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The Fine in England, the United States and Canada

William Renwick Riddell

THE FINE IN ENGLAND, THE UNITED STATES AND CANADA

By William Renwick Riddell*

The curious fact that the conveyance known in English law as the Fine[1] and in England rightly considered of great value, once seemed about to be adopted in the Province of Ontario and the United States does not appear to have been noticed by our legal writers.

The origin of the Fine is lost in the mists of antiquity—something like it existed in Saxon times and "we have an account in 1038 of a suit in which a verbal conveyance was declared in the

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[1]General Note. It may be of interest to note the manner of "levying a Fine" prescribed by the Statute of 1290, 18 Edward I, St. 4: Modus levandi Fines, Ruffhead, 124. I accept his correction of the ancient translation as stated in the Introduction, p. xxxiv—I, also, a little modernise: "When the Writ Original is, in the presence of the parties, placed before the Justices, then a Counsel (contour) shall say: 'Sir Justice "Conge daccorder" (leave to agree, licentia concordandi): The Justice shall say to him, 'What will Sir Robert give?' and shall name one of the parties. Then when they are agreed on the amount of money which is given to the King (i.e. the Post Fine or King's Silver, ten per cent. of the annual value) then shall the Justice say 'Cry the peace' and then the Counsel shall say: 'Inasmuch as the peace is licensed thus to you, William and Alice his wife, here present, do acknowledge the Manor of B. with the appurtenances (mentioned in the writ) to be the right of Robert had as by gift from them, to Have and to Hold to him and his heirs of William and Alice and the heirs of Alice as in Demesne, Rents. Seigniories, Courts, (the text reads "Counts" a clear lapsus pennae), Pleas, Purchases, Wards, Marriages, Reliefs, Escheats, Mills, Advowsons of Churches and all other Franchises and free Customs to the said Manor belonging rendering each year to Robert and his heirs as Chief Lords of the Fee, the Services and Customs due for all Services' (the Text here seems uncertain but the meaning is clear).

"And be it known that the course of the Law will not suffer that a Final Accord be levied in the Court of the King without a Writ Original and that before at least four Justices en Banc or in Eyre and not elsewhere and in presence of the parties named in the Writ who are (i.e. must be) of full age, of sound mind and out of prison. And if a married woman be one of the parties, then she must first be examined by the said four Justices: and if she do not assent the Fine shall not be levied.

"And the reason why such solemnity should be done in a Fine is that a Fine is so high a Bar and of such great Force and of so puissant a nature in itself that it concludes ('forclos,' our 'forecloses') not only those who are Parties and Privies to the Fine and their Heirs but also every one else in the world who is of full age, out of prison, of sound mind and within the four seas the day of Fine levied who does not make his claim upon the Foot (of the Fine) within a year and a day."

gemot."[2] Plowden speaks of its existence before the Conquest with perfect confidence.[3]

Indeed in the very nature of things, once you have Bookland, something in the nature of conveyance publicly, coram populo, will be a desideratum and registration expedient: and what more public than a court which it is a duty to attend and what registration more permanent than in the records of a court? The day of public registry offices was not yet anywhere and is not yet in England (except very partially).

However that may be, Glanvil in the reign of Henry II and Bracton in the reign of Henry III speak of the Fine as well-known and long established,[4] The practice was systematised by the Statute de Modo levandi Fines, (1290) 18 Edward 1.[5]

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[2]2 Holdsworth, History of English Law, 3d ed., pp. 76, 77, referring to Essays in Anglo Saxon Law, App. No. 28; Kemble, Constitutional Documents, No. 775. I should like to pay tribute to extraordinary value of Professor Holdsworth's work which need not fear comparison with Pollock and Maitland, The History of English Law, so well and favorably known.

