1898.
October 29.

MENDIS *v.* CORNELIS *et al.*

D. C., Tangalla, 12,139.

Charges of theft and house-breaking for theft—Separate offences—Separate punishments—Power of District Court—Penal Code, ss. 440 and 369—Criminal Procedure Code, s. 67.

It is open to the District Court to pass two separate sentences for the offences of house-breaking with intent to commit theft and of theft.

Meedin v. Kirihatana (*2 N. L. R. 157*) considered and doubted.

IN this case, the three appellants with three others were brought up before the Police Magistrate of Tangalla on two charges of house-breaking for theft and theft, when the Magistrate, who was also District Judge, exercised the powers conferred on him by Ordinance No. 8 of 1896 and tried the case as District Judge. He found the three appellants guilty of each of those offences, and sentenced each accused to three months and six months, respectively, under sections 440 and 369.

W. Pereira, for appellants.

Van Langenberg, for respondents.

BONSER, C.J., quashed the convictions and sentences on the ground that the trial was not satisfactorily conducted, and directed the case to be re-tried before the District Judge with assessors.

Dealing with the argument of the appellants, that if both charges were held to be established the District Judge should have punished them only for the principal offence, his Lordship delivered the following judgment :—

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An objection on a point of law was taken on the part of the appellants. The accused were charged and convicted of house-breaking with the intention to commit theft and of theft, and they

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were sentenced for the first offence to three months' rigorous imprisonment and for the second offence to six months. It will be noted that the combined sentence is well within the jurisdiction of the District Court; but it was argued that it was wrong to award separate punishments for these offences. Reliance was placed on the case of *Meedin v. Kirihatana* (*2 N. L. R. 157*) decided by my brother LAWRIE, where he is reported to have said that a separate sentence for house-breaking by night with intent to commit theft and also for theft committed on the same occasion was contrary to section 67 of the Penal Code. I think there must be some mistake about this, because section 67 has nothing to do with a case of this kind, since theft and house-breaking by night with intent to commit theft are distinct offences, although they occurred on the same occasion. A man may break into a house to commit theft, and may then repent and desist from carrying out his original design. Again, a man may commit theft in a dwelling-house without breaking into it. The view I take of it is the view taken by two High Courts of India: the High Courts of Bombay and Madras. The High Court of Bombay held that when a Magistrate convicted a man of house-breaking by night to commit theft and of theft in a dwelling-house, and sentenced him for the two separate offences to a punishment, which in the aggregate exceeded his powers as a Magistrate, he was justified in so doing, and they held that section 71 of the Indian Penal Code, which corresponds to our section 67, had no application to the case. That case was followed by the Madras High Court in the case of the *Queen v. Nirichan* (*12 Madras 36*), where the offences were house-breaking by night to commit mischief and assault, and mischief and assault. They held that it was legal to award several punishments for each of those offences.

There is a case reported in *1 N. L. R. 320* decided by my brother WITHERS, which, as I understand it, is not inconsistent with the view I take of the law. All I understand that was decided there is that under the circumstances of the case the punishment awarded was too severe. It is not only not inconsistent, but distinctly expresses that the law is as I hold it to be, for in that case the accused was convicted of house-breaking by night and committing theft at the same time. The District Court awarded two years for the first offence and two for the second. It was held in appeal that the District Court was competent to pass those sentences exceeding in the aggregate the punishment which, in its ordinary jurisdiction, it was competent to inflict, because the offences were distinct offences (see section 18 of the Criminal Procedure Code, 1883).