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## Les officialités à la veille du Concile de Trente

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## Recent Books

### BOOK REVIEWS

LES OFFICIALITÉS À LA VEILLE DU CONCILE DE TRENTE. By *Anne Lefebvre-Teillard*. Paris: R. Pichon et R. Durand-Auzias. 1973. Pp. vii, 291. (Bibliothèque d'Histoire du Droit et Droit Romain, no. 19) 48 FF.

Like the blind men examining the elephant in the child's poem, scholars examining the practice of church courts in the Middle Ages and Renaissance have tended to assume that the part which they have studied is representative of the whole.<sup>1</sup> There are, indeed, powerful reasons for assuming the unitary nature of church court practice: The canon law taught in the universities knew no national boundaries, and until the Reformation the church courts recognized a superior jurisdiction in the Court of Rome. Furthermore, the records of the church courts are scattered, spotty, hard to read, and largely unpublished. Once one has gone through the painful process of mastering the records of a given jurisdiction for a given period, it is altogether too tempting to assume that one has an adequate picture of the whole. As we are now coming to realize, however, the practice of the church courts was not unitary; it varied from place to place, not only between countries but within countries, and it also varied over time, not only as the academic and papal law evolved, but also quite independently of that evolution.<sup>2</sup>

For the legal historian, the great interest of the church courts lies in these variations. How are we to explain them? The church courts are the intersection point of a number of competing forces: the academic canon law with its highly developed, sometimes abstruse doctrines; the papacy with its ever-changing political influence; secular law and institutions, the former completing the legal setting within which the church courts operated, the latter concerned with protecting their secular jurisdiction; and local society, which created the problems which the church courts were called upon to resolve. Thus, the church courts provide an excellent paradigm for the study of the way in which law and society interact. Although it is possible to study the interaction of these forces in the context of one particular

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1. P. HAIR, *BEFORE THE BAWDY COURT* (1972), is particularly prone to this offense, and even P. FOURNIER, *LES OFFICIALITÉS AU MOYEN ÂGE* (1880), has a tendency to fill in details from the academic canon law when he lacks documentation from the practice.

2. See, e.g., pp. 179-206, for variations in the French practice of granting separations.

court, a comparative dimension aids in helping us to understand which element—church law or institutions, secular law or institutions, or local society—was decisive in shaping the practice of the church courts.

Mme. Lefebvre-Teillard has studied the French *officialités*<sup>3</sup> from 1490 to 1540. Although she relies heavily on the most complete set of church-court records from her period—those of the court of the archdeacon of Paris—she seems to have examined all of the known deposits of French church-court records from her period, and, in some cases, she has searched beyond her period (pp. 3-12). She is quite conscious of the variations among her courts, both as to the different types of cases brought before them and as to the ways in which those cases were resolved;<sup>4</sup> she tries, as many students of the church courts have not,<sup>5</sup> to show the relationship between the academic canon law and the actual practice of her courts; she offers a comprehensive view of the relationship between the church courts and the secular courts in her period (pp. 129-38); and she occasionally provides insights into the relationship of the church courts to the society in which they operated.<sup>6</sup> Yet, good as the book is, it can only be regarded as a beginning.

I leave to the margin my technical criticisms of the book,<sup>7</sup> save

3. The word is hard to translate. "Officiality" is not often used in English, and "church court" is both too broad in that it encompasses courts which had no official, such as a court of papal judges delegate, and too narrow in that it implies exercise solely of what today we would regard as judicial functions; the *officialités* also performed administrative or quasi-judicial functions. We can preserve the ambiguity of the term if we define an *officialité* as a department of ecclesiastical governance, headed by a functionary known as an official who exercised the jurisdiction of a superior ecclesiastical officer, such as a bishop or archdeacon. See pp. 25-32.

4. One should not take too seriously her assertion of a "*unité profonde du système judiciaire et du droit appliqué*" (p. 4). The contents of the book substantially qualify this assertion. See, e.g., pp. 116-19, 254-63 (testamentary cases); pp. 222-50 (contract cases).

5. See, e.g., B. WOODCOCK, *MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* 4 (1952) ("[N]o adequate basis exists for the correlation of the practice of particular courts with the injunctions of the canon law").

