The fame of Pinkney was wide and earned. It had been said that he was " . . . the only man at the bar of the Supreme Court, who could meet Webster upon anything like equal ground."[60]

With Pinkney's entry into the case it became necessary for Webster and Hopkinson to consider menas of excluding him

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[59]Lord, pp. 155-158.

[60]Shirley, p. 202.

from the opportunity to present his argument. Pinkney intended to argue that the Legislature of New Hampshire had all the power of Parliament which, if the Court agreed, would have nullified much of the College case.

Technically, the case began on February 1, 1819, but all of the judges were not present on that Monday, and the Court adjourned until the next day.[61] When the Court reconvened on February 2, only six of the justices were in attendance. Thomas Todd was absent the entire term due to illness.[62] Considering Webster's observation of a year earlier, this factor should have presented a favorable picture to the College officials, since, in their eyes, this meant one less negative vote. The balance of the Court remained as it was during the 1818 term.

Since a decision was not expected immediately, counsel for the defense was absent with the exception of Pinkney, who was eagerly awaiting the earliest opportunity to present his motion for reargument to the Court. He was not to be given this opportunity; for in a completely surprising turn of events, Chief Justice Marshall silenced his motion by announcing that the court had reached a decision during the recess. He immediately began to read his opinion from his own handwriting, which was contained on "eighteen folio pages."[63]

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[61]Shirley, pp. 202-204.

[62]4 Wheaton, ii.

[63]Shirley, p. 203.

Marshall's opinion began with an introduction, naming the parties in the case, the cause for the action, and the agreement on the special verdict. He reiterated the decision of the New Hampshire Superior Court and observed that there is but one question before the Court: that being, " . . . do the acts to which the verdict refers violate the constitution of the United States?"

His initial comment on the magnitude of the decision before the Court is worthy of note.[64]

> This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised; an opinion which carries with it intrinsic evidence of the diligence of the ability, and the integrity, with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approached the consideration of such questions; and has declared that, in no doubtful case would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall also extend to all cases in law and equity arising from the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

Having notified the audience of the Court's sensitivity to the problem at hand, as well as giving a hint as to the

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[64] 4 Wheaton, 625.

final decision, Marshall moved to the facts of the case. He stated, "It can require no argument that the circumstances of this case constitute a contract."[65]

Marshall observed two points for consideration which he recognized as being (1) the question of whether or not the contract is entitled to protection under the constitution, and (2) was the contract impaired by the acts of the legislature?

Marshall considered these points one at a time. Discussing the first point, he considered each of the counsel's objections to allowing the contract clause of the constitution to assume extremely broad proportions, and concurred with these objections because such an interpretation would place an extreme burden on the internal concerns of a state. Such an interpretation was not intended by those who framed the Constitution, rather it was intended to offer protection to the private individual, so that he might claim the right to have his property unimpaired by state legislatures. He further stated that since this was the intent of that clause of the Constitution, that would be the limit of its protection.

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[65]In order to be legally enforceable, a contract must fulfill three requirements. There must be an offer, the offer must be accepted, and there must be some consideration exchanged. These conditions, having been satisfied, the contract becomes valid, assuming that the object of the contract is legal, the contracting parties have the capacity, and if it has the formality required.

Marshall's next consideration was to determine in terms of the nature of the original Charter whether or not the corporation was public or private. If that Charter had created a civil institution with political power, or if the funds involved had been public property, then the action would have been at the option of the state. Alternatively, if the corporation had been founded for purposes not connected with the government with private funds bestowed on the strength of the Charter and administered in a manner also prescribed by the Charter, it would be classed as a private corporation. Marshall decided that the answer was in the Charter, and proceeded to examine it to " . . . ascertain its true character."

Marshall followed the instrument from Wheelock's first school in 1754 to its issuance in 1769. He examined the provisions of the Charter in a clear, precise manner, noting that Wheelock had requested the Charter; it was offered by the King, through the state, and finally accepted by Wheelock, and ". . . the property both real and personal, which had been contributed for the benefit of the College, was conveyed to, and vested in, the corporate body." He concluded that it is an eleemosynary corporation and its funds were of a private nature. In fact, he could find nothing that would mark the corporation as a public one.

In the next section of his opinion, Marshall made a very important point which is worthy of note:[66]

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[66] 4 Wheaton, 635.

> Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source from whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. . . .

He then asked if the College could be considered public by the act of its incorporation? He explored this possibility at some length but concluded that the only difference between a private corporation and a private individual is immortality; and this unique feature would not make it of a civil nature.

He then asked who benefits from the corporation, noting that the defense suggested that it is the people of New Hampshire. To answer this point he reviewed the purposes of the Charter and concluded that these words offer the benefits to anyone who might wish them; it is merely coincidental that the people of New Hampshire are included in this group.

He pointed out that this Charter was clearly a contract between the donors and Trustees and the crown, whose obligations were assumed by the State of New Hampshire. He terminates his first point with the following statement:

> The opinion of this court, after mature deliberation, is, that this is a contract, the obligation of which can not be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

Marshall then moved to his second point for consideration: that of the contract impairment by the legislative acts. This

point is disposed of comparatively quickly by Marshall. His reasoning was sharp and to the point.

The Charter was quite specific in delegating authority and stating how the school was to function. The authority was vested in the Trustees and through them in its operating officials. The obligations of this Charter were not changed by the revolution. The legislative acts transferred the whole governing power from those to whom it had been intrusted to the chief executive of the State of New Hampshire, or " . . . the will of the state is substituted for the will of the donors, in every essential operation of the College . . . the system was totally changed." He suggested that this may well be in the best interests of a particular institution, but that it is not in agreement with the will of the donors and was opposed to their wishes.

Marshall concluded his written opinion with these momentous words:

> It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that judgement on this special verdict ought to have been for the plaintiffs. The judgement of the State Court must therefore be reversed.

Washington[67] assented with the Chief Justice but wrote an opinion under his own name. His opinion did not seem to differ to any great extent from Marshall's. He cited the same

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[67] 4 Wheaton, 654.

two points and then agreed with Marshall. His logic seemed to be somewhat more technical in nature, with the citation of a number of cases. He considered such points as Wheelock not being the founder of the College, but reasoned that this would not matter anyway, and concluded that " . . . the judgement of the State Court ought to be reversed."

Johnson concurred for the reasons stated by Marshall.

Livingston concurred for the reasons stated by Marshall, Washington, and Story.

Story[68] concurred and wrote a lengthy opinion, which will be examined to the extent that his opinion differed from his associates. Story presented an extremely well thought out, technical opinion. It was broad in scope and the genesis of points of law which affect colleges and universities today. Story discussed the technical aspects of corporations and consideration. In these areas his reasoning seemed to be superior to the others. He also suggested that states wishing to place constraints on future corporate charters should take the facts of this case into consideration and limit the scope of the charter, if that was their wish. Such limitations should include everything necessary to maintain adequate control over the grantee.

He also considered the rights, duties, and authority of the trustees of an eleemosynary corporation. He covered the

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[68] 4 Wheaton, 666.

right of visitation and illegal removal from office. Story specified that the proper remedy for such a removal was mandamus[69] to restore the individual to his office. Story closed with the following statement:

> In the examination, I have endeavored to keep my steps super antiquas vias of the law, under guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgement of our country.

The only dissenting opinion came from Duvall, and since he gave no written opinion, it is not completely clear just why his opinion differed from his colleagues.[70]

After Marshall's opinion was read, Webster moved that the judgement be entered, nunc pro tunc,[71] since Woodward had died during the recess. This motion was opposed by Pinkney and Wirt, but on February 23, 1819, the court granted the motion of the plaintiffs and finally adjourned on March 12, 1819.[72]

The old Trustees learned of the Court's decision on February 9th during the winter vacation. The officials of

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[69]A writ issued by a higher court to a lesser court, or peace officer, or corporation commanding it to take an action.

[70]4 Wheaton, 713.

[71]A Latin expression meaning, now for then.

[72]Shirley, p. 205.

the College were only partially successful in regaining their property, for Allen and the University officials did not give up easily.

Armed with the judgement of the Supreme Court, Webster prepared to resolve the cases filed in the Circuit Court at Portsmouth. The case came to the bar on May 1, 1819, before Justice Story, the Associate Justice of the Supreme Court and also the presiding judge of the Circuit Court. Judgement was pronounced for the plaintiffs, which was to be effective immediately unless the defense could produce further facts to warrant delay. On May 27 James T. Austin presented new facts on the case to Judge Story, who held that these new facts did not alter the situation and executed the judgement.

Thus ended the litigation in the Dartmouth College Case.

CHAPTER IV

SUBSEQUENT LITIGATION

Since case law is a basic foundation of the law of the land, the influence of the decision of the Supreme Court in the Dartmouth Case did not cease in 1819; instead, it has exerted a profound influence upon society in general and higher education in particular. This decision established a principle which has served as the basis for future adjudication in cases involving contracts, charters, and corporations.

Time after time legislatures have attempted to impose their will upon college corporations without success. The impact of the decision has carried over to many other parts of society as well as education. This impact becomes clear when consulting Shepard's United States Citations,[1] since this publication lists nearly 2,000 court cases which have used the Dartmouth decision to reinforce some point of law. The vast majority of these cases do not pertain to higher education and, as a consequence, will not be studied. The fact that Shepard's lists only the volume and the page means that each case listed must be consulted to determine whether or not it pertains to higher education. The cases which directly

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[1]Shepard's United States Citations, 313 vols., (San Francisco, 1943), pp. 103-106.

involve higher education were located through systematic legal research, and those will be examined in detail in the sections which follow.

These cases will be listed in chronological order and will include the name of the case, the volume and page, and the date. Following this information, a case brief will list the pertinent facts of the case, and the point of law derived from the Dartmouth decision will be discussed. The heading entitled, Probable Impact, will attempt to assess the impact of the case upon higher education. The decision of the case will be given and a descriptor will be chosen so that the information might be organized into some future data retrieval system.

9 GJ, 365
University of Maryland
v.
Williams

Court of Appeals of Maryland

June, 1838

Case brief.--Action was brought by the Regents of the University of Maryland against the Treasurer of the Trustees, to recover monies, to which the Regents were allegedly entitled. The defendant had won the decision in a lower court, and the Regents appealed.

Dartmouth case law.--The case was used to cite the fact that colleges should be treated in a manner similar to hospitals, and that regents had powers of visitation, which were given by the charter. Reference was also made to the fact that the charter was impaired by an action of the legislature in 1825.

Probable impact.--The case served notice that the points laid down in the Dartmouth decision applied to all types of schools. It re-enforced the charter impairment concept.

Decision.--For the plaintiffs.

Descriptor.--Charters.