[3]Plowden in Stowel v. Lord Zouch, (1564) 1 Plow. 353, reports that it was said "that fines have been of very great antiquity at the common law for they have been as long as there has been any court of Record." The judges were very enthusiastic in supporting the fine—because it "put a stop to contention and made peace." "Southcote, Weston, Whidon, Dyer and Catline, Justices . . . said that peace and concord is the end of all laws and that the Law was ordained for the sake of Peace. And Dyer said that for Peace Christ descended from Heaven upon the Earth, and his Law which is the New Testament and the old law which are the divine laws, were given only for peace here and elsewhere. And Weston cited St. Augustine, who says, et concordia stat et augetur respublica et discordia ruit et diminuitur. And Catline said that Peace is described in this manner, Pax, mater alma opulentiae, vehitur curru; currus, ubi pax vehitur, dicitur unanimitas; auriga, qui currum regit, dicitur amor; duo equi currum trahentes sunt concordiâ et utilitas; comites pacis sunt justitia, veritas, diligentia, industria, omnium artium parendarum."

Glanvil was cited by Catline, J., "A Judge of this Realm a long time ago for he died in the Time of King Richard 1 at the City of Aires in the Borders of Juey (i.e. Jewry) attending upon King Richard in his voyage to that Place." Bracton also is quoted at some length.

Stowel v. Lord Zouch, (1564) 1 Plow. 353, 357, 368, 369.

[4]Glanvil's great work, De Legibus et Consuetudinibus Angliae, is now believed by many to have been written by his nephew and secretary Hubert Walter, afterwards Archbishop of Canterbury, Chancellor and Justiciar. 2 Holdsworth, op. cit., 189. The passage referred to is Lib. 8. c. 1: the author adds "Contingit autem aliquando loquelas motas in Curia domini Regis per amicabilem compositionem et finalem concordiam terminari, sed ex licentia Regis vel ejus justiciarorum"—but this is certainly too narrow.

See Bracton, De Legibus et Consuetudinibus Angliae, Lib. 5, Tit. 5, c. 28—he adds: "Finis est extremitas unius cujusque rei hoc est idem in quo unaquaque res terminatur, et ideo finalis concordia quia imponit finem litibus."

The well known legal maxim, Interest republicae ut sit finis litium, was frequently invoked in olden times. cf. 2 Blackstone, Commentaries on the Laws of England 349, 350.

The Fine was a conveyance of land in the presence of the court—the court might be the King or his justices either at Westminster or itinerant, the bishop in his court, the comitatus or county court—indeed any court of record.[6]

After the Statute de Modo levandi Fines which forbade "a final Accord to be levied in the King's Court without a Writ Original," the Fine was in form the compromise of an action; but before that statute this was not always the case. For example, we find in Easter Term, 2 John (1201) a Record in Curia Regis in a Cambridgeshire case in which Philip de Sumeri defends an action concerning the third part of a knight's fee by setting up "cartam quandam Hugonis Archeri, in qua continetur quod idem Hugo . . . illam vendidit et quietam clamavit Philippo de Sumeri et heredibus suis totum jus quod habuit in ea pro x. solidis et j. pallio viridi in curia Rogeri de Sumeri . . . et Philippus interrogatus utrum illa finis facta esset per breve regis vel justiciariorum dicebat quod non fuit lis inter eos per aliquod breve sed per voluntatem utriusque"—a certain grant of Hugh Archer (the plaintiff) in which it is contained that the said Hugh sold it and quitted claim to Philip de Sumeri and his heirs all the right which he had in it for ten shillings and one green cloak in the Court of Roger de Sumeri . . . and Philip being asked whether that Fine was made by Writ of the King or the Justices said that there was no litigation between them by any Writ but (the Fine) was by mutual agreement.[7]

It is possible that this Fine might not be held valid, as we find the further entry. "Concordati sunt"—they settled; and further: "Dies datus est Philippo de Sumeri et Hugoni Archeri de placito recipiendi cirographum[8] suum a die Pasche[9] in v septimanas.

[6]Some consider that this so-called Statute was not in reality a Statute but rather a Rule of Court. Pollock and Maitland, op. cit., p., p. 94, n. 3, referring also to the Statute de Finibus Levatis, 27 Edward 1, Ibid, p. 98, n. 6, "It is to be distinguished from the unquestionable Statute de Finibus Levatis of 27 Edw. 1." Whatever it was, it was considered to have the force of a statute and I do not depart from the traditional terminology.

[6]See any of the old law writers.

[7]1 Curia Regis Rolls of the Reigns of Richard 1 and John 447, 448. It will be seen that this Fine was not "Sur cognizance de droit, come ceo que il ad de son done," the usual form in later days; but "Sur concessit." 2 Blackstone, Commentaries 352, 353.