6. See, e.g., pp. 242-43 (discussion of inflation and the obligation to pay a fixed sum of money).

7. My most serious criticism has to do with the number of errors in the quotations from Latin documents. For example, there are twenty-seven errors and questionable readings on the first two pages of the *Documents Annexés* (pp. 267-68). These range in seriousness from omission of (or failure to supply) a conjunction (Doc. 1, between *prosequitur* and *se iactavit*); to failure to extend (Doc. 2, *id.* for *idem*); to a fairly consistent practice of transcribing *it* as *ct*, making forms of *mittere* (Docs. 1 & 3) look like forms of *mingere* (wicked thought!); to false agreement (Doc. 6, *hanc* for *hunc*). Such a high rate of error can only cast doubts on the accuracy of Mme. Lefebvre-Teillard's readings which are not obviously erroneous.

Further, Mme. Lefebvre-Teillard's apparatus of footnotes leaves much to be desired. She makes a number of substantive statements for which she offers no support, e.g., p. 46 (with regard to the age of majority); p. 59 n.79 (with regard to interlocutory sentences); p. 252 n.10 bis (with regard to prenuptial contracts), or for which she offers support without citation, e.g., p. 148 n.7 (synodal statutes). Im-

to say that it is marred by an unusually large number of silly errors and omissions, which do not, so far as I can tell, affect its main themes. My major concern, however, is with the scope of the book. Mme. Lefebvre-Teillard takes a nation, France, as the geographical area for her survey. This is a natural choice given the relative ease of access to archives in one's own country; moreover, of the forces which determined church-court practice, the secular law (to a considerable extent), and ecclesiastical institutions (to a certain extent), operated on a national level. On the other hand, the academic canon law and the papacy transcended national boundaries, while society tended to operate on a much more local level than it does today. By choosing a national scope for her study, Mme. Lefebvre-Teillard runs the risk of overemphasizing those influences on the practice of the church courts which operated on a national level, and underemphasizing those which operated on either a supranational or a local level.

Because Mme. Lefebvre-Teillard's book does not provide enough of the personal and social context of the local church-court practice, it fails as a local study, as a building block upon which broader studies can be based. For example, one of Mme. Lefebvre-Teillard's most interesting findings is that during the period covered by her study the *officialité* of Cambrai and that of Montivilliers differed markedly from the rest of France in their practice of granting marital separations (pp. 201-05). Cambrai's practice was loose: The court granted separations from bed and board on the ground of what we might, without too much anachronism, call "irretrievable breakdown of the marriage" (*morum incompatibilitas*). Montivilliers' practice, on the other hand, was strict: The court apparently refused to grant even separation of goods on the ground of simple cruelty. The church courts in the rest of France seem to have fallen some place in between, granting separation of goods fairly freely but reserving separation from bed and board for cases of adultery or aggravated cruelty.<sup>8</sup>

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portant concepts are sometimes not defined, e.g., letters *ni si*, pp. 98, 116, 125, 269-70, or are defined after their first appearance. For example, on p. 30 we encounter a reference to "*un système de prévention*"; that system is not defined until p. 45, where we are told (n.3) that more details will be forthcoming on p. 234; p. 234 does not say anything about the system, which is, in fact, discussed on pp. 140-43. It is useless to multiply the examples of misprints, e.g., pp. 132 n.219, 224 l.21 (wrong font); p. 245 (n.141 misnumbered "142"), or miscitations, e.g., p. 56 n.61 ("Décrétales 11, 22, 12" for "Décrétales II, 22, 12"); p. 57 n.72 ("Décrétales 11, 19, 4" for "Décrétales II, 19, 4"[?]). Suffice it to say that the cause of scholarship would have been better served if the production of this book had been delayed for some thorough editorial work.

8. Separation from bed and board (*separatio quoad thorum*) carried with it most of the consequences of modern divorce, except that the parties were not free to remarry (pp. 185-86); separation of goods (*separatio quoad bona*) was, in fact, more than a separation of property: the parties were permitted to live apart. They were,

Why did Cambrai and Montivilliers develop practices so different from each other and from the rest of France? The period is short enough that we could be dealing with nothing more than the idiosyncracies of two judges. But Mme. Lefebvre-Teillard does not tell us who the judges were, much less what, if anything, is known about them. Another possibility is that this divergence in practice can be traced to differences in the underlying customary law. Both the central part of modern Belgium, in which much of the diocese of Cambrai lay, and Normandy, in which the small monastic jurisdiction of Montivilliers lay, had their own distinctive customary law during this period.<sup>9</sup> Or perhaps the differences in the practice of these two jurisdictions can be explained politically. Cambrai was not subject to the French king in this period;<sup>10</sup> Montivilliers was a curiosity, an exempt jurisdiction under the control of an abbess and hence out of the mainstream of political and ecclesiastical life.<sup>11</sup> Or perhaps the differences can be traced to the social structures or customs of the two areas, or to the types of litigants coming before the two courts. Mme. Lefebvre-Teillard has not given us the answers to these questions or even much of the information needed to construct answers.<sup>12</sup>