10 Ohio, 235
Armstrong et al.
v.
The Treasurer of Athens County

Supreme Court of Ohio

December, 1840

Case brief.--The original charter granted to Athens University gave tax exemptions on certain land holdings forever. These lands were sold by the University, and taxes were authorized to be levied on the new owners of these lands. The plaintiff filed suit to prevent these taxes from being collected.

Dartmouth case law.--The point used in the citation of the Dartmouth decision was the point that certain acts of incorporation are contracts and cannot be altered without the consent of the corporators.

Probable impact.--This case shows that the charter franchise is available to the original contractor and that these benefits are null and void to anyone taking over the property of the original grantee.

Decision.--For the defendant.

Descriptor.--Charters.

54 Ky, 642
City of Lousiville
v.
President and Trustees of the
University of Louisville

Court of Appeals of Kentucky

July 4, 1854

Case brief.--The question arose as to the corporate status of the University of Louisville. The city maintained that the school was public and, as such, was subject to public control. The Trustees held that the school was private, and because of this, the move to change the organizational structure was illegal, under Article I, Section 10, of the Federal Constitution. The plaintiffs lost the decision in the lower court and appealed.

Dartmouth case law.--The decision was referred to at great length by both attorneys and in the majority opinion of the court, as well as that of the dissenting judge. The attorneys for the city used the case to show how it defined the institution to be of a public nature. The school's counsel used Dartmouth law to give Marshall's description of a private, eleemosynary college. They pointed out that funds received from the government were no different from gifts received from a private individual. The appellee's attorneys suggested that the changes involved in the case at hand were less rigorous than those of Dartmouth.

Probable impact.--The decision was a reinforcement of the principle that a government, at any level, cannot usurp the benefits allowed a private institution in its charter. It effectively served notice that the courts felt that private higher education was guaranteed the right of existence under the laws of the land.

Decision.--For the appellee.

Descriptor.--Private corporations.

4 Mich, 213
The Regents of the University of Michigan
v.
The Board of Education of the City of Detroit
Supreme Court of Michigan
January, 1856

Case brief.--Action was taken by the Regents to recover property in the city of Detroit. The property was originally conveyed to the Trustees of the University, who were the predecessors of the Regents. The questions before the Court were: (1) did the governor have the authority to convey the property to the Trustees, and (2) were the plaintiffs the legal successors to the grantees?

Dartmouth case law.--The decision was used to show that the University was a public institution chartered by the legislature, who had reserved the right to ammend the charter.

Probable impact.--The court re-enforced the Dartmouth concept of public and private corporations. It pointed out that the public institutions were subject to the wills of the legislatures, while differentiating between institutions which had the power to perpetuate themselves.

Decision.--For the plaintiffs.

Descriptor.--Public corporations.

15 Md, 330
St. John's College
v.
The State of Maryland
Court of Appeals of Maryland
December, 1859

Case brief.--The original charter of the College provided that funds would be donated by the State for the use of the College forever. The State demurred and action was taken to recover the funds.

Dartmouth case law.--In deciding the case the justices used the Dartmouth decision as the basis for making the judgement. In their opinion the judges used emphatic terms such as " . . . the leading and controlling case on the subject." The opinion also proclaimed that its " . . . doctrines . . . are the law of the land."

Probable impact.--This case is another re-enforcement of the inviolability of the contract. The courts served notice that they would not allow a state to impair a contract that it had legally made.

Decision.--For the plaintiffs.

Descriptor.--Private corporations.

42 Mo, 308
Washington University
v.
Rowse

Supreme Court of Missouri
St. Louis

March, 1868

Case brief.--Washington University was granted permanent exemption from taxation in their original charter. The tax

collector filed suit to compel the University to pay the taxes. The circuit court decided for the tax collector. The University appealed.

Dartmouth case law.--Marshall's opinion was quoted to show that charters could not be impaired without the consent of both contracting parties.

Probable impact.--This decision re-enforced the concept that charters, once granted, were virtually untouchable without the consent of both parties.

Decision.--For the plaintiffs.

Descriptor.--Charters.

44 Mo, 570
Pittman et al.
v.
Adams et al.

Supreme Court of Missouri
St. Louis

October, 1869

Case brief.--St. Charles College was granted a charter on February 3, 1837. It was founded and supported by George Collier. The General Assembly passed an act on December 11, 1863, which impaired the charter.

Dartmouth case law.--The Dartmouth decision was used to show that the Trustees had full power to operate and set the

policy of an institution within the constriction set forth in the charter. These Trustees were their own visitors. It also points out that mandamus is the proper remedy for the restoration of an officer or trustee removed from his office in any illegal manner.

Probable impact.--The decision has further clarified the rights and responsibilities of the trustees and visitors of an institution of higher learning. It pointed out that the trustees of any eleemosynary institution in this country must act as their own visitors. They are responsible only to themselves, within the limitation of the charter. It warned those who would grant or accept a charter that they should be aware of the possible consequences of careless actions.

Decision.--For the plaintiffs.

Descriptor.--Visitation.

80 US, 212
Pennsylvania College Cases
United States Supreme Court
December, 1871

Case brief.--Jefferson College was chartered by the Pennsylvania Legislature and was to be subject only to the will of the legislature. The College solicited funds, offering perpetual tuition-free scholarships in return for donations. The legislature consolidated Jefferson with another college

at Washington, Pennsylvania, with the consent of both boards. The legislature next passed a statute in 1869, allowing the legislature to revise any charter granted thereafter. The Supreme Court of Pennsylvania held that the legislature did not violate the obligation of contract in its passage. The case was then brought to the United States Supreme Court on three writs of error.

Dartmouth case law.--The Dartmouth Case was cited to show that private corporations, being duly incorporated, were entitled to all protection from charter impairment under Article I, Section 10, of the United States Constitution.

Probable impact.--The court, in ruling for the State, upheld the acts of the legislature uniting the colleges. The original act, establishing Jefferson, was not violated, since it reserved the right to amend the original charter. In addition, care was taken to preserve the rights of the parties concerned. The court, in its opinion, held that the advice of Story was still valid and that it should be taken into consideration, as it was, in the case at hand.

Decision.--The Pennsylvania Supreme Court decision upheld.

Descriptor.--Charters.

67 Ten, 231
The Directors of Maryville College
v.
Bartlett

Supreme Court of Tennessee
Eastern Division

September, 1874

Case brief.--An action taken by the Directors of Maryville College to recover property held by the defendant. The defendant demurred to the bill, but the demurrer was dismissed in the lower court, and the defendant appealed on a writ of error. The higher court disallowed all five points, on which the demurrer was based, and awarded the decision to the plaintiffs.

Dartmouth case law.--As a private corporation the property of the school was private. It was, therefore, entitled to the protection of the State and Federal Constitutions.

Probable impact.--This was an earlier re-enforcement of the rights of the private corporation to protection from the acts of a state legislature. These actions serve to make the dicta of the Dartmouth more puissant.

Decision.--For the plaintiff.

Descriptor.--Private corporations.

16 Fla, 577
State ex rel. Attorney-General
v.
Knowles et al.

Supreme Court of Florida

June, 1878

Case brief.--The Florida State Agricultural College was organized under the Morrill Act of 1862. In 1877 the legislature passed an act approving establishment of the Florida Agricultural College and named a totally new administration. The State College Trustees failed to accept this amendment to their charter. The Attorney-General filed suit to gain control.

Dartmouth case law.--It is clear that the Dartmouth case weighs heavily in this decision. Reference was made to both the opinions of Marshall and of Story. The court raised the question as to whether the institution was one of public or private nature. The court decided that it was public and, therefore, subject to the laws governing public institutions. The court said that the respondents could not say that they had been denied due process of law, since the legislative action was the process of the law.

Probable impact.--The court defined the difference between public and private higher education. This case also clarified this division with respect to grants from states

and the source of funds for the establishment of these institutions.

Decision.--For the plaintiff.

Descriptor.--Public corporations.

77 Va, 415
Lewis et al.
v.
Whittle et al.

Supreme Court of Appeals, Richmond

April 19, 1883

Case brief.--Suit was filed by Lewis and others, who were appointed by the governor as a board of visitors to replace the respondents, Whittle and others, the original board of visitors. The dispute was over which group had the rightful board of visitors.

Dartmouth case law.--The rights of visitation are covered by the citation of the Dartmouth decision. In addition, it is referenced to show the circumstances surrounding the founding of a public institution.

Probable impact.--Since the court decided that the institution was public, it reasoned that it followed that the right of visitation rests with the state and the legislature and not with the governor. The court's decision drew a fine line between the authority of the governor and the legislature.

It also pointed out that the authority for granting charters rested with the legislature.

Decision.--For the defendant.

Descriptor.--Visitation

50 NW, 632
Synod of Dakota
v.
The State

Supreme Court of South Dakota

December 22, 1891

Case brief.--Action was taken by the plaintiffs to recover tuition funds from the State, allegedly due under a contract with the board of education.

Dartmouth case law.--The Dartmouth decision was cited to agree with the counsel for the plaintiffs that a contract was an obligation which was protected by the United States Constitution. It was further stated that the contracting party must be legally qualified to enter into the contract.

Probable impact.--The case used rather elementary points of contract law and had little impact, except to show that a court desiring to make legal points concerning contracts still felt that 4 Wheaton, 518, was an excellent case in point.

Decision.--For the defendant.

Descriptor.--Charters.

40 NE, 720
State ex rel. White et al.
v.
Neff et al.

Supreme Court of Ohio

March 12, 1895

Case brief.--The State enacted a statute, giving control of Cincinnati College to the Directors of the University of Cincinnati. The lower court awarded the decision to the defendants; the plaintiffs appealed on a writ of error. The higher court upheld the verdict.

Dartmouth case law.--The court was most specific in emphasizing that the law maintaining private property is clear. To make this point the court cited the Dartmouth case.

Probable impact.--It is well settled from the Dartmouth decision that private property, owned by private institutions, is free from arbitrary confiscation by the state.

Decision.--For the defendant.

Descriptor.--Private corporations.

52 P, 921
Oklahoma Agricultural and Mechanical College
v.
Willis et al.

Supreme Court of Oklahoma

February 12, 1898

Case brief.--Action was taken by two partners against Oklahoma Agricultural and Mechanical College to recover funds to repay them for work, which they had performed for the College. The lower court awarded the decision to the plaintiffs, and this decision was appealed by the school on a writ of error. The decision was reversed.

Dartmouth case law.--The College was identified as a public institution through the Dartmouth citation. The main points were that it was established by public funds and managed by public officials.

Probable impact.--The decision was used to show that the school was a public corporation. In the case at hand, this was an important point, since the statutes of Oklahoma do not make any provision which would allow a public corporation to be sued.

Decision.--For the plaintiff.

Descriptor.--Public corporations.

49 NE, 993
Spalding
v.
People

Supreme Court of Illinois

February 14, 1898

Case brief.--As the treasurer of the University of Illinois, the defendant was an officer of a public institution

and was indicted for embezzlement in that capacity. Spalding was convicted in a lower court and sought relief from his conviction on a writ of error. The judgement was affirmed.