[8]1 Curia Regis Rolls 253. "cirographum" or "cyrographum" (literally "handwriting") was the technical term, generally employed for the deed in a Fine. The terminology "levying a Fine" always employed in later times does not seem to have yet been adopted—a "Finis" is always "facta," made, never "levata," levied: and the cognizee has a day "habendi (or ad recipendum) cirographum suum" not "levandi, &c."

Philippus de Sumeri ponit loco suo Ricardum Capellanum ad recipiendum cirographum suum . . ."—a day is given to Philip de Sumeri and Hugh Archer in their action to receive their chirograph, five weeks after Easter. Philip de Sumeri appoints Richard Chaplain his attorney to receive his chirograph.[10]

But of a record in Trinity Term, 2 John, (1200), there can be no doubt:

"Oxon.' Buking.'—Hec[11] est convencio facta inter Radulfum Hareng' et Willelmum de Weberi et coram G. filio Petri capitali justiciario et Simone de Pateshull' et Ricardo Heriet et sociis eorum de tenementis subscriptis, unde tamen placitum non fuit in curia regis coram eis, scilicet quod predictus Willelmus concessit eidem Radulfo . . . Omnia hec[12] predicta tenementa predictus Willelmus et heredes sui warrantizabunt predicto Radulfo et heredibus suis [et] totum jus et clamium quod habet in terris et in feudis que[13] aliquis ei deforciat in Anglia."

Oxford, Buckingham. This is the agreement made between Ralph Hareng and William de Veber and before Geoffrey Fitz-Peter, Chief Justiciar, and Simon Pateshull and Richard Heriet and their associates concerning the tenements hereunder written in respect of which there was no plea in the Curia Regis before them, that is to say, that the said William grants to the said Ralph (here follows the agreement which I do not translate in full—in substance, de Veber grants to Hareng, his Manor, the "homagium" of certain named persons and their heirs and certain services "in wood and field, in meadows and pastures, in meres and mills . . ." for a rental of ten marks—£6.13.4—yearly, five payable at Easter and five at Michaelmas—a Fine "sur concessit"). All the said tenements the said William and his heirs will warrant to the said Ralph and his heirs (and) the right and claim which he has in the lands and fees which anyone in England may deforce him of.[14]

Pollock and Maitland's explanation of the expression, "levying a Fine" is ingenious: "It may take us back to the Frankish levatio chartae, the ceremonial lifting of a parchment from the ground . . ." 2 Pollock and Maitland, op. cit. 98. "Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the earth and thence it is solemnly lifted up or 'levied' (levatio cartae): Englishmen in later days know how to 'levy a fine.'" Ibid, 86.

[9]In these MSS., our diphthong "æ" is written "e"., e.g., Pasche for Paschæ, Hec for Hæc, que for quæ, concordie facte et concesse for concordiæ factæ et concessæ.

[10]1 Curia Regis Rolls 183.

[11]See note 9. [12]See note 9. [13]See note 9.

[14]1 Curia Regis Rolls 74. Then "for this gift and concession," Ralph acquiets William against Annora de Sancto Walterico, 100 marks.

Even at this time generally and, as we have seen, later always, in order to levy a Fine there was an action at law, very commonly though not always a collusive action. The authorities say that the usual writ was a Writ of Covenant alleging a covenant by the vendor of the land to sell it to the purchaser, although a Writ of Mesne, of Warrantia Chartae, de Consuetudinibus et Servitiis, &c, might be employed. No doubt, the Writ of Covenant was the usual writ when the action had become collusive and the Fine a mere method of conveyancing; but in earlier times, I find the Writ of Novel Disseisin, of Mort d'Ancestor, of Right, &c., all employed—and the rule came to be recognized that any original writ would answer.

The Fine might be made before the King himself generally with some of his Justices. E.g. in Hilary Term, 2 John, (1201), a Fine is set up which had been made "in curia domini regis apud Marleberge coram domino rege H. patre Rannulfo de Glanvill' Willelmo Ruffo justiciariis"—in the Court of our Lord the King at Marlbridge before our Lord King Henry II, father (of the present King), Ranulph de Glanville and William Ruffus, Justices.