Although further intensive research into the local practice of the church courts is obviously necessary, I think the time has come when we should also begin to compare ecclesiastical practice across national boundaries. Such comparisons would aid in determining the role each of the multiple forces which influenced ecclesiastical practice played. Studies like Mme. Lefebvre-Teillard's are a necessary first step, but, unfortunately, when Mme. Lefebvre-Teillard goes much beyond the French border her mastery deserts her. In drawing comparisons with England, for example, she makes some use of

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however, at least technically obliged to render to each other the "conjugal debt," an obligation which was occasionally enforced at the instance of one of the parties (pp. 198-99).

9. This is an exceedingly complex topic, particularly for the diocese of Cambrai, where the variation of customs within the diocese was considerable. See generally sources cited in INTRODUCTION BIBLIOGRAPHIQUE À L'HISTOIRE DU DROIT ET À L'ETHNOLOGIE JURIDIQUE (J. Glissen ed.) C/1, nos. 1164-298 (1967) (Normandy); C/3, nos. 133-52, 158-61, 182 (1971) (Brabant, Hainault, & Cambrai).

10. Although appeal from Cambrai lay to the metropolitan see of Reims, most appeals seem to have been taken directly to the Court of Rome (p. 201 n.272).

11. See Le Cacheux, *Le fonds de l'officialité de Montivilliers*, in TRAVAUX DE LA SEMAINE D'HISTOIRE DU DROIT NORMAND 275-305 (1928).

12. One of the problems with a survey like Mme. Lefebvre-Teillard's is that important details about individual courts get lost. Despite the excellent series of records surviving from the *officialité* of the archdeacon of Paris (p. 5), and despite the fact that statistics as to the types of cases heard in this court may be found scattered throughout the book (pp. 111 n.119, 171 n.107, 176 n.131, 198 n.258, 251 n.5 bis), the reader never really gets a clear picture of the jurisdiction of this important court.

Woodcock,<sup>13</sup> but does not seem to know Sheehan,<sup>14</sup> or Logan,<sup>15</sup> or, most disturbingly, Marchant,<sup>16</sup> whose study of the York courts covers a period quite close to her own. Those of us who have worked with the English church courts have been even more parochial: Although the earliest French church-court records have been in print for some time, the only English-language study that I know of which uses them is an unpublished licentiate thesis.<sup>17</sup>

What follows is but a series of suggestions for future comparative studies of the English and French church courts. It is based on my own incomplete knowledge of the English records, and I have had to rely on memory for some of the examples. Furthermore, my own work has been principally with English records of the thirteenth and fourteenth centuries; hence, some of the divergences which I note between English and French practice may be the result of differences in time rather than place.

The initial impression that one gets after reading Mme. Lefebvre-Teillard's account is that the English and French ecclesiastical courts were clearly part of the same world. The procedures used by both courts were basically the same, even in the respects in which they differed from the academic law. For example, in England, as in France (p. 51), it is difficult to distinguish a pre-emptory exception from a substantive defense; in both English and French practice the canonical prohibition of women's testimony had become pretty much a dead letter (p. 82). Many of the basic categories of jurisdiction were also the same: Marriage, testament, contract, benefice, and tithes cases are found in both courts, as well as a whole series of offenses which were left to the church courts because of their lack of secular importance or their peculiarly ecclesiastical nature.

Yet, the closer one looks the more one is struck by the fact that the differences between the practice of the English and French ecclesiastical courts are as important, if not more important, than the similarities. Take, for example, the difficult question of the relationship between the ecclesiastical and the secular courts. In France, as in England, there was considerable friction between the two, particularly when it came to drawing jurisdictional boundaries. In France, as in England, the church courts had a considerably broader

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13. B. WOODCOCK, *supra* note 5.