Dartmouth case law.--This is the only instance which involved higher education where the decision has been cited in a criminal case. Story's opinion was used to define a public corporation.

Probable impact.--The impact of this case was less than important to higher education. It has been included merely to show the application to criminal proceedings and to reenforce the Dartmouth concept of a public corporation.

Decision.--Judgement affirmed.

Descriptor.--Public corporations.

38 SE, 698
Hartigan
v.
Board of Regents of West Virginia University
Supreme Court of Appeals of West Virginia
March 9, 1901

Case brief.--The Regents removed a professor from the institution. The professor filed for a writ of prohibition against the Regents to prevent them from executing the removal.

Dartmouth case law.--The Dartmouth case was cited to show the relationship that a faculty member, or officer of an

institution, has with that institution. The court denied the writ.

Probable impact.--Faculty members are not necessarily members of the corporation. They are appointed by the Trustees and can only be removed by the Trustees. Both officers and faculty are freeholders, in their office, and are subject to removal for good cause. In this case the writ was denied with one justice dissenting.

Decision.--For the defendants.

Descriptor.--Faculty rights.

64 SW, 278
Vincenheller
v.
Regan

Supreme Court of Arkansas

July 6, 1901

Case brief.--A writ of mandamus was obtained by the plaintiff to compel the Secretary of the Board of Trustees to reinstate him to his previous office. Judgement in the lower court was for the defense.

Dartmouth case law.--The Dartmouth decision was cited by the judges in the court's opinion and also by the judge who dissented. In the majority opinion, the case was cited to show that the University of Arkansas was a public institution.

The dissenting justice used the case to point out that the court was not using the case properly in reaching its decision.

Probable impact.--The court differentiated between an employee under contract and an officer of the school. It held that an employee, who accepted employment under conditions such as these, was not entitled to the protection of a contract. The court provided that an officer of a corporation was not to be treated in a manner similar to that of a member of the faculty.

Decision.--For the defendant.

Descriptor.--Faculty rights.

117 F 44
Currier
v.
Trustees of Dartmouth College

Circuit Court of Appeals,
First Circuit

May 29, 1902

Case brief.--Suit was brought by a student to recover damages for injury incurred while observing the destruction of a chimney. The chimney was on property owned by the defendant. The defendant stated that the plaintiff was at the site of the chimney of his own volition and not at the direction of the defendant.

Dartmouth case law.--The Dartmouth case was cited to verify that the institution was an eleemosynary institution.

Probable impact.--The court upheld the relationship of an eleemosynary institution and its freedom from liability in incidents such as these.

Decision.--For the defendant.

Descriptor.--Eleemosynary institutions.

39 So, 246
State ex rel. Medical College of Alabama
v.
Sowell

Supreme Court of Alabama

May 16, 1905

Case brief.--The school charter stated that the school was not under the absolute control of the State. The State Constitution declared that no funds would be given to any educational institution, not under the control of the State, except by a bill which passed the legislature by a two-thirds majority. The appropriation for the Medical College did not receive the required two-thirds majority, and the funds were not appropriated. Mandamus was sought to compel the State Auditor to release the funds. The writ was denied in the lower court and the suit was appealed.

Dartmouth case law.--Story's comments were used again to show how the Dartmouth opinion offered relief to chartering bodies, when they required such relief.

Probable impact.--This case is another example showing how legislatures could escape the dicta of the Dartmouth decision, and allow legislatures to forego the complications of possible charter impairment.

Decision.--Judgement affirmed.

Descriptor.--Public corporations.

75 NE 128
Wilson
v.
Massachusetts Institute of Technology

Supreme Judicial Court of Massachusetts
Suffolk

September 6, 1905

Case brief.--This case involved a dispute over the ownership of land. Suit was filed by the plaintiff to prevent the defendant from taking any action to dispose of these properties at this time.

Dartmouth case law.--The court observed that "Although the Commonwealth is a sovereign state, it can no more change the grant thus made than can an individual."

Probable impact.--This is another re-enforcement of the obligation of contracts. This court referred to the Dartmouth

case to point out that the State must adhere to any contract to which it legally becomes a party.

Decision.--For the plaintiffs.

Descriptor.--Charters.

39 So, 929
State ex rel. Moodie et al.
v.
Bryan et al.

Supreme Court of Florida

December 19, 1905

Case brief.--The question before the court was to decide on the constitutionality of an act, of the state legislature, to abolish the Florida Agricultural College. The school was known as the University of Florida at the time.

Dartmouth case law.--The Dartmouth decision was used to clarify a point pertaining to the rights of trustees.

Probable impact.--This case contributed to the constitutional question of an act of a legislative body. The court held that the legislature expressed its will in passing the act and the governor by signing it. This case has further clarified the rights of the legislatures with respect to the obligation of contracts, and public corporations.

Decision.--For the plaintiff.

Descriptor.--Charters.

84 P, 90
Wyoming Agricultural College
v.
Irvine

Supreme Court of Wyoming

January 31, 1906

Case brief.--This is a suit filed by the Trustees of the Wyoming Agricultural College, against the State Treasurer. The action was to compel the treasurer to pay certain monies in his care to the College.

Dartmouth case law.--It is well settled that a charter is a contract within the meaning of the Constitution and prohibits legislatures from enacting any statute which might impair a contract.

Probable impact.--The treasurer filed a demurrer to resist the action of the Regents. The court sustained the demurrer since Wyoming has a clause in its Constitution, which allows the Legislature to pass laws, revising charters in the public interest. This action relates directly to the Dartmouth case and Story's opinion, which advised future governments to be aware of the necessity of such an action, if they wished to exert further control over any particular charter.

Decision.--For the defendant.

Descriptor.--Charters.

156 F, 112
Board of Trustees of Whitman College
v.
Berryman et al.

Circuit Court, E. D. Washington, S. D.

June 4, 1907

Case brief.--This was a suit by an educational corporation to restrain a tax official from levying and collecting taxes from the institution. The plaintiffs alleged that the charter which covered their operation exempted them from such taxation.

Dartmouth case law.--The decision was again applied to the fact that a charter was a contract, and in this case the charter provided for a freedom from taxation.

Probable impact.--The immediate impact was a re-enforcement of the obligation of contract, even when it applies to taxation. The court specifically said that the decision was to have no broader scope than conditions in the immediate case.

Decision.--For the plaintiff.

Descriptor.--Taxation

172 NYS, 5
Hamburger
v.
Cornell University

Supreme Court, Appellate Division
Third Department

September 11, 1918

Case brief.--This case involves action by the plaintiff to recover damages for injuries. The court awarded the damages on the basis that the institution was not free from such action. This was based on the fact that the court held that the institution was neither a public nor a charitable institution.

Dartmouth case law.--The entire decision was based on the Dartmouth decision. The court reasoned that the two institutions were so parallel in nature that such a conclusion was logical.

Probable impact.--The court drew a fine line between institutions of higher learning as private institutions and those that were eleemosynary in nature. This presents evidence that case law is beginning to narrow the scope of the decision.

Decision.--For the plaintiff.

Descriptor.--Eleemosynary institutions.

176 NW, 330
Curtis & Barker et al.
v.
Central University of Iowa
Supreme Court of Iowa
February 16, 1920

Case brief.--Action was taken by the plaintiff to recover monies donated to the defendant. This action was taken because

of alleged breach of contract. The lower court found for the plaintiff, and the defendant appealed.

Dartmouth case law.--The Dartmouth case was used to show that a contract was not to be impaired without the full consent of both parties.

Probable impact.--The decision in this case served notice to those wishing to donate to institutions of this type that their donations, once made, would only be used in the manner which they prescribed. If the donee did not perform, as he had agreed, the doner was free to recover everything.

Decision.--For the plaintiff.

Descriptor.--Grants.

86 So, 77
Stevens et al.
v.
Thames

Supreme Court of Alabama

June 30, 1920

Case brief.--This case involved action to prevent the removal of the Mobile Medical College from Mobile to Tuscaloosa. The original suit was found in favor of the defendant, the plaintiff appealed, and the judgement was reversed.

Dartmouth case law.--The charter stipulated that the Medical school was to remain at Mobile, for all time, but an

exception was noted. This exception declared that this condition could be overruled by a vote of a two-thirds majority of the legislature. This is another clear case where the advice of Story was heeded.

Probable impact.--This was another re-enforcement of the advice of Story, which effectively dulled the edges of the Dartmouth decision whenever the legislature wished to do so.

Decision.--For the plaintiffs.

Descriptor.--Charters.

31 F, 2d, 869
Ettlinger
v.
Trustees of Randolph-Macon College

Circuit Court of Appeals,
Fourth Circuit

April 9, 1929

Case brief.--Action was taken by a student, who was injured while jumping from a burning building. The plaintiff alleged negligence on the part of the defendant. In a lower court the judgement was found for the defendant, the plaintiff appealed, but the judgement of the lower court was affirmed.

Dartmouth case law.--The Dartmouth case was used to define an eleemosynary corporation.

Probable impact.--The impact was to again re-enforce the concept than an eleemosynary institution is not liable for the negligence of its managers.

Decision.--For the defendant.

Descriptor.--Eleemosynary institutions.

25 P, 2d, 747
Baker
v.
Carter, State Auditor, et al.
Supreme Court of Oklahoma
September 26, 1933

Case brief.--Action was taken by the plaintiff, a taxpayer, to prevent the defendant from issuing dormitory bonds, which would raise the State debt above its legally authorized maximum. A lower court dismissed the action, and the plaintiff appealed, but the judgement of the lower court was affirmed.

Dartmouth case law.--The Dartmouth case pointed out that the school was a public corporation and, as such, should be governed by policies which pertained to public bodies. The point was made in a dissenting opinion.

Probable impact.--Law is derived from statute law and case law. The Dartmouth case would be cited to support a point with respect to case law. It would seem to follow that

the point raised in the dissenting opinion would be valid, since if the school was public, it should be governed by the same policies that pertain to the other governmental agencies. The dissenting opinion would seem to be well taken.

Decision.--For the defendant.

Descriptor.--Public corporations.

154 So, 41
Ex parte Steckler et al.
Supreme Court of Louisiana
March 14, 1934

Case brief.--The case involved action by law school graduates and the Tulane University, challenging the constitutionality of a law requiring that the graduates of the Tulane law school take the bar examination. Exception was taken to this requirement, since the examination was not required of the graduates of the law school of the University of Louisiana.

Dartmouth case law.--The Dartmouth case was cited to support the point that the State had no authority over the Tulane Charter even by constitutional amendment.

Probable impact.--The court differentiated between a diploma granted by a school and a license to practice law, which was a privilege granted by the State Supreme Court.