Generally the King is absent and the Fine is "coram Justiciariis" either "apud Westmonasterium" or "iterantibus." Other Courts had jurisdiction: e.g., in Hilary Term, 10 Richard II. (1199) we find—

"Glouc' Dies datus est abbati de Cirencestr' et Barlet de placito concordie facte et concesse[15] coram H. Cantuariensi archiepiscopo a die Pasche[16] in xv dies ut per archiepiscopum sciatur forma concordie"[17]. Gloucestershire—A day is given to the Abbot of Cirencester and Barlet (or Barbet) concerning a plea of a Fine made and granted before Henry Archbishop of Canterbury on the Quindene of Easter that it may be known from the Archbishop what is the form of the Fine."

Sometimes the King intervened personally, and forbade a Fine to be levied. In a long Record in Eastern Term, 2 John, (1201), we have an instance of royal interference[18]: In a Sussex

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(The next entry is about a kinswoman of mine, Sibyl Ridel, who had lost her land "in manumregis" and wanted it back. There is a story about Sibyl, "but that is another story").

[15]See note 6.

[16]See note 9.

[17]See note 14. "Barlet" is properly "Barbet" (Barbectus).

[18]It was such interferences that led to the famous chapter xxix of Magna Carta: ". . . Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam." It will be seen that King John was not the first

case a complaint is made by certain men of Prunhulle (now Broomhill) that the Abbot of Battle (de Bello) and the Abbot of Robertsbridge (de Ponte Roberti) made a Fine in the Curia Regis in the time of Henry II, of a certain fen belonging to the men: they offer a fee to the King to have the matter inquired into by a jury. The Abbot of Battle comes and says that he recovered the land from the Abbot of Robertsbridge on a writ of Novel Disseisin, that the latter then brought a Writ of Right and then they made a Fine—the Abbot of Robertsbridge agreed in this. The men of Prunhulle in addition to a plea on the merits, "adicunt etiam quod Steffanus de Turnham tulit domino G. filio Petri breve regis, in quo continebatur quod finis non fieret inter eosdem abbates si esset ad nocumentum hominum de Prunhull; et inde voca(n)t ipsum dominum G. ad warantum—also said that Stephen de Turnham[19] bore to my Lord Geoffrey Fitz-Peter (Chief Justiciar) the King's Writ in which it was contained that there should be no Fine between these Abbots to the injury of the men of Prunhulle, and therein they vouch the said Lord Geoffrey to warranty. Not having this prohibitory writ in court they could not proceed—and they were not content to rely solely on it but desired to prove their plea that the Assize on the Writ of Right did not cover this fen but only a certain property called Frith, and that the Abbot of Battle the defendant did not justly occupy the fen of some fifty acres. Accordingly they paid five marks (£3.16.8) to the King for an enlargement to the Quindene of Michaelmas.[20]

Of course a fee had to be paid to the King for the Writ to begin the action—this fee called the Primer Fine (Premier or Pre-

to send prohibitory Writs to the Judges. The Record quoted is in 1 Curia Regis Rolls 467.

[19]See 1 Curia Regis Rolls 467. From other entries, it appears that Stephen de Turnham or de Thorneham was one of the Justices: 1 Curia Regis Rolls 72.

[20]The story is completed in 2 Curia Regis Rolls 102, 237, 312. In Michaelmas Term, 4 John, (1202), a Great Assize was called to determine whether the Abbot of Battle was seized in his domain of the whole fen between Swansemere and Lachene (now Chene) belonging to the Manor of Prunhulle—this was enlarged to three weeks after St. Hilary's day. In Easter Term 4 John (1203), they agreed, and a day was given "hominibus de Prumhill" per atornatos suos et Johanni abbati de Bello ad capiendum cirographum in iij septimanas post festum sancte Trinitatis"—to the men of Broomhill by their attorneys and to John, Abbot of Battle, to receive their chirograph, three weeks after the Feast of the Holy Trinity. This was again enlarged, Trinity Term, 5 John, (1203) to a month after Michaelmas.