14. M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* (Pontifical Institute of Mediaeval Studies, Studies and Texts No. 6, 1963); Sheehan, *The Formation and Stability of Marriage in the Fourteenth Century: Evidence of an Ely Register*, 33 *MEDIAEVAL STUDIES* 228 (1971).

15. F. LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* (Pontifical Institute of Mediaeval Studies, Studies and Texts No. 15, 1968).

16. R. MARCHANT, *THE CHURCH UNDER THE LAW* (1969).

17. K. Corsano, *Marriage Law in Fourteenth Century France* (1969) (unpublished M.S.L. thesis, on file at the Pontifical Institute of Mediaeval Studies, Toronto).

jurisdiction in fact than they "ought" to have had, at least if one determines that "ought" from the judgments of the royal courts.<sup>18</sup> Mme. Lefebvre-Teillard's basic perception of why the church courts continued to entertain cases that they "ought" not to have heard is, I think, equally applicable to England: the litigants continued to come to them. The litigants continued to come for a congeries of reasons that included custom, the fact that churchmen were the traditional arbiters of disputes, and the fact that the church courts were relatively cheap. The fees seem to have been reasonable; the courts were, in many instances, situated closer to the litigants; and ecclesiastical court procedure was relatively expeditious (pp. 31, 61-64, 124-26, 265).

On the other hand, there was a marked difference between the two countries as to where these de facto jurisdictional lines were drawn. In France, in the early sixteenth century, ordinary contract litigation continued to constitute a major part of some church courts' jurisdiction (pp. 222-60), whereas contract cases virtually disappeared from the English church courts during the same period.<sup>19</sup> The French courts also entertained a general action for battery (pp. 125, 128) and actions arising from disputes concerning the segregation of lepers and the appointment of midwives (pp. 123-24); none of these actions, to my knowledge, were ever entertained by the English church courts. On the other hand, the jurisdiction of the French courts in regard to testaments declined in this period (pp. 116-19), whereas in England it remained an important part of the ecclesiastical jurisdiction (although shared with the secular courts).<sup>20</sup> Furthermore, while the French church courts did entertain defamation actions (pp. 114, 125-26), such actions were obviously not a staple of the courts' jurisdiction, as they were in England.<sup>21</sup>

With regard to the relationship between ecclesiastical and secular jurisdictions, perhaps the most important difference between the two countries lay in the dynamics of that relationship. One gets the impression that the French secular courts were far more vigorous than the English secular courts in enforcing their jurisdictional pretensions. The basic procedural device in England for enforcing the claims of secular justice against the church courts was the writ of pro-

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18. See pp. 130-38; Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records From the Church Courts*, 72 MICH. L. REV. 647, 660-65 (1974).

19. See Helmholz, *Assumpsit and Fidei Laesio*, 91 L.Q. REV. 406, 427 (1975); R. Helmholz, *Private Actions for Breach of Faith in the Medieval Church Courts* (unpublished paper delivered at Am. Soc. for Legal History, 3d Annual Meeting, Chicago, Nov. 9, 1973). Mme. Lefebvre-Teillard suggests that the French practice may have ended with the *ordonnance* of Villers-Cotterêts (1539) (pp. 126-27), but the temporal limitation of her study does not permit her to trace its effects.

20. See R. MARCHANT, *supra* note 16, at 86-113.

21. See *id.* at 62.

hibition. Although once the royal courts issued such a writ it was almost always obeyed, its issuance depended in the first instance upon the willingness of the litigant to go to Westminster to obtain it.<sup>22</sup> In France, too, a litigant could stop an ecclesiastical court from proceeding; this was accomplished by bringing before the secular courts an *appel comme d'abus* (pp. 69-70). The French, however, had an institution for enforcing the royal jurisdiction which, unlike the English prohibition system, did not depend on the willingness of one of the litigants to bring his claim to the attention of the secular courts: the *procureurs du roi*, who by royal edict were supposed to sit in every ecclesiastical court and whose principal function in ecclesiastical proceedings seems to have been to ensure that the ecclesiastical court did not infringe upon the prerogative of the king's courts (p. 41). Thus, while the situation in England might be described as one in which a litigant brought before a church court in a matter that "ought" not to have been there could obtain royal justice if he wanted it, in France the secular courts attempted to make sure that the litigant received royal justice whether he wanted it or not.