Statutes allowed the court to establish such requirements that it might deem necessary to establish competency. It was the court's decision that the graduates of the state University did not require the examination as a prerequisite to licensing.

Decision.--Judgement against Steckler.

Descriptor.--Student rights.

182 A, 590
Pearson et al.
v.
Murray

Court of Appeals of Maryland

January 15, 1936

Case brief.--Murray petitioned for a writ of mandamus, which would have commanded the admission of Murray, a Negro, to the law school. The Regents of the University of Maryland appealed.

Dartmouth case law.--The Dartmouth decision was used to define the nature of a public institution. It was then related to its rights and obligations as a public institution.

Probable impact.--At that time the State of Maryland did not offer equal facilities for Negroes to attend law school. Since this was the only State institution offering this type of education, the court commanded that he be admitted to the school.

Decision.--For the defendant.

Descriptor.--Discrimination.

268 NW, 858
Peterson
v.
Quinlivan

Supreme Court of Minnesota

September 16, 1936

Case brief.--A show cause action was filed by the Attorney-General for the removal of a regent from his duly appointed office.

Dartmouth case law.--In this case the opinions of Marshall, Washington, and Story were all quoted extensively. All of these men had suggested that the founder of an institution, having been granted a charter, could determine forever that the governance of that institution would be in the hands of those appointed by themselves.

Probable impact.--This case included the regents of a public institution in the group of institutional policy-makers which could be self perpetuating, if the original charter so provided.

Decision.--For the defendant.

Descriptor.--Public corporations.

31 NYS, 2d, 796
Elliot et al.
v.
Teachers College et al.

Supreme Court, Trial Term
New York County

December 15, 1941

Case brief.--Suit was brought by the plaintiff to obtain an injunction to prevent the Teachers College in New York City from uniting two teaching schools, to wit: Horace Mann and Lincoln. The plaintiff alleged that the contemplated action was in violation of the terms of grants given the institution.

Dartmouth case law.--In this case the Dartmouth decision was used to show that Lincoln school, unlike Dartmouth, did not possess a charter and owned no tangible assets. The school, therefore, had no existence in the eyes of the law.

Probable impact.--This case served to clarify the aspect of the grantor-grantee relationship. It also gives a general view of how the courts view the obligation of the grantee to stay within the grant constrictions imposed by the grantor.

Decision.--Plaintiff's motion dismissed.

Descriptor.--Grants.

42 A, 2d, 222
Sisters of Mercy
v.
Town of Hooksett

Supreme Court of New Hampshire
Merrimack

March 6, 1945

Case brief.--A petition was initiated by the plaintiffs, for relief from taxation, because they operated a "seminary of learning." Their petition was denied.

Dartmouth case law.--The Dartmouth case was used to define what the term seminary meant in that case. The question was whether the court in the Dartmouth case referred to seminary as meaning any institution of higher learning or whether, in fact, it meant something more specific.

Probable impact.--The court concluded that the word seminary was a word, used in those times to mean college. The net effect of the case was to differentiate between religious institutions, used for religious purposes, and those which are used purely for public purposes. The court found that only an institution which served religious purposes by training religious persons to do religious work qualified for a tax exempt status.

Decision.--For the defendant.

Descriptor.--Taxation.

77 NE, 2d, 345
Tinkoff
v.
Northwestern University

Appellate Court of Illinois,
First District, Third Division

December 10, 1947

Case brief.--Suit was brought by the plaintiff to compel the defendant to admit the student as a freshman in the College of Liberal Arts. A judgement of dismissal was given in a lower court and was upheld by the appellate court.

Dartmouth case law.--The charter of the University is a contract, and the Dartmouth decision was cited as authority for the following principles: (1) that education is of a national concern; (2) that a charter granted by the State, is given in anticipation of the benefits that the public will derive from the school; (3) that a charter is a contract that cannot be impaired by law; and (4) that the legislatures of the states hold only such power over the school as was reserved in the Charter.

Probable impact.--This case served notice that the courts still viewed the charter as a contract and subject to the protection of the constitution. It offered clarification as to the rights of the university in setting admission standards, and the freedom with which it could carry out those standards.

Decision.--For the defendant.

Descriptor.--Student rights.

200 P, 2d, 221
King
v.
Regents of the University of Nevada

Supreme Court of Nevada

November 17, 1948

Case brief.--The plaintiff brought suit against the Regents of the University of Nevada to prevent the Regents from naming an Advisory Board of Regents. In a lower court a temporary injunction was dissolved, and the plaintiff appealed. The Supreme Court of Nevada upheld the judgement of the lower court.

Dartmouth case law.--Reference was made to the Dartmouth case to provide a basis for deciding whether a corporation was public or private. It showed that the Regents were not the agents of the State but, instead, were a separate entity and were free to employ its own counsel or advisors.

Probable impact.--In this case the decision pointed to the fact that even though the Regents were the trustees of a public corporation, they were still a corporate body and entitled to the rights thereof.

Decision.--For the defendant.

Descriptor.--Public corporations.

75 A, 2d, 225
Parker et al.
v.
University of Deleware et al.

Court of Chancery of Deleware
New Castle

August 9, 1950

Case brief.--Suit was brought by the plaintiffs to restrain the University from denying application blanks for admission to the University for reasons of race, color, or ancestry. It was established that equal facilities did not exist for Negro undergraduate students at Deleware State College, and therefore, the application of the plaintiffs should be considered.

Dartmouth case law.--The Dartmouth decision was used to define the status of a public corporation.

Probable impact.--The court determined that the University had its origin through public sources and that it currently existed as a public institution. It could not, therefore, be classed as a private institution. The immediate impact was to allow the prospective students to enter the institution, but only because they were denied their rights under the Equal Protection Clause of the United States Constitution. It

would appear that had the facilities been equal at the other public institution, the judgement might have been different.

Decision.--For the plaintiffs.

Descriptor.--Discrimination.

112 A, 2d, 678
Board of Regents of the University of Maryland
v.
Trustees of the Endowment Fund

Court of Appeals of Maryland

March 24, 1955

Case brief.--A suit questioning the validity of an act, which attempted to amend the charter of a corporation, formed to act as the trustee of an endowment fund of the State University. A lower court ruled for the Trustees; the case was appealed and reappealed to higher courts. The judgement was affirmed.

Dartmouth case law.--Justice Story's opinion was quoted to show that the charter was a contract and could not be revised or amended without the consent of both parties.

Probable impact.--This was another re-enforcement of the contract impairment segment of the Dartmouth decision. It served to make clear that even the regents of a State University did not have the authority to alter a charter pertaining to that University once the charter fulfilled the requirements of a contract.

Decision.--For the defendant.

Descriptor.--Charters.

125 A, 2d, 10
Trustees of Rutgers College
v.
Richman

Superior Court of New Jersey
Chancery Division

August 3, 1956

Case brief.--The Trustees of Rutgers College brought suit against the Attorney-General of New Jersey and other State officials to determine the constitutionality of a University Reorganization Act, which was to become null and void if it was not accepted by the Trustees. The hearing was to also determine if the Trustees' fiduciary duties would permit them to accept such an act.

Dartmouth case law.--In this case the University Trustees were willing to accept the act as an amendment to their charter; and as a result, the precedent established by the Dartmouth decision did not apply.

Probable impact.--Since the Trustees in the case merely sought a legal opinion relative to their ability to legally accept a charter amendment, the case only serves to re-enforce the obligation of contract.

Decision.--The Trustees have the power to accept the revision.

Descriptor.--Charters.

128 So 2d, 557
Mississippi College et al.
v.
May et al.

Supreme Court of Mississippi

March 27, 1961

Case brief.--Action which involved mortmain statutes by the heirs of a deceased person to cancel claims which were clouding a title. In a lower court the heirs were awarded a judgement which was appealed. The State Supreme Court held that the legislature had the power to amend a private college's charter, if constitutional and statutory mortmain provisions affected the charter. Under these conditions the charter did not have a constitutional guarantee against impairment of contract.

Dartmouth case law.--The decision was used to establish a base point, to show that even if the mortmain provisions did affect the charter, it was not protected by the principle of the Dartmouth decision. This was due to the fact that the mortmain provisions were made prior to the granting of the charter.

Probable impact.--This decision was not influenced, to any great extent, by the Dartmouth decision. It did show that an ex post facto charter was not protected from statutes or constitutional provisions which might have proceeded it.

Decision.--Judgement affirmed.

Descriptor.--Charters.

231 NYS, 2d, 403
Carr
v.
St. John's University,
New York

Supreme Court, Special Term
King's County, Part I

June 5, 1962

Case brief.--Three students sought an order, directing the University to reinstate them and to place another student on the graduation list. The school argued that as a private university it had the right to dismiss a student for any reason whatsoever.

Dartmouth case law.--A privately founded university, endowed with private funds, is a private enterprise not a public one. This point is covered by the Dartmouth decision. The court agreed that St. John's University was not the agency of the State in religious matters.

Probable impact.--The court has found reason to further clarify the rights of a university with respect to the student. In ruling for the plaintiffs the court drew a fine line of demarcation between the public and private aspects of the school. It said that even though a school was private, when dealing in public matters, it was bound by public law. The case was appealed to the New York State Supreme Court, where the ruling was reversed and the plaintiffs' motion was denied. The Court also ruled that a student, entering the University, entered into an implied contract when admitted and must comply with the prescribed regulations.

Decision.--For the defendant.

Descriptor.--Student rights.

212 FS, 674
Guillory
v.
Administrators of Tulane
University of Louisiana

United States District Court
E. D. Louisiana
New Orleans Division

December 5, 1962

Case brief.--Action was brought by the plaintiffs to gain admission to Tulane, contending that they were denied admission simply because they were Negroes, although qualified in every other way. A state law prevented their admission.

Dartmouth case law.--The decision was used to show that Tulane was a private and not a public institution.

Probable impact.--This case determined that a private institution, free from state involvement, was accordingly free from the privileges and requirements of the Fourteenth Amendment to the Constitution. The immediate impact was to continue to allow a private institution the freedom to establish its own admission policies. The school was free to admit whom it pleased.

Decision.--For the defendant.

Descriptor.--Student rights.

222 FS, 467
Berry
v.
Odom

United States District Court
M. D. North Carolina
Durham Division

October 15, 1963

Case brief.--Action was taken by a patient against medical personnel at Duke University for negligence. The University moved for a summary judgement, which was granted.

Dartmouth case law.--Duke University made the point that it was an eleemosynary institution, and the Dartmouth decision was used as a basis for comparison.

Probable impact.--It was established that the University was a private eleemosynary institution, even though part of its income was derived from tuition. Since the University was an eleemosynary organization at the time, it is immune from liability for the torts of its agents.

Decision.--For the defendant.

Descriptor.--Eleemosynary institutions.

