but in any event the evidence of the witness Lillie is, as I have said, a sufficient ground in itself for quashing the proceedings, and acordingly in this case also the conviction will be set aside.

The other two cases (48/1932 and 42/1932) can be dealt with together. In both cases it is somewhat difficult to arrive at a clear understanding of the nature of the proceedings, but in these cases, and especially in 48/1932 where Form E has been inserted, it would appear, that even if he did so intend and there is no note of his reasoning, the Deputy Commissioner was in fact acting as in what I have termed Case 3, and in consequence his powers of punishment were limited to a sentence of six months imprisonment. But if this should not be so this Court is clearly of opinion that in the absence of evidence of previous convictions the sentences imposed are much too severe, and accordingly the Court reduces the sentence on each of the six accused to one of six months imprisonment with hard labour.

In the hearing of cases, if a conviction results, evidence of previous convictions, if any, should be given before sentence is passed. This is especially so when a case is likely to come before this Court for review, as in the absence of any such evidence this Court will be bound to assume that the conviction is for a first offence.

I add in conclusion that even if this Court had been able to sustain the convictions of Una and Alfred, the punishments inflicted would have been reduced since they appear to be much too severe. It is always a difficult matter to arrive at a just determination in awarding a sentence and it follows that it is impossible to lay down any rule, but as a guide to Deputy Commissioners this Court would advise that in the case of a first offence, a sentence should not, in the absence of special considerations, exceed six months imprisonment. It is an universal experience that heavy sentences are not *per se* deterrent in the prevention of crime, and the first object of imprisonment is reformative and educative.

KRIPA MASIH *v.* SUSANNA & OR.

[In Divorce (Maxwell Anderson C.J.) December 6, 1933.]

Divorce—covenant in deed of separation contemplating adultery—whether evidence of connivance—whether s. 45 *of the Marriage Ordinance* 1918[1] *is a reason for special covenants.*

A petitioner (who petitioned on grounds of adultery) produced a deed of separation containing the covenant " the husband raises no objection to his wife living or cohabiting with any man and consents to his wife acting accordingly." It was contended that this clause was necessary in Fiji in the case of Indians to meet the " special menace " of s. 45 of the Marriage Ordinance, 1918.

HELD.—(On the facts). That there was no evidence of connivance.

Obiter dictum.—A covenant and consent for a wife to cohabit with another man contained in a deed of separation is against public policy and not excusable on account of s. 45 of the Marriage Ordinance 1918.[1]

[1] *Vide Marriage Ordinance Cap.* 118 *s.* 46 (*Revised Edition Vol.* II *p.* 1190).

Cases referred to :—
Fearon v. Earl of Aylesford (1884) 14 Q.B.D. 792 ; 54 L.J. Q.B. 33 ; 52 L.T. 954 ; 49 J.P. 596 ; 1 T.L.R. 68 ; 27 Dig. 231.

MOTION FOR DECREE ABSOLUTE of dissolution of marriage. The facts fully appear from the judgment.
D. C. Chalmers, for the Petitioner.
Respondent and co-respondent in person.

MAXWELL ANDERSON, C.J.—This is a husband's petition for the dissolution of his marriage on account of his life's adultery with the co-respondent. The facts of the adultery were clearly proved and a decree *nisi* was granted. In moving for the decree to be made absolute, Counsel for petitioner has produced a deed of separation made between the petitioner and his wife in September, 1931, which contains *inter alia* the following covenant : " The husband raises no objection to his wife living or cohabiting with any man and consents to his wife acting accordingly." Counsel states that he has felt it his duty to produce this deed now (he had overlooked the fact of its existence at the original hearing) and he now argues that this deed does not constitute connivance between the parties.