It will be seen that the men of Broomhill and the Abbot of Battle levied a Fine.

fine) was in Blackstone's time one-tenth of the annual value of the land.[21]

Then the parties pretended to agree on terms of settlement—the concordia. As much of the royal revenue in olden times was derived from the Courts, and a litigant who failed was "in misericordia," in mercy and was liable to pay a fine to the King[22] he would lose money if an action were settled—consequently it was but just to the King that he should receive a fee for consenting to a settlement of the action. Cases were known in which a litigant withdrawing or settling without the leave of the King or his justices was fined or imprisoned.[23]

Accordingly when the consent of the King's Justices was obtained, the King became entitled to another fee, the Post Fine, often called the King's Silver, which in Blackstone's time was three-twentieths or 15% of the actual value of the land. This consent was generally called licentia concordandi and made the agreement effective.

Then came at least in later times, for I find no trace of it in the times of Richard I and John, the note of the Fine, an abstract of the Writ and the Agreement. A Statute of 1403, 15 Henry IV, c. 14, reciting that many Feet of Fines were in the treasury and the notes in the Common Bench, directed that the notes should be inrolled and remain in the custody of the chief clerk of the Common Bench.

Then the fifth step—the Foot of the Fine including the whole matter. This, from July 15, 1195, when Hubert Walter devised the form of engrossing Fines,[24] was written in triplicate by the

[21]Sellon, The Practice of the Courts of King's Bench and Common Pleas, 2d ed. gives a sufficiently full account of the practice. William Cruise's more elaborate work, An Essay on the Nature and Operation of Fines and Recoveries, 2d ed., may also be consulted (I have placed a copy in the Riddell Canadian Library at Osgoode Hall. See Note 45 infra.)

[22]In some cases the fine might be remitted for special circumstances, e.g., the poverty, or nonage of the suitor.

[23]E.g. in Hilary Term, 2 John, (1201), 1 Curia Regis Rolls 411. "Cantebr.'—Johannes de Wasingel' venit in curiam et quietos clamavit Ricardum de Wasingel' et Widonem de Fukeswrthe et Rogerum Malartes de morte patris sui, unde fecerat eos attachiari et retraxit se. Et preceptum est quod habat breve ad vicecomitae quod ipse et plegii ejus sint quieti et ut capiat corpus Johannis et mittat eum in gaoliam"—Cambridgeshire—John of Wasingale came into Court and acquitted Richard of Wasingale and Guy of Folksworth and Roger Malartes of the death of his father whereof he had had them attached and withdrew. And it was ordered that he (Richard) should have a writ to the sheriff releasing him and his bondsmen and that he (the sheriff) should take the body of said John and put him in gaol.

chirographer of the Court of Common Bench—which court had a monopoly of Fines after the differentiation following Magna Carta. Each of the parties, Conusee (plaintiff, purchaser) and Conusor (defendant, vendor) received a copy of the chirograph and the third, the real Foot of the Fine, was kept in the royal treasury.[25] An unbroken series of Feet of Fines there remains from 1195 till the abolition of Fines in 1834 by the Act, 3, 4, William IV, c. 74.

A day was given to the parties in early times to come into Court for their copy,[26] and they had to take it up or be "in mercy."

In the case of a married woman's land, she was examined apart by the justices as to her consent; and one of the main advantages of the Fine was that thus a married woman was allowed effectively to dispose of her land by joining with her husband in levying a Fine—she could not thereafter, when her husband died sue out a Writ of Cui in Vita.

Other advantages are detailed by Blackstone and the common law writers: but so far as I can find, the Fine was used on this Continent only to convey the lands of married women—and by that time the practice had become purely formal and collusive and at the same time very expensive.[27]

In the North American Colonies afterwards the Unitel States, the Fine seems to have been little used—and when used, only for the purpose of conveying the lands of married women.

In one Colony, New York, notwithstanding certain remarks in one of the cases cited below, it was in use beyond question; in another, Massachusetts, it is authoritatively stated that it was not —in some others, it seems to be doubtful.

It may be well to look at the decisions:

In *Clay v. White*,[28] Mr. Justice Roane says: "a fine . . . would be . . . effectual were it not obsolete in this country."

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[24]2 Holdsworth, A History of English Law 184. In vol. 3, pp. 223, sec., of this excellent work a very accurate and admirable account is given of Fines.