269 NYS, 2d, 285
St. Lawrence University
v.
The Trustees of the Theological School
of St. Lawrence University

Supreme Court, Special Term
St. Lawrence County

April 1, 1966

Case brief.--The University, as the plaintiff, requested a summary judgement, eliminating a separate board of trustees for the Theological School. The defense moved for a dismissal.

Dartmouth case law.--The University was a corporation, created by the State, and possessed only those properties granted by the State under its authority. If the legislature should change the authority, the properties change accordingly. In this specific case, the corporation was granted the right to establish a separate department within the University and did not possess the authority to give that department a corporate status.

Probable impact.--This decision further re-enforced the concept that the legislation creating a charter maintains a different position than a charter granted by some enabling Act of the Legislature. This situation was the direct result of the suggestion of Story, when he suggested that if a legislature wished to restrict their charters, they must do so when the charter is granted.

Decision.--For the plaintiff.

Descriptor.--Charters.

226 A, 2d, 612
Shelton College
v.
State Board of Education

Supreme Court of New Jersey

February 6, 1967

Case brief.--Action was brought by the College attacking the constitutionality of a statute, limiting the school's authority to grant baccalaureate degrees. The statute also granted the State Board of Education the power to set standards for these degrees.

Dartmouth case law.--Marshall's opinion was quoted, which showed his concern that education should be an item of national concern.

Probable impact.--The Dartmouth decision was used in this case to show that if education was of national concern, the nation should also be concerned about the quality of the degrees which were issued in its name. The degree is evidence of academic attainment and care should be taken in its structure. The decision of the immediate case refused to exempt Shelton; and as a consequence, the statute regulating State control over the bacculaureate degree was retained.

Decision.--For the defendant.

Descriptor.--Academic standards.

271 FS, 609
Green et al.
v.
Howard University

United States District Court
District of Columbia

August 28, 1967

Case brief.--Action by former students and former faculty members to restore them to their previous status. The motions were denied, since the University had conformed to its agreed actions set forth in the University catalog and faculty handbook. The plaintiffs appealed.

Dartmouth case law.--The aspect of government control was covered by reference to the Dartmouth decision.

Probable impact.--The court pointed out that it would be a sad state of affairs if the courts were to step in and control the internal affairs of an institution of higher learning. It noted that such a step would be a wedge of influence which could hinder the growth and development of these institutions.

Decision.--For the defendant.

Descriptor.--Student rights.

320 NYS, 2d, 592
Clancy
v.
The Trustees of Columbia University

Supreme Court, Special Term
New York County, Part I

April 23, 1971

Case brief.--The petitioner, Clancy, was dismissed from his position, after being investigated and evaluated after complaints were received that he was incapable of doing his job. Formal charges were not brought to bear, nor was he afforded a hearing before termination.

Dartmouth case law.--The petitioner contended that the dismissal was in violation of a State Education Law, which provided for an examination and due proof of the charges in a written complaint. The court judged that this statute did not apply, since Columbia was chartered by the Legislature not the State. The Dartmouth decision was cited as authority.

Probable impact.--The petition was dismissed. The court decided that the Trustees acted responsibly in the action. The court agreed that he had been given every opportunity to become familiar with his job and knew what was expected of him; and therefore, the University had the right to dismiss him.

Decision.--Petition dismissed.

Descriptor.--Faculty rights.

443 F, 2d, 121
Billy Lamon Blackburn et al.
v.
Fisk University et al.

United States Court of Appeals,
Sixth Circuit

May 28, 1971

Case brief.--The case involved action by a suspended college student to gain relief under the Civil Rights Act. The motion was denied in the lower court and the decision was upheld in the Court of Appeals.

Dartmouth case law.--The Dartmouth decision was used to make the point that the transformation of a private university into a state institution requires more than the mere chartering of the university.

Probable impact.--In upholding the lower court decision, the Court of Appeals ruled that private institutions were

free to operate in an autonomous fashion. The court stated that there was insufficient evidence to show that the State was involved in the institution to the extent of making Fisk a public facility.

Decision.--Motion denied.

Descriptor.--Private corporation.

184 SE, 2d, 172
William H. Miller
v.
J. Don Alderhold et al.
Supreme Court of Georgia
September 27, 1971

Case brief.--This case was a class action suit brought by students challenging the actions of the board of trustees. The lower court dismissed the case, the plaintiff appealed, and the Supreme Court of Georgia upheld the decision.

Dartmouth case law.--The main point of law used by the court in reaching its decision had its basis in the Dartmouth decision. The court quoted Chief Justice Marshall's opinion stating, " . . . The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice."

Probable impact.--This case added further weight to the position of the private institution and its freedom to operate

in a manner free from government intervention. It made clear the fact that a student has no vested interest in a private institution of higher learning which can be asserted in a court of law.

Decision.--Motion denied.

Descriptor.--Student rights.

343 FS, 836
Dr. Ina Braden, on behalf of herself
and all others similarly situated
v.
The University of Pittsburg and
Wesley W. Posvar

United States District Court
W. D. Pennsylvania

January 31, 1972

Case brief.--A female employee of the university alleged unlawful discrimination by the university against professional women employees. The complaint was dismissed.

Dartmouth case law.--The Dartmouth case was used to show that the mere chartering of an institution of higher learning does not give the state the authority to change the institution to one which is public in nature.

Probable impact.--Through the Dartmouth decision and the cases related to that decision, the court restated the fact that private institutions were free to function in a manner restricted only by its charter.

Decision.--Motion denied.

Descriptor.--Faculty rights.

332 NYS, 2d, 909
Galton et al.
v.
The College of Pharmaceutical Sciences
Columbia University

Supreme Court, Special Term
New York County, Part I

April 26, 1972

Case brief.--The plaintiffs in the case were students, faculty, and alumni of the School of Pharmaceutical Sciences. Their complaint was brought to prevent the school from closing prior to the graduation of the students, who were presently enrolled. The defendant filed a cross action motion to dismiss the case for summary judgement.

Dartmouth case law.--The defendants argued that the Pharmaceutical School did not have the authority nor the duty to support the College financially. They contended that their charter, issued in 1754, was pre-Dartmouth decision, and as a result, it had full authority over its affairs.

Probable impact.--In this case Dartmouth was cited as an exception and, as such, was used to show that it did not apply. The inference, however, would have offered some re-enforcement to the ex post facto segment of the decision. The court ruled

that the defendants showed adequate evidence that the Pharmaceutical School was in financial distress, sufficient financial distress to warrant the discontinuance of the school program, and denied the motion of the plaintiffs. The court also ruled that the defendants were not entitled to summary dismissal of the complaint and denied that motion. The court suggested an immediate trial.

Decision.--Plaintiff's motion denied.

Defendant's motion denied.

Descriptor.--Private corporations.

The cases briefed in this chapter have been provided with descriptions which place each case in a category descriptive of the general characteristics of that case. See Table II .

TABLE II

CASE DESCRIPTORS

Descriptor	Number of Cases
Academic standards	1
Charters	13
Discrimination	2
Eleemosynary institutions	4
Faculty rights	4
Grants	2
Private corporations	6
Public corporations	8
Student rights	6
Taxation	2
Visitation	2
Total	50

In some instances the area covered in the case is more broad than the particular descriptor which was selected. In these cases the descriptor used is the one which was deemed to be most appropriate.

The cases in Chapter IV have been presented in chronological order. This litigation can be found in the bibliography listed in alphabetical sequence. The same cases have been listed in alphabetical order, by descriptor, in the Appendix, page 154.

CHAPTER V

THE ANALYSIS OF THE IMPACT

The circumstances surrounding the Dartmouth College case have been investigated from the founding of the Moor Indian Charity-School, through the actual legal proceedings of the case itself, to subsequent cases involving higher education which have used the Dartmouth decision as at least a partial authority for arriving at a decision.

In order to arrive at an analysis of the impact, the facts of the preceding chapters will be structured around the framework of the guideline questions. The information, synthesized in this manner, will present the probable impact of the Dartmouth decision upon higher education. The account will be divided into six major headings as follows:

1. Historical Summary
2. Political Summary
3. Legal Summary
4. Subsequent Citations
5. Significance of the Decision
    a. Public Institutions
    b. Private Institutions
    c. The Impact
6. Possible Future Impact

Historical Summary

Dartmouth College was established in 1754, by Eleazar Wheelock, as the Moor Indian Charity-School. Through excellent advice, Wheelock sought and was granted a royal charter by Governor John Wentworth of New Hampshire, through the authority of King George III. The school was named for the Earl of Dartmouth in the hope that the honor would at least partially appease him, since the Earl and the other European Trustees were known to be angry over the manner in which Wheelock had obtained the charter. They were also disturbed concerning the fact that the charter had been issued at all, since they believed that they were giving contributions to a school which was to educate and make Christians of the American Indians. Wheelock acquiesced to the wishes of the European Trustees and the Charity-School and Dartmouth College operated side by side for many years.

Dartmouth College operated under the guidance of its founder and president, Eleazar Wheelock, until his death in 1779. As provided by the charter, Wheelock willed that his son, John Wheelock, should succeed him as the president of the school. John Wheelock, a lieutenant-colonel in the Continental Army, had not been trained for the job and was understandably reluctant to accept the position. He was persuaded to change his mind and administered the school in much the same dogmatic fashion as his father for nearly thirty-seven years. Just before the turn of the century, the advent of new trustees

weakened Wheelock's control of the school and he began to lose power. In a dispute with the local church congregation, Wheelock found himself taking one side, with some of the more powerful Trustees aligning themselves on the other.

This disagreement grew in intensity, with most of the Trustees uniting against the president and a few of his loyal followers. Wheelock solicited the aid of the state legislature, and although he was unsuccessful in his first attempt, his subsequent efforts bore fruit; the legislature enacting a bill which would allow the state to take over the school.

The Trustees, who had fired Wheelock, and the school secretary-treasurer, William H. Woodward, resisted the bill. On February 8, 1817, Mills Olcott, the new secretary of the school, filed an action to recover certain properties of the school. This act by Olcott marked the beginning of the litigation of the famous Dartmouth College Case.

Political Summary

There is little doubt that politics exerted an influence on the circumstances surrounding the Dartmouth case. The questions to be answered are how, and to what extent?

In the beginning the facts do not offer any reason to believe that politics contributed to either the original dispute or its later complications. This is indicated since most of the participants were Federalists or had Federalist sympathies. This is not to say that it would not be possible

for members of the same political party to disagree on political matters, but the college case was not of a political nature, and as long as it remained a local issue, it offered little possibility for political gain. It was still not a political move when Wheelock took his plea to the legislature. At this juncture, Wheelock's only goal appeared to be to regain control over his school. To this end he was willing to do virtually anything,and he was becoming desperate. He finally approached his friend, Elijah Parish, for assistance. This could not be construed to be a political move, since Parish was not only a close friend but an ardent Federalist as well. His Federalist beliefs were so strong that it is doubtful if he would have participated in anything that was anti-Federalist. His partnership in the action was predicated on friendship for Wheelock and an intense dislike for the school officials. To this point there is no indication that politics had contributed to the later litigation. In fact, if Wheelock and Parish had not published the "Sketches" it appears doubtful that there would have been any litigation.