This difference should not be exaggerated; the number of cases in the French ecclesiastical courts that "ought" not have been there should make us cautious of overstatement. Nonetheless, there is substantial evidence that the French secular jurisdiction was decidedly more at odds with the ecclesiastical jurisdiction than was the case in England (at least as was the case in England until the beginning of the seventeenth century).<sup>23</sup> The French church courts were apparently having difficulty in obtaining the aid of the secular arm in enforcing their process and judgments (pp. 50, 122);<sup>24</sup> the secular theory that all possessory actions belonged in the secular courts (a marked contrast to the theory in England)<sup>25</sup> was causing the French church courts to lose benefice and tithe litigation (pp. 119-20, 138); and I know of no instance in England, as there was in France, of a secular official placing his sergeants on the road to the church court in order to constrain litigants to buy commissions forbidding the church court from proceeding (p. 126).<sup>26</sup>

Much more careful study is needed before we can clarify the significance of the differences in the way in which the lines of

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22. See Donahue, *supra* note 18, at 665-68, 701, and sources cited therein.

23. On the jurisdictional battle between common lawyers and the church courts in this period, see generally B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641* (1973).

24. In France, an excommunicate had to remain so for a year before the aid of the secular arm could be invoked; in England, the period was forty days. See generally F. LOGAN, *supra* note 15.

25. In England, the church courts seemed to have used possessory actions to gain jurisdiction over cases that might otherwise have been heard in the secular courts. See Donahue, *supra* note 18, at 661-63. Cf. *id.* at 676-77.

26. The matter came to litigation, and I doubt it was a common practice.

ecclesiastical jurisdiction were drawn (both *de facto* and *de jure*) in England and France. As for the difference in dynamics between the two countries, the French had clearly devised a more effective enforcement mechanism. Why? Could it be that the English didn't want a more effective enforcement mechanism? Could it be that there was a difference in attitude about law enforcement generally?

Another area that presents fertile ground for future comparative study is the ecclesiastical courts' jurisdiction over marriage and separation. In both England and France, the jurisdiction of the church courts over marriage matters was probably their most important area of jurisdiction, at least from the point of view of the layman. Here the significant differences lie not so much in the law applied (although there are differences),<sup>27</sup> as in the types of cases coming before the courts. In England, the most frequent type of action seems to have been one concerning a *de presenti* marriage performed without regard to the required solemnities<sup>28</sup>—a “clandestine” marriage, although that term is somewhat misleading.<sup>29</sup> Contrary to what has been suggested elsewhere,<sup>30</sup> Mme. Lefebvre-Teillard shows quite clearly that such cases did exist in France (pp. 165-71); however, these cases pale in statistical importance before cases involving contracts to marry (*de futuro* marriages) and cases involving marriages formed by a contract to marry followed by intercourse between the parties.<sup>31</sup> Furthermore, and again in contrast

27. Compare pp. 186-200, with R. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 100-07 (1974) (separations of goods); pp. 208-12, with R. HELMHOLZ, *supra*, at 110 (actions for dowry and marriage portions).

28. See, e.g., R. HELMHOLZ, *supra* note 27, at 25-26; Sheehan, *supra* note 13.

29. Many of the “clandestine” marriages that were the subject of litigation in England were not secret, at least in the sense of unwitnessed; they were merely marriages in which the parties exchanged words of present consent before friends, rather than before a priest at the church door after the proclamation of the banns. The Church frowned on informal marriages of this sort, but recognized their validity until the Council of Trent. See Donahue, *The Policy of Alexander III's Consent Theory of Marriage*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 335 (S. Kuttner ed. 1975).

30. See Lévy, *L'officialité de Paris et les questions familiales à la fin du XIV<sup>e</sup> siècle*, in 2 ÉTUDES D'HISTOIRE DE DROIT CANONIQUE DÉDIÉES À GABRIEL LE BRAS 1265 (1965); Turlan, *Recherches sur le mariage dans la pratique coutumière (XII<sup>e</sup>-XVI<sup>e</sup> s.)*, 35 RÉVUE HISTORIQUE DU DROIT 477 (4th. ser. 1957).