[25]In Trinity Term, 2 John, (1200), I find in a Norfolk case, William Chaplain, attorney for Roger of Brandon claiming half the advowson of the Church at Brandon under a Fine made before the Justices Itinerant, "et pedem cirographi . . . est in thesauro." 1 Curia Regis Rolls 208.

[26]For example in Trinity Term, 2 John (1200), 1 Curia Regis Rolls 197, a day is given one month after Michaelmas to the parties (named) "de recipiendo cirographo suo." "Et Eborardus habet notam, quam Galfridus Clericus de Tademerton' scripsit"—and Everard has the note which Geoffrey, the Clerk of Tademerton (in Oxfordshire) wrote.

[27]Sellon, op. cit., p. 477, says that in order to complete a Fine "they must pass through the several following offices . . . viz: the Alienation

In *Knight v. Lawrence,*[29] after stating that, "By the ancient common law the method of conveying a married woman's lands was for her to unite with her husband in levying a Fine," the court by Mr. Justice Elliot said, that[30] "the common law methods are practically obsolete in Colorado at the present time."

In *Woodbourne v. Borrel,*[31] the court refrained from expressing an opinion as to the Fine before the Revised Statutes of 1751.

In Maryland the Fine seems to have been in use before the Act of 1751.[32]

In Massachusetts, it is positively stated by Chief Justice Parsons in *Fowler v. Shearer,*[33] that estates had never been conveyed by a Fine there. Chief Justice Taylor in *Jackson v. Gilchrist*[34] says speaking of the Fine:

"It may, however, I think, be assumed that in point of fact and as a matter of practice, the common law in this respect has never been adopted with us: and it may not be amiss briefly to observe that in some of our sister states which were British Colonies and, equally with us subject to the common law, the mode of acknowledgment adopted in this case has been substantially recognized and sanctioned."

Then he says:

"I have barely referred to some cases that have arisen in other states . . . to show that the common law mode of conveyance by Fine was not in practice there, nor, most likely in any of the British American colonies."

I find some difficulty in understanding this judgment in view of other New York cases. *Rosebloom v. VanVechten*[35] speaks of the Fine being provided for by an Act of 1808 and the Revised Laws of 1813—an Act of 1828 repealed the former legislation from and after the end of 1829.

In *Jackson ex dem. Watson v. Smith,*[36] a Fine sur cognizance de droit come ceo que il ad de son done levied in 1805 was under consideration—it was held valid: In *Jackson v. Gilchrist,*[37] the

office, the Return office, the Warrant of attorney office, the Custos Brevium office, the King's Silver office and the Chirographer's office.

[28](1810) 1 Mun. (Va.) 162, 173.

[29](1894) 19 Colo. 425, 435, 36 Pac. 242.

[30](1894) 19 Colo. 425, 436, 36 Pac. 242.

[31](1872) 66 N. C. 82.

[32]Nicholson's Lessee v. Hemsley, (1796) 3 Md. 409; with this accords Hitz v. Jenks, (1887) 123 U. S. 297, 8 Sup. Ct. 143, 31 L. Ed. 156.

[33](1810) 7 Mass. 20.

[34](1818) 15 John. (N.Y.) 89, 109.

[35](1845) 5 Den. (N.Y.) 414.

[36](1816) 13 John. (N.Y.) 426.

[37](1818) 15 John. (N.Y.) 89.

question was raised whether before the Act of 1771 a married woman could convey her real estate except by a Fine. In *Albany Fire Insurance Co. v. Bay,*[38] Mr. Justice Jewett points out: "By our usages and laws we have substituted her deed for a conveyance of lands in the place of the common law mode for Fine."

In *McGregor v. Comstock,*[39] there was under consideration a Fine levied in 1827: it was held good after a learned and elaborate discussion.

The Supreme Court of the United States in *Hitz v. Jenks*[40] states that from 1715, in Maryland, "the conveyance of the estates of married women by deed with separate examination and acknowledgment has taken the place of the alienation of such estates by Fine in a court of record under the law of England."

In *First National Bank v. Roberts,*[41] is an elaborate discussion of the Fine which is called "the prototype of the more modern method prescribed by Statute," but the discussion is not helpful in the present inquiry.