The publication of the "Sketches" changed the picture completely and was the basis for the entry of Isaac Hill into the picture. Hill was extremely anti-Federalist and used the Dartmouth dispute as a weapon for attempting to rid the country of the hated Federalists. Hill did not really care who controlled Dartmouth, or if it continued to exist. He saw the dispute as a political means to an end and used it accordingly.

Unfortunately the Trustees played into Hill's hands by firing John Wheelock. This action gave Hill new ammunition to use to attack the Dartmouth Trustees. The fact that the Trustees were not all Federalists did not matter to Hill, and his story about the martyred president generated wide interest with people beginning to take sides. The issue had finally become political and had widened far beyond the small Dartmouth campus.

The Federalists were losing power and were in the decline of their life cycle. Federalist Governor John Gilman did not run for office in 1816, and the Federalists nominated James Sheafe, who lost to William Plumer, a Democrat. In his inaugural address, Plumer requested the legislature to enact a bill which would allow the state to take over the operation of Dartmouth. The bill was passed on June 27, 1816, along party lines.

It is felt that at this point politics again became an incidental issue, for the die was cast and politicians had little to gain from any further association with the case. There remains, however, the possibility of politics influencing the decisions of the courts of record. In support of the contention that politics did not enter into these decisions, they will be probed in pursuit of an answer.

The first hearing by the Superior Court of New Hampshire appears to be free from any political influence. The decision of the court was without a dissenting opinion. This meant

that the two non-Federalist associate justices and the Federalist chief justice, who read the opinion, all agreed. If the decision had been political, the opinion should have been two to one.

To further support the contention that the decision was non-political, it is only necessary to carefully read the opinion of Chief Justice Richardson. The judgement is clear, logical, and easy to follow. It was a masterful work of jurisprudence. This opinion was shared by no less an authority than Daniel Webster, the Federalist attorney for the Trustees. This would not seem to carry political overtones.

The next hearing before the Supreme Court at Washington could have been a different story, but it does not appear to have been any more political than the hearing in New Hampshire. It is true that Marshall was a most persuasive man and a Federalist, but there are other facts which would show that the case was decided on a non-political basis.

Washington and Johnson, both Federalists, sided with Marshall, while Duvall, who was not a Federalist, dissented. This accounts for four votes which did not give a majority to either side. Livingston and Story, both Democrats, swung the majority to the side of the College. Todd, who did not sit at this session due to illness, was not a Federalist, but usually sided with Marshall on constitutional questions. These facts would seem to present grounds for the belief that the decision was not political.

Other facts would tend to confirm this view. Marshall's opinion is based on reason and his own views and philosophy. This is not entirely unexpected since, at that point in the history of the young republic, many questions were left unanswered by the constitution. Marshall is noted for having filled in many answers to these questions. Story, on the other hand, presented not only a clear and logical opinion based on reason, but one which was highly technical and based on principles and authorities of a sound nature. It is difficult to conceive how any person who reads law would not read Story's opinion with admiration, and confirm that it was "super antiquas vias" of the law.

Legal Summary

The legal aspects of the Dartmouth decision were initiated when Olcott filed suit against William H. Woodward. From this point onward the dispute rapidly arrived at its climax inasmuch as the entire legal action only consumed twenty-eight months. This time frame included an eleven month delay in the Supreme Court.

After Olcott filed his complaint in the Grafton County Court of Common Pleas, the case was passed on to the Superior Court of New Hampshire due to the fact that the defendant was presiding judge of the Grafton County Court. The Superior Court heard the case during its May term at Haverhill, but counsel was unable to reach agreement in the wording of the

special verdict and the case was re-argued at the September term of the court at Exeter. When this session was concluded, the court retired for deliberation prior to announcing its decision at its November term in Plymouth.

Much of the literature consulted in this study has made reference to the imbalance of talent of counsel participating in the Dartmouth case. The plaintiffs' case was pleaded in the state court by Mason, Smith, and Webster. The legal ability of these men, according to most accounts, was superior to that of most attorneys practicing law at that time. Careful study of the arguments of these men give reason to believe that this might well be true. Their presentations are clear and easy to follow, and their points are well taken and based on sound authority.

On the other hand, counsel for the defendant do not give the same impression. Sullivan's presentation, under other circumstances, might have been considered to be more than adequate, but Bartlett, his co-counsel, was much less impressive. His points were based on questionable authorities, and his presentation was most difficult to follow.

When the case reached the Supreme Court the disparity of talent seemed to be even more pronounced. Here, Webster and Hopkinson argued the case for the plaintiffs, while Wirt and Holmes represented the defense. The reason for the complete change of defense counsel is not clear; however, most accounts seem to feel that the University officials were overconfident

of their success and did not feel that it was necessary to incur the expense of sending Sullivan and Bartlett to Washington. Both of these factors probably entered into their decision, since the University was experiencing a period of financial difficulty due to a lack of students. In any event, counsel for the defense appeared to be totally inept, in both their presentations and their technical arguments. There is an element of excuse for the performance of Wirt since he had been ill, was busy with the tasks which he performed as the Attorney-General, and finally because he was not completely informed of the facts. The latter factor explained why he questioned that Wheelock was the founder of Dartmouth. There was no such excuse for Holmes, who appeared to be simply out of his class.

The counsel for the plaintiffs presented an entirely different picture. They were competent attorneys, able orators, and extremely well prepared. There can be little doubt that these circumstances must have contributed to the final outcome of the litigation.

The final legal breath of Dartmouth University was drawn on June 10, 1819. At this time, Associate Justice Joseph Story, who presided over the Circuit Court for New Hampshire, entered a judgement for the plaintiffs.

Subsequent Citations

The judgement rendered by the Supreme Court, on February 2, 1819, has been used as an authority many times in subsequent court cases. The decision has been cited fifty times in cases relating directly to higher education. This compares to well over 1,000 citations in other branches of law. The case has never been qualified by the Supreme Court and was as potent in its last citation [Galton v. Columbia University][1] as it was in its first [University of Maryland v. Williams].[2]

The principles laid down by the Supreme Court in the Dartmouth decision are very broad, and as a result the dicta of the decision have been applied over a wide span of law. The litigation, involving higher education, ranges from a case involving academic standards [Shelton College v. State Board of Education][3] to cases involving visitation [Lewis v. Whittle; Pittman v. Adams].[4]

Twenty-six of the forty-seven cases cited refer directly to either charters or corporate rights. Sixteen others refer to these same subjects indirectly, while only five are concerned with other subjects. Of these five, one refers to academic standards [Shelton College v. State Board of Education],[5]

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[1] 332 NYS, 2d, 909 (1972). [2] 9GJ, 365 (1838).

[3] 226 A, 2d, 612 (1967).

[4] 77 Va, 415 (1883); 34 Mo, 570 (1869).

[5] 226 A, 2d, 612 (1967).

and the other four are related to eleemosynary organizations [Berry v. Odom; Currier v. Dartmouth; Ettlinger v. Randolph-Macon College; Hamburger v. Cornell].[6] It is significant to note that the case has never been upset or even qualified, and as a result would be applied in the same manner today as it was in 1819.

Significance of the Decision

The Marshall court divided the college corporation into two classes, public and private, and it advised that the main factor in making this distinction lies in the origin of the institution.

The Public Institution

The public institution is one which is formed by public persons, with public funds, and for public purposes [Oklahoma Agricultural and Mechanical College v. Willis].[7] The distinction between what constitutes a public corporation and a private one would need to be decided by the courts, except in a very clear case.

A public institution is free to accept grants, gifts, and other considerations from private individuals or from other public sources. If the public institution were to

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[6] 222 FS, 467 (1963); 117 F, 44 (1920); 31 F, 2d, 869 (1929); 172 NYS, 5 (1918).

[7] 52 P, 921 (1898).

accept gifts from private individuals, it would not become a private corporation [State v. Knowles].[8]

Since the state is the founder and principal donor of the public institution, it is free to alter or dissolve the charter as it sees fit [State v. Knowles; University of Michigan v. City of Detroit].[9] The state may also dissolve or modify the governing body in any way that it may decide is in the public interest. The state will make this change by statutory means [Peterson v. Quinlivan; State v. Knowles].[10]

The public university is a public corporation, and as a public corporation it is subject to the control of the legislature [University of Michigan v. City of Detroit].[11] The limiting factor in this concept is the fact that the trustees or regents of these institutions are frequently considered to be instruments or representatives appointed to carry out the will of the legislature [King v. University of Nevada].[12] Both the institution and the trustees are under the absolute control of the legislature, but this control is subject to constitutional restrictions and prior statutes [University of Michigan v. City of Detroit; Moodie v. Bryan; Mississippi College v. May].[13]

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[8] 16 Fla, 577 (1878).

[9] 16 Fla, 577 (1878); 4 Mich, 213 (1856).

[10] 268 NW, 858 (1936); 16 Fla, 577 (1878).

[11] 4 Mich, 213 (1856). [12] 200 P, 2d, 221 (1948).

[13] 4 Mich, 213 (1856); 39 So, 929 (1905); 128 So, 2d, 557 (1961).

State universities are created by the will of the legislatures and may only be dissolved by an action of that legislature [Moodie v. Bryan].[14] The public university is also required to accept all qualified applicants [Guillory v. Tulane University].[15]

The Private Institution

If a corporation is founded by private individuals, with private funds for private purposes, or if it is privately supported or endowed, it is a private corporation [City of Louisville v. University of Louisville].[16] The institution will remain private even though it serves the public and charges tuition. This is based on the premise that the charter designates the institution to be established for charitable purposes [Carr v. St. John's University; Hamburger v. Cornell].[17]

It is well settled that grants, donations, or other valuable considerations given to the institution by the state do not change this status. These donations received from governmental bodies are no different than those received from private individuals [Carr v. St. John's University; Wilson v. Massachusetts Institute of Technology].[18] This should not be

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[14] 39 So, 929 (1905). [15] 212 FS, 674 (1962).

[16] 54 Ky, 642 (1854).

[17] 231 NYS, 2d, 403 (1962); 172 NYS, 5 (1918).