Counsel argues that the only difference between the covenant referred to and that used in English precedents which he quotes as follows :— " The said wife may all times hereafter live apart from the said husband as if she were unmarried " is that the covenant in this case merely states explicitly what is stated implicitly in the English form. He states further that the form of covenant as in this deed is largely used in Fiji and is designed to ensure that the husband shall not at any future time after separation exercise the powers set out in s. 45 of the Marriage Ordinance (No. 2 of 1918).

Whatever may be the motive of such a covenant in terms its effect can only be to render the deed of separation liable to construction as an agreement in contemplation of adultery and as such sufficient to invalidate the deed. I adopt the language of Cotton, L.J., in *Fearon v. Earl of Aylesford* (14 Q.B.D. 792 at p. 808) and say that if a deed of separation is prepared and so constructed as to enable a woman to commit adultery with impunity and it was a deed executed with that object no doubt that deed would be against public policy.

This should make it clear that the covenant in the deed in this case is not an explicit statement of what is to be found implicit in the English form. The words " as if she were unmarried " do not confer on the wife a licence or leave to commit adultery with impunity but mean that she shall live free from marital control, shall not be bound to cohabit with her husband and that the deed shall be the answer to any suit for restitution of conjugal rights or for desertion.

But be that as it may I am satisfied that in this case the deed of separation with its covenants was not executed in circumstances showing conduct which would amount to connivance at the wife's adultery and accordingly the decree will be made absolute.

In view however of the argument of counsel that because there are a great number of deeds of this nature in existence and because they have been so drawn to meet what he terms " special menace of the law in Fiji," i.e., s. 45 of the Marriage Ordinance, therefore this Court should construe the form as merely negativing the effect of the section

and not intended connivance—in other words as meant "to secure complete freedom for the woman and place her in the position of an unmarried woman as the English form does" it seems to be desirable to add a few observations.

I emphatically reject the suggestion that the English form in any way has the same effect as the covenant now under discussion. I have explained above what the English form does mean, and need only repeat that the words therein used do not constitute a licence to commit adultery. The local form does, in effect, constitute such a licence and if the words are really intended to meet the provisions of s. 45 of the Marriage Ordinance, they appear to me not merely clumsy but also ineffective in many cases which will come readily to the mind. If it be necessary, which I doubt, to insert in a deed of separation some provision safeguarding a party against possible proceedings under the Marriage Ordinance there is no difficulty in drafting a suitable form of words which, while having the desired effect, will not leave a party in a divorce action open to the charge of connivance and perhaps deprive him of desired relief.

It is further to be observed that although this covenant is stated to be inserted in the deed to provide against possible consequence arising out of the Marriage Ordinance yet there also appears another covenant as follows: "The husband will not institute or consent to the institution of any proceedings under s. 45 of the Marriage Ordinance No. 2 of 1918." If Counsel's argument is correct then this further covenant is a mere redundancy. I need not pursue the matter other than to repeat that the deed in form—and as I am told commonly in use—is objectionable and should be revised. Admittedly the presumption of law is against the existence of connivance but such presumption is rebuttable and when the deed of separation is produced to the Court, as it always should be if in existence, the circumstances of time and conduct surrounding its execution will have to be considered.

JAINAB *ats.* POLICE.

[Appellate Jurisdiction (Maxwell Anderson, C.J.) February 7, 1934.]

Prosecution under Native Trespass Ordinance[1]*—Claim to title by defendant—whether a claim to title ousts Magistrate's jurisdiction in proceedings under the Native Trespass Ordinance.*

Jainab, who was the lessee under a lease for 21 years of certain native land, which expired on January 18, 1933, applied for an extension in June, 1932—six months before the date of expiration of the lease—under s. 15, Native Lands Ordinance, 1905. A valuation of the improvements was made in December, 1932, shortly before the expiration of the lease, and the value was fixed at £68. Jainab continued to occupy the land after the expiration of the lease, but the native owners refused to give an extension of the lease. On March 20, 1933, the Governor in Council made an order for the native owners to pay £68 compensation within four months. On July 5, 1933, Jainab ten-

[1] *Cap.* 87.