Nothing of a more definite character seems available as to the prevalence of the Fine in the thirteen colonies.

In Pennsylvania as early as 1706, we find legislation which provides,[41a] "that from henceforth no woman shall be debarred of her right . . . in any lands . . . in her own right . . . sold aliened or conveyed by her husband during coverture unless she be party to such deeds . . . and be examined secretely and apart by the justice or justices . . . whether she be content of her own free will to part with her right . . ." and the justice or justices might examine as to her age. This act was disallowed by the Queen in Council, and a more comprehensive one chapter clxx, passed in February 1711 was also disallowed—I do not trace the subsequent legislation.

Coming further north into what is now Canada, I find no trace of the Fine in Nova Scotia, New Brunswick or Prince Edward Island.

In Quebec except for the short time between the Royal Proclamation of 1763 and the Quebec Act of 1774, the French Civil law prevailed which knew not the Fine.

In the territory which became the Province of Upper Canada, the French Civil law was in force in December, 1791 when

[38](1850) 4 Comst. (N.Y.) 9.
[39](1858) 17 N. Y. 162.
[40](1887) 123 U. S. 297, 301, 8 Sup. Ct. 143, 31 L. Ed. 156.
[41](1890) 9 Mont. 323.
[41a] Pa. St. at L. c. 135 sec. 3.

the new Province began its separate career and until the passage in September 1792 of the Act, 32 George III, c. 1 (U.C.) which by section 3 introduced the Laws of England in all matters of property and civil rights.

The Province was divided into four districts each with a Court of Common Pleas with full civil jurisdiction: the records of all these courts are extant[42] and no reference to a Fine being levied is to be found therein.

But in 1794, these courts were abolished and a Court of King's Bench instituted[43] with all the jurisdiction of the Courts of King's Bench, Common Bench and (as to revenue) Exchequer in England.

The Term Books of this Court which lasted till 1881 are extant: and there are to be found entries of passing Fines by married women.

In Easter Term 39 George III, Friday, April 12, 1799, the entry appears in the Term Book. Present, Elmsley, C. J., and Powell and Allcock, JJ.

"Mrs. Elmsley[44] appeared in court to pass a Fine."

In Michaelmas Term, 42 George III, Wednesday, November 11, 1801, before Elmsley, C. J., and Powell, J.

"William Jarvis, Esquire, and his wife Hannah, came into Court and suffered a Fine and Recovery, etc. to R. I. D. Gray, Esquire."[45]

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[42]Reprinted in 14 Ontario Archives Reports, (1917) pp. 25 sqg: The Records of the Court of Common Pleas for the District of Hesse including Detroit are also to be found reprinted with notes in my Michigan Under British Rule, 1760–1796, Michigan Historical Commission, Lansing, 1926.

[43]By the Act (1794) 34 George III, c. 2 (U.C.)

[44]Mrs. Elmsley was the wife of the chief justice (Term Book p. 80) —they were both English and he had been a member of the English Bar.

[45]William Jarvis was our first Provincial Secretary; his wife Hannah was born in Hebron, Connecticut, the daughter of the Revd. Samuel Peters, a Loyalist, who went to England on the outbreak of the Revolution. Robert Issac Dey Gray, was the son of Major James Gray, a Loyalist: the son received a License to practise Law under the Act of 1794 and in 1797 became our first Solicitor General. He was drowned in the "Speedy" disaster in October, 1804.

It may be of interest to note that my copy of Cruise—See Note 21, supra, was once the property of Gray—it contains on the fly leaf the following in the Solicitor-General's handwriting: "Purchased of Mr. White's auction, 15th April. 1800, 12s6d. Robt. I. D. Gray." "Mr. White" was John White, an English Barrister, our first Attorney General, 1792-1800: he was killed in a duel by John Small, January 4, 1800: the Law Society of Upper Canada desired to purchase his library but for some reason failed (probably res angusta domi), and Hon Peter Russell, White's executor sold the books by auction, April 11, 15—William Cooper whom we shall meet again being auctioneer. See my Legal Profession in

There were others but the passing of them was not recorded in the Term Books: and the parties were not quite content with any of them.

The matter came up in the Provincial Parliament.