[18] 231 NYS, 2d, 403 (1962); 75 NE, 128 (1905).

misconstrued to mean that any agreement made by a donor with an institution cannot be a valid contract. This presupposes that the agreement fulfills the normal requirements for contractual accord, in which case it is subject to the laws accordingly [Curtis & Barker v. Central University of Iowa; Elliot v. Teachers College].[19]

According to the Dartmouth decision, the college charter is a contract and is subject to the protection of Article I, Section 10, Clause 1 of the United States Constitution. This article prohibits state legislatures from enacting any statute which would impair the charter of any institution, assuming that the legislature had not reserved such a right in granting the charter [Ex parte Steckler].[20] Should the legislature wish to alter a charter in any way not provided in that charter, it can only do so with the assent of the governing body specified in the charter [St. Lawrence University v. Trustees of St. Lawrence Theological School].[21]

The private institution is free to admit any person it wishes and is only limited in this respect by its publicized catalog which states the limiting factors [Guillory v. Tulane University; Tinkoff v. Northwestern University].[22]

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[19] 176 NW, 330 (1920); 31 NYS, 2d, 796 (1941).

[20] 154 So, 41 (1934). [21] 269 NYS, 2d, 285 (1966).

[22] 212 FS, 674 (1962); 77 NE, 2d, 345 (1947).

The Impact

The immediate effect of the Dartmouth decision was to return Dartmouth College to its original status of a private institution under the control of its Charter Trustees. The judgement of the court did not contain any other direct provisions. It did provide constitutional dicta that was to contribute to the evolution of the higher education system. This dicta covers college charters and the definition of public and private corporations. The law of the Dartmouth case has become so well settled that higher education has merely adapted to its principles where they applied.

The first non-Dartmouth consequence of the case was to make clear to the states that they would have to use their own resources if they wished to provide a public education for its citizens. Why should state governments spend money to found institutions of higher learning when private citizens would do it for them? On the other hand, why should private citizens contribute to what they thought was to be a private institution, when they knew that it was only a matter of time until the state would take over the institution and its property? In this light, it is difficult to see how the decision could have had any other effect than to accelerate the growth of public education.

As a result of the decision, the private college saw that it could exist and perform its function in an environment free from government influence [Green v. Howard University;

Guillory v. Tulane University; Tinkoff v. Northwestern University].[23] It meant that potential donors could bestow gifts upon a private institution secure in the knowledge that these gifts would only be used in the manner and by whom the donor prescribed [Elliot v. Teachers College; Curtis & Barker v. Central University of Iowa].[24] The decision also guaranteed that the private institution could pursue its purposes in a manner which it deemed to be in its own best interests, free from the political whims of the legislatures [Carr v. St. Johns University; Guillory v. Tulane University].[25] Private institutions of higher learning were also shown to possibly be eleemosynary institutions and, as institutions of this type, could operate with freedom from taxation and liability for the torts of its agents [Sisters of Mercy v. Hooksett; Whitman College v. Berryman; Berry v. Odom; Currier v. Dartmouth; Ettlinger v. Randolph-Macon College].[26]

The main thrust of the Dartmouth decision was in the branch of law which deals with contracts. The decision affords the college charter all of the protection of the United States Constitution against possible impairment by statutory action of the state legislatures. In making this point,

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[23] 271 FS, 609 (1967); 212 FS, 674 (1962); 77NE, 2d, 345 (1947).

[24] 31 NYS, 2d, 796 (1941); 176 NW, 330 (1920).

[25] 231 NYS, 2d, 403 (1962); 212 FS, 674 (1962).

[26] 42 A, 2d, 222 (1945); 156 F, 112 (1907); 222 FS, 467 (1963); 117 F, 44 (1902); 31 F, 2d, 869 (1929).

Marshall found it necessary to differentiate between public and private institutions [Dartmouth v. Woodward].[27] The importance of this point to the logic which he used to arrive at his decision, forced Marshall to make this definition extremely complete. The fact that Dartmouth was a private corporation was the foundation of his whole case, for if Dartmouth was not a private corporation, it lacked the shield of constitutional protection. The net result has been a halo-like effect which has been the source of much subsequent case law since 1819.

The results can be seen by the examination of the cases which have used the Dartmouth decision as a point of reference. Although these cases have dealt with many different circumstances, almost without exception the courts have used the Marshall decision to show whether a college was a private or a public institution. The distinction between the two has become increasingly important in view of recent court decisions and the effects or counter effects which these decisions may have had on the law of the Dartmouth case. At first glance, it appears that certain conflicts might exist within the legal process because of the decision of the Marshall court in 1819. In light of these conflicts certain areas of higher education will be examined in an attempt to determine how these conflicts

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[27] 4 Wheaton (17 US), 634 (1819).

might be resolved by the process of higher education. This discussion will be broken down into three divisions as follows:

1. Students
2. Faculty and staff
3. Operations

Students.--This topic seems to be increasingly important in view of recent student moves toward a voice in the governance of colleges and universities. The trend toward acquiescence to these demands gives rise to surprise when examining the consequences of the Dartmouth decision.

In a most recent case on the rights of an institution [Miller v. Alderhold],[28] the Supreme Court of Georgia held that the words of Marshall were still valid when he said that " . . . the students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice" [Dartmouth v. Woodward].[29]

This right of the institution is clearly defined in other cases which involved different circumstances. It has been upheld in areas which have pertained to the rights of the institution to refuse to allow a student to continue his course of study when it is clear that he has violated the rules of the institution [Blackburn v. Fisk University; Green v. Howard

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[28] 184 SE, 2d, 172 (1971).

[29] 4 Wheaton (17 US), 641 (1819).

University; Carr v. St. John's University].[30] The courts have likewise held that private institutions are free to admit whomever they please because of their private status [Guillory v. Tulane University; Tinkoff v. Northwestern University].[31] Whereas the courts have consistently upheld the fact that public institutions do not possess this choice and must admit all, who are reasonably qualified, as students [Parker v. University of Delaware; Pearson v. Murray].[32]

These decisions clearly indicate that private institutions are free to govern, suspend, and admit students as they see fit, assuming that the rules are otherwise legal. If they do not choose to exercise these rights, it is of their own choice. Certainly this choice is weighted by the threat of the various government agencies to withhold funds if the private institutions do not comply with their guidelines. This then is the hold which these government agencies have over the private institution, and not the Civil Rights Act or the Fourteenth Amendment.

Faculty and staff.--Contemporary standards of employee relations are pressuring institutions of higher learning in much

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[30] 443 F, 2d, 121 (1971); 271 FS, 609 (1967); 231 NYS, 2d, 403 (1962); 77 NE, 2d, 345 (1947).

[31] 212 FS, 674 (1962); 77 NE, 2d, 345 (1947).

[32] 75 A, 2d, 225 (1950); 182 A, 590 (1936).

the same manner as in student relations. The courts are no less clear in dealing with employees than they are with the students.

A recent case [Baden v. University of Pittsbury][33] alleged that the plaintiff was discriminated against because of her sex. Popular belief might hold that her motion for relief would have been upheld in her class action suit. Instead, the United States District Court of the Western District of Pennsylvania was completely unsympathetic to her petition and dismissed her suit on the grounds that the institution was private in nature and free to function in a manner restricted only by its charter.

Other cases reinforce this principle. The right of the private institution to dismiss a faculty member was upheld, assuming that other potentially legal requirements are fulfilled [Clancey v. Columbia University].[34] This decision pointed out that if the institution had acted in a responsible manner with respect to its dismissal action, it was free to act as it wished.

In another instance [Vincenheller v. Regan][35] the court differentiated between an employee under contract and an officer or an employee not under contract. In using the Dartmouth decision to show that the University of Arkansas was a

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[33] 343 FS, 836 (1972). [34] 320 NYS, 2d, 592 (1971).

[35] 64 SW, 278 (1901).

public institution, the court held that as an officer of the school, the employee was not entitled to the same job protection that a contract would give to a faculty member.

The courts have also held that the faculty member is not entitled to be considered as a member of the corporation. Faculty members are appointed through the authority, either directly or delegated, of the Trustees, and can only be removed by the same authority. Both officers and faculty are freeholders in their offices and are subject to removal for good cause [Hartigan v. West Virginia University; Dartmouth v. Woodward].[36]

It appears that the employees of institutions of higher learning are in essentially the same position as the students. The private institution is legally free to hire, assign, pay, and dismiss the faculty or staff as it wishes, assuming that they act in a responsible manner. Any revision in this policy must be of the institution's own volition and could be the result of the institution wishing to comply with the guidelines of a funding government agency.

The public institution, on the other hand, lacks the freedom of choice outlined above. These institutions must refrain from discrimination in any faculty or staff members, merely because of its public nature.

Operations.--Many cases fall into this division and relate to the origin of the college or university and their charters.

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[36]38 SE, 698 (1901); 4 Wheaton (17 US), 632 (1819).

The fact that the charter, and the circumstances surrounding its issue, are determining factors to its nature, has been discussed at length [Dartmouth v. Woodward].[37] After the charters have been issued however, certain questions arise concerning the relationship of the responsibilities of both parties. The courts have held that the mere chartering of an institution is not sufficient cause to transform the institution to one of a public nature [Braden v. University of Pittsburg; Miller v. Alderhold].[38]

Once the charter has been issued, it is well settled that it becomes a contract, between the issuing agency and the grantee, is entitled to the protection of the United States Constitution [City of Louisville v. University of Louisville],[39] and can not be dissolved without the consent of both parties [Washington University v. Rowse].[40] Conversely, the courts have been sympathetic to charter revisions when both parties have been agreeable [Rutgers College v. Richman].[41]

The courts have clarified the status of an ex post facto charter which was granted subsequent to statutes or constitutional provisions which preceded it [Mississippi College v. May].[42] It has also been shown that although the chartering

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[37] 4 Wheaton (17 US), 632 (1819).

[38] 343 FS, 836 (1972); 184 SE, 2d, 172 (1971).

[39] 54 KY, 642 (1854). [40] 42 Mo, 308 (1868).

[41] 125 A, 2d, 10 (1956). [42] 128 So, 2d, 557 (1961).

agency does not possess the right to alter the charter, neither is this right possessed by the Charter Regents or Trustees [Regents of the University of Maryland v. Trustees of the Endowment Fund].[43] These Regents or Trustees possess the right to operate as they see fit, within the constrictions of the charter, and even though they might be the Regents of a public corporation, they are still a corporate body and are entitled to the rights thereof [King v. University of Nevada].[44]

Courts have consistently pointed out that it was necessary to heed Story's advice, if chartering agencies wished to maintain control over the charter after it had been issued [Stevens v. Thames; Wyoming Agricultural College v. Irvine; Moodie v. Bryan; Pennsylvania College Cases; Armstrong v. Athens County; University of Maryland v. Williams].[45] Action has also shown the consequences due those who do not choose to follow Story's advice [Wilson v. Massachusetts Institute of Technology; Whitman College v. Berryman].[46] It has also been shown that certain privileges granted the original charter holder cannot be transferred to subsequent owners unless so provided in the charter [Washington University v. Rowse].[47]

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[43] 112 A, 2d, 678 (1955). [44] 200 P, 2d, 221 (1948.