31. Mme. Lefebvre-Teillard's data seem to include 56 contract cases (p. 148 n.6), 14 clandestine marriages (p. 166 n.82), and approximately 40 contracts followed by intercourse (p. 171 n.107) for the *officialité* of the archdeacon of Paris for the years 1499 to 1506. Note 82 is not completely clear as to dates; note 107 refers to 1505 rather than 1506 (probably because the criminal register ends in December 1505, while the civil register continues until February 1506) and contains an erroneous cross-reference, which I think is intended to be to note 82. Although further precision on Mme. Lefebvre-Teillard's part would have led to clearer statistics, it is frequently difficult to tell from a register precisely what is at stake. For example, an entry reproduced on p. 152 n.22 is used to illustrate an order by the official that

to England,<sup>32</sup> actions for judicial separation made up a significant portion of the marriage and separation cases before the French church courts.<sup>33</sup>

How are these differences to be explained? Without attempting to prejudice further research, it strikes me that an explanation for the first difference—the type of marriage formation case brought before the courts—may be found in a difference in the underlying societies. Marriage contracts simply do not seem to have been much used in England, hence the absence of litigation about them. The reason why such contracts were not much used may lie in folk custom, or in the fact that marital property law was relatively inflexible, or in some combination of custom and law. We would need to know more both about local marriage customs<sup>34</sup> and about who the litigants were before we could arrive at a definite conclusion on this matter.

The second difference—the relative absence of separation cases in the English courts—may be related to a difference in methods of law enforcement. A figure who played a large role in the French records (p. 34) and who is notably absent from the English records is the promoter, a type of prosecutor whose job it was to ferret out offenders and bring them before the court.<sup>35</sup> French promoters seem to have regarded it as part of their function to bring before the court married persons who were not living together (p. 179). Thus, it may be that the threat of prosecution, coupled with a more complicated law of marital property, forced couples whose marriage was breaking up before the French church courts. The courts may, in turn, have been forced to elaborate on the law of separation of goods in order to resolve these disputes.

Thus, in the area of marriage litigation, as in the area of the relations between the ecclesiastical and secular jurisdictions, variations in French and English attitudes toward law enforcement appear to have had an important influence on the development of differences in the church courts' practice. The English courts seem to have been willing to leave much more to the litigants; at least in an instance case, if the parties did not want to press a point, the court rarely

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engaged parties solemnize their marriage, but the entry could also be a sentence in a case of *de presenti* informal marriage.

32. See R. HELMHOLZ, *supra* note 27, at 74-76, 101, 111.

33. There were 29 cases of separation of goods before the Paris archidiaconal *officialité* between 1500 and 1506 (p. 198 n.258).

34. For example, in marked contrast to France (p. 157) and to what would seem to be the case for the rest of England, the depositions of the Chester Consistory Court, 1561-1566, reveal a remarkably large number of cases involving marriage contracts of children below the age of puberty. See CHILD-MARRIAGES, DIVORCES AND RATIFICATIONS (F. Furnivall ed., Early English Text Society No. 108 (O.S.), 1897).

35. The *apparitor* (Chaucer's summoner) may have played a somewhat similar role so far as investigation of offenses is concerned, but I know of no English record

would.<sup>36</sup> The French courts, on the other hand, without losing sight of their dispute-resolution function, seem to have been more concerned with law enforcement. For example, the French courts would fine parties who they discovered had entered into an informal marriage (pp. 127 n.200, 170-72)—an order that I can't recall ever having seen in an instance case in England.<sup>37</sup>

Is this a national difference (the French were more rigorist than the English)? Or is it a temporal difference (attitudes toward law enforcement changed between the fourteenth and the sixteenth centuries)? Or is it a difference in the type of records we are looking at (more and better criminal registers for higher level courts survive in France)?

" 'I see,' said he, 'the elephant is very like a wall.' "

*Charles Donahue, Jr.*  
*Professor of Law*  
*The University of Michigan*

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where he presented the case against the accused in court, as did the French promoter. *See, e.g.,* p. 267 (Doc. 2); p. 268 (Docs. 7, 9).

36. One of the most striking pieces of evidence for the proposition that litigation was controlled by the parties in England is the large number of cases which were begun and then dropped before judgment was rendered. *See* Donahue, *supra* note 18, at 705-06. The fact that absence of sentences, at least in comparison with the number of cases begun, was also characteristic of the French records should make us cautious about overemphasizing the law enforcement role of the French church courts. Mme. Lefebvre-Teillard attempts to explain this absence of sentences by suggesting that the sentences were imperfectly recorded (pp. 60 n.80, 63 & n.99), but I find more plausible her suggestion that it was caused as much by settlements as by incompetence of the clerks (pp. 71-72).

37. *Cf.* R. HELMHOLZ, *supra* note 27, at 135-38.