On Monday, February 7, 1803, in the Legislative Council, almost immediately after passing the Address, Hon. James Baby, formerly of Detroit, brought in a Bill "to enable married women having real estate more conveniently to alien and convey the same." It was read that day; February 12, it was considered in Committee of the Whole, the attention of the committee was called to the Fines levied in the Court of King's Bench without all the formalities required by the practice and it was determined to validate them by legislation. Accordingly, the Bill was amended in committee so as also "to confirm and declare valid four several Fines heretofore levied or intended to have been levied in the Court of King's Bench in this Province." It passed its third Reading, February 14, and was engrossed and sent down to the Legislative Assembly. The Houses were at odds over an alleged contempt of the Assembly by David Burns, Master in Chancery in the Council, but Robert Isaac Dey Gray, the Solicitor General who was a Member of the Assembly succeeded in persuading that House to proceed with the business of the Session. February 17, the Bill went to Committee of the Whole: the next day there was no quorum but, February 22, it was reported with amendments, next day engrossed and sent up to the Council. The Council requested a Conference which was agreed to: the Assembly Conferees[46] insisted on dropping the part of the Bill validating the Fines but withdrew all other objections: the Council agreed and the Bill was passed in that form.

The solicitor general was personally interested and there was no real objection to the measure: he accordingly on Tuesday, March 1, brought in a Petition on behalf of himself and four others to validate "four several Fines" which he "together with (Chief Justice) the Honorable John Elmsley and William Cooper had been concerned in levying . . . in the Court of King's

Upper Canada, &c., Toronto, 1916, pp. 84, 151-153. The volume was afterwards the property of Clarke Gamble, K. C., and was given me by his son, H. D. Gamble, K. C., of the Toronto Bar.

[46]The conferees from the Assembly were Sheriff Macdonell, Isaac Swayze, E. Washburn, Robert Nelles, Angus Macdonell and Robert Isaac Dey Gray, Solicitor General, the two last-named being lawyers; William Hamilton and Richard Cartwright who though laymen had both been Judges of the Court of Common Pleas represented the Council.

Bench in this Province . . . being advised that the said Fines are not legal on account of the want of the necessary officers to carry through the same."

He introduced a Bill, seconded by Ralfe Clench of Niagara which passed all its Readings the same day—sent up to the Council, it there passed all its Readings that same day—and but required the Royal Assent to become law. But this was the one Bill of the Session to which His Excellency, General Peter Hunter, the Lieutenant-Governor of Upper Canada, on March 5 "was pleased to withhold his Assent to."[47]

Hunter was not a lawyer: in none of his despatches to the secretary of state is any information given of his reason for refusing the Royal Assent[48]: it was believed at the time to be due to the advice of Chief Justice Allcock—his reason has not come down to us.[49] However, in those days the governor actually governed: he had not yet become lucus a non lucendo, he had some say in legislation and was responsible to no one but the King and the Ministry at Westminster. Nothing could be done and the attempt was not again made—the defective Fines were replaced by valid conveyances under the Act now to be mentioned.

The "Act to enable Married Women having Real Estate more conveniently to Alien and Convey the Same" was assented to after being denuded of the provisions validating the Fines—and the Fine was never again resorted to.

This act[50] provided for the examination of the married women in open Court before the Court of King's Bench or any judge in chambers or at an Assize as to her consent, following closely the legislation in some of the American Colonies. There continued to be an examination of the married woman grantor in this Province until 1873 when the Legislature having got over the idea that the wife is the weaker vessel killed it[51] after a life of three score and ten years.

[47]For the proceedings in the Legislative Council see 7 Ontario Archives Reports (1910) pp. 179, 184, 185, 190, 191, 192, 198: in the Legislative Assembly, see 6 Ontario Archives Reports (1909), pp. 355, 360, 363, 364, 369, 372, 373, 374, 375, 383, 409.

[48]Canadian Archives, Q. 244, pp. 43, 49, 66, 140.

[49]There is a hint in one contemporary letter that Allcock had a grudge against Gray: another suggests a feeling against the Elmsleys—but all that is gossip, more or less malicious.

[50] (1803) 43 George III. c. 5. (U.C.)

[51]Ontario Statutes (1873) 36 Vict., c. 19, (Ont.).