[45] 86 So, 77 (1920); 84 P, 90 (1906); 39 So, 929 (1905); 80 US, 212 (1871); 10 Ohio, 235 (1840).

[46] 75 NE, 128 (1905); 156 F, 112 (1907).

[47] 42 Mo, 308 (1868).

It is well settled that grants and donations from public sources do not transform the private institution to that of a public status since these gifts are no different from those received from private sources [City of Louisville v. University of Louisville].[48] The courts have also upheld the rights and privileges of grantors, showing that the grantee is bound to adhere to the conditions of the grant [Elliot v. Teachers College][49], or he will be compelled to return everything given to them in the grant [Stevens v. Thames].[50]

These cases effectively explain how the various government agencies, who make financial grants and gifts to private institutions, can control these institutions and intimidate them to agree to the conditions of the grants. It is clear that the gifts in themselves do not constitute the means to accomplish this, since they are as private gifts. However, once the institution avails itself of these monies it is compelled by law to live up to the conditions to which it agreed accepting the money. Thus, a truly private institution which can exist without government funds is free to pursue any admission, hiring, or operating policy it might choose and expect the full protection of the law of the Dartmouth decision.

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[48] 54 KY, 642 (1854). [49] 32 NYS, 2d, 796 (1941).

[50] 86 So, 77 (1920).

Possible Future Impact

What then is the future of Dartmouth case law? It appears that the law of the Dartmouth decision is still sound law and has a place in the jurisprudence system in the United States. In higher education alone, it has been cited no less than six times since April 1971.

While the main thrust of the Dartmouth decision will no doubt continue to rest in the concept of charter impairment, the main use will probably continue to be in cases where it becomes necessary to classify the institution as public or private. This could well be in the area of discrimination and student rights, as indicated by the most recent citations.

It is doubtful that the Dartmouth case law will ever be in direct conflict with the Fourteenth Amendment, since the object of the Fourteenth Amendment is to protect the private individual from the power of the state. Since a private corporation is essentially the same as a private individual, it would consequently be entitled to the same protection under the amendment. It would be interesting to speculate that the private corporation, as defined by the Dartmouth decision, would seek relief from state intimidation under the Fourteenth Amendment.

Much of the criticism of the decision centers around the fact that the principles of the case covers all charters and all corporations. The research of this study has verified that this is valid. Since this is the case, it is quite likely

that, if the case is ever qualified, it will be due to the fact that it covers such an extremely broad range of law, and not through its relationship to higher education.

There remains but one aspect of the case and its subsequent citations which does not seem to follow the principles laid down in the other cases involved in the study. This case appears to be worthy of further discussion with respect to the future. This case [Shelton College v. State Board of Education][51] presents a situation where a state statute gave authority to the state Board of Education to set state standards for a baccalaureate degree. The Dartmouth case was cited to show Marshall's concern for the importance of education [Dartmouth v. Woodward][52] In the Shelton case, the court reasoned that if education was of national concern, the nation should also be concerned with the quality of the degrees which were issued in its name. It suggested that the degree was evidence of academic achievement and therefore care should be taken in its structure. The court upheld the statute.

The plaintiff in the case, Shelton College, was prevented, by the Board of Education, from granting bachelors degrees because Shelton did not meet the Board's standards. Shelton attacked the statute, under the Fourteenth Amendment. To this authority, the court makes the point that hardly every private person is qualified to grant degrees and therefore

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[51] 226 A, 2d, 612 (1967). [52] 4 Wheaton (17 US), 634 (1819).

there must be some control over who grants these representations of academic achievement. The opinion also takes note of the institution which awards degrees indiscriminately and the private agencies which accredit most degree-granting schools. The court then asks how those schools not accredited by the reputable agencies should be controlled.

The court's opinion presents many other points, and certainly most of these are well taken. There are, however, many questions left unanswered. Where do the regulations stop? How are institutions which award degrees indiscriminately eliminated without controlling all institutions? Is it constitutional to regulate private degree-granting institutions?

The answers to these questions might well be the subject of some later study; they are beyond the scope of this paper. To close with a provoking thought: the court of record in the Shelton case left the constitutional question unanswered, since it did not feel that an answer to the question was necessary to the case. Certainly, this subject will rise again in some court of law, since it is clearly a problem which needs to be solved.

Recommendations

During the accumulation of information on which this study was based, it became apparent that there were other court cases which have influenced higher education in a manner similar to that of the Dartmouth case. The knowledge of the

information contained in these cases could be very valuable to an administrator for use in making decisions and forming policy.

It would appear that two barriers exist with respect to gaining the use of this information. First, which cases were of sufficient magnitude to serve as the genesis of enough case law to make a study of this type worth while? This information can be located by consulting American Jurisprudence, 2d, Corpus Juris, Secundum, and the Decennial Digests. The latter publication reports all cases, by subject, which have been heard in a ten-year period.

When a possible case has been located, the next step would be to consult Shepard's Citations. This publication will list all of the subsequent cases which have cited the case at hand as a reference. If it appears that the number of citations represent a volume of sufficient magnitude to warrant further study, the next step is to determine how many of the cases cited apply directly to higher education, or any subject in which the researcher might have an interest. This question can only be answered by checking each citation until it is determined that a sufficient number exists for the study.

The second barrier involves the orderly arrangement of the cases, so that the information is readily available and in some form which can be easily utilized. Unfortunately, the second barrier cannot be hurdled until the first has been completely cleared.

In Chapter IV, it will be noted that each case has been given a descriptor. These are suggested terms, which have been selected arbitrarily, and are included to serve as guides for case classification. The cases in subsequent studies should also include descriptors, using the same nomenclature whenever it is possible. These descriptors will serve as keys to be used by some computer technician to use to correlate and organize all of the cases into a data retrieval system. This system could be available to all administrators for use whenever they had a problem which might be solved, at least in part, by a knowledge of case law on the subject. The administrator would select the descriptor which he feels best represents the problem at hand, and request a printout of the cases keyed on that descriptor. The program would necessarily include provisions for secondary and tertiary descriptors. The printout would list each case in a brief form similar to that used in Chapter IV, including other possible descriptors of interest. Each case brief could be examined to determine if the facts of the case were similar to the problem at hand. When a case brief was found to fit the problem, further research into the indicated court reporter would be the next appropriate step. The savings in time and effort can only be appreciated to those who have performed such legal research.

The system will have a built-in benefit, since it can never become outdated nor can it ever be completed, for even after the software system has been designed, scholars can

still add new inputs to the system. The only constriction will be that they must then use the pre-decided descriptors if they apply.

It is hoped that others will see the benefits of building a system of this type and help to develop it, so that it may benefit administrators and legal counsel throughout the country.

APPENDIX

A DIVISION OF CASES BY DESCRIPTOR

Academic Standards

Shelton College v. State Board of Education, 226 A, 2d, 612 (1967).

Charters

Armstrong et al. v. The Treasurer of Athens County, 10 Ohio, 235 (1840).

Board of Regents of the University of Maryland v. Trustees of the Endowment Fund, 112 A, 2d, 678 (1955).

Mississippi College et al. v. May et al., 128 So, 2d, 557 (1961).

Pennsylvania College Cases, 80 US, 212 (1871).

St. Lawrence University v. The Trustees of the Theological School of St. Lawrence University, 269 NYS, 285 (1966).

State ex rel. Moodie et al. v. Bryan et al., 39 So, 929 (1905).

Stevens et al. v. Thames, 86 So, 77 (1920).

Synod of Dakota v. State, 50 NW, 632 (1891).

Trustees of Rutgers College v. Richman, 125 A, 2d, 10 (1956).

University of Maryland v. Williams, 9 GJ, 365 (1838).

Washington University v. Rowse, 42 Mo, 308 (1868).

Wilson v. Massachusetts Institute of Technology, 75 NE, 128 (1905).

Wyoming Agricultural College v. Irvine, 84 P, 90 (1906).

Discrimination

Parker et al. v. University of Deleware et al., 75 A, 2d, 225 (1950).

Pearson et al. v. Murry, 182 A, 590 (1936).

Eleemosynary Institutions

Berry v. Odom, 222 FS, 467 (1963).

Currier v. Trustees of Dartmouth College, 117 F, 44 (1902).

Ettlinger v. Trustees of Randolph-Macon College, 31 F, 2d, 869 (1929).

Hamburger v. Cornell University, 172 NYS, 5 (1918).

Faculty Rights

Braden v. The University of Pittsburg, 343 FS, 836 (1972).

Clancy v. The Trustees of Columbia University, 320 NYS, 2d, 592 (1971).

Hartigan v. Board of Regents of West Virginia University, 38 SE, 698 (1901).

Vincenheller v. Regan, 64 SW, 278 (1901).

Grants

Curtis and Baker et al. v. Central University of Iowa, 176 NW, 330 (1920).

Elliot et al. v. Teachers College et al., 31 NYS, 2d, 796 (1941).

Private Corporations

Blackburn et al. v. Fisk University et al., 443 F, 2d, 121 (1971).

City of Louisville v. President and Trustees of the University of Louisville, 54 Ky, 642 (1854).

The Directors of Maryville College v. Bartlett, 67 Tenn, 231 (1874).

Galton et al. v. The College of Pharmaceutical Sciences, Columbia University, 332 NYS, 2d, 909 (1972).

St. John's College v. The State of Maryland, 15 Md, 330 (1859).

State ex rel. White et al. v. Neff et al., 40 NE, 720 (1895).

Public Corporations

Baker v. Carter, State Auditor et al., 25 P, 2d, 747 (1933).

King v. Board of Regents of the University of Nevada, 200 P, 2d, 221 (1948).

Oklahoma Agricultural and Mechanical College v. Wallis et al., 52 P, 921 (1898).

Peterson v. Quinlivan, 268 NW, 858 (1936).

The Regents of the University of Michigan v. The Board of Education of the City of Detroit, 4 Mich, 213 (1856).

Spalding v. People, 49 NE, 933 (1898).

State ex rel. Attorney-General v. Knowles et al., 16 Fla, 577 (1878).

Student Rights

Carr v. St. John's University, New York, 231 NYS, 2d, 403 (1962).

Ex Parte Steckler et al., 154 So, 41 (1934).

Green et al. v. Howard University, 271 FS, 609 (1967).

Guillory v. Administrators of Tulane University of Louisiana, 212 FS, 674 (1962).

Miller v. Alderhold et al., 184 SE, 2d, 172 (1971).

Tinkoff v. Northwestern University, 77 NE, 2d, 345 (1947).

Taxation

Board of Trustees of Whitman College v. Berryman et al., 156 F, 112 (1907).

Sisters of Mercy v. The Town of Hocksett, 42 A, 2d, 222 (1945).

Visitation

Lewis et al. v. Whittle et al., 77 Va, 415 (1883).

Pittman et al. v. Adams et al., 44 Mo, 570 (1869).

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