1948 *Present :* **Basnayake J.**

KANDIAH, Appellant, *and* RAMALINGAM *et al.*, Respondents.

S. C. 1,203—M. C. Chavakachcheri, 24,744.

Criminal Procedure Code—Order for payment of compensation—Frivolous and vexatious complaint—Does appeal lie ?—Section 253 (B).

No appeal lies from an order for the payment of compensation under section 253 (B) of the Criminal Procedure Code.

[1] *(1941) 43 N. L. R. 192.*

APPEAL from a judgment of the Magistrate, Chavakachcheri.

H. W. Tambiah, with *S. Sharvananda*, for the complainant, appellant.

No appearance for the respondent.

Cur. adv. vult.

March 3, 1948. BASNAYAKE J.—

On a written complaint made by the appellant one Sinnappu Kandiah under section 148 (1) (*a*) of the Criminal Procedure Code six persons by name S. Ramalingam, K. Sivalai, S. Kandan, S. Vaddan, S. Kanapathy and V. Poothan were charged and tried by the learned Magistrate, who is also a District Judge, under section 152 (3) of the Criminal Procedure Code on charges of being members of an unlawful assembly and committing criminal trespass and theft of praedial produce, offences punishable under sections 140, 143, 367 and 368 of the Penal Code.

The appellant and the accused were represented by their respective pleaders. In the course of the trial after the appellant and one witness for the prosecution had given evidence the pleader for the appellant was, on his own motion, permitted by the learned Magistrate to withdraw the case in order that the appellant may seek his civil remedy.

Thereafter the learned Magistrate made the following record :—

"I call upon the complainant under section 253 (B) to show cause why Crown costs and compensation should not be ordered against him as his action is frivolous and vexatious and appears to be false. He states 'I am entitled to the land on a lease and thought I was entitled to the land *bona fide*. As the accused criminally entered and obstructed me, I filed the action.' I cannot accept it. I order him to pay Rs. 5 as Crown costs and Rs. 10 to each of the accused."

Counsel for the appellant contends that his right of appeal against the order to pay compensation is not affected by sub-section (4) of section 253 (B) which takes away the right of appeal against any order for payment of Crown costs. He relies on the case of *Ratnapala Terunanse v. Marthelis Perera*[1] in which Grenier J. following the decision in *De Silva v. Gregoris*[2] and *99 P. C. Panadura 29,561*[3] dealt with an appeal from an order for the payment of compensation under section 197 (3) of the Criminal Procedure Code, No. 15 of 1898, on the footing that there was a right of appeal.

I am afraid I cannot uphold the contention of counsel. A close examination of section 253 (B) reveals that the provision of sub-section (4) is a bar not only to an appeal against an order for the payment of Crown costs, but also against the order for the payment of compensation in a case where such an order is made. Before elaborating what I have said I shall quote the section in full. It reads :—

"(1) If in any case instituted on complaint under section 148 (1) (*a*) which a Magistrate's Court has power to try, a Magistrate acquits or discharges the accused and declares that the complaint was frivolous

[1] *(1909) 2 Weerakoon's Reports 78.* [2] *(1906) 1 A. C. R. 29.*
[3] *S. C. Minutes 26th February 1909.*

or vexatious, it shall be lawful for such Magistrate to order the complainant to pay by way of Crown costs a sum not exceeding five rupees, and he may, in addition, at the same time, order the complainant to pay to the accused or to each of the accused when there are more than one, such compensation not exceeding ten rupees to each person as the Magistrate shall think fit, which sum if paid or recovered shall be taken into account in any subsequent civil suit relating to the same matter.

(2) Any sum awarded under this section shall be recoverable as if it were a fine, and if it cannot be recovered, the imprisonment to be awarded shall be simple and for such term not exceeding in the case of a sum awarded by way of compensation thirty days, and in the case of a sum awarded by way of Crown costs fourteen days, as the Magistrate directs at the time of awarding such sum.

(3) Before making any such order the Magistrate shall record and consider any objection which the complainant may urge against the making of the order, and if he makes such order, he shall record his reasons for making the same.

(4) No appeal shall lie against any order for payment of Crown costs."

It will be seen from the foregoing that an order for payment of Crown costs can be made only if, after acquitting or discharging an accused, the Magistrate declares that the complaint was frivolous or vexatious. In a case where a Magistrate makes an order for the payment of Crown costs he may in addition at the same time make an order for the payment of compensation.

An order for payment of Crown costs can exist without an order for the payment of compensation, but an order for the payment of compensation cannot exist without an order for the payment of Crown costs. If then the statute forbids an appeal against the order for the payment of Crown costs which is a *sine qua non* for the order for payment of compensation it cannot in my view be claimed that the order for payment of compensation escapes the prohibition in sub-section (4). In my opinion when the legislature took away the right of appeal against an order for the payment of Crown costs the right of appeal against all orders dependent thereon ceased. Any other view would have the effect of nullifying the statute. If in every case in which an order for the payment of compensation is made an appeal were to lie it would amount to allowing a right of appeal against the order for the payment of Crown costs. For, the order for the payment of compensation cannot be disturbed without at the same time disturbing the order for the payment of Crown costs as they both rest on the same foundation, viz., the acquittal or discharge of the accused and the declaration that the complaint is frivolous or vexatious. A construction which renders the express provisions of a statute nugatory and defeats its very object is unacceptable and must be rejected in favour of that which gives effect to the statute.

The decided cases including the one cited by counsel do not appear to take into account the wide difference between section 236 of the Criminal Procedure Code of 1883 and Sections 197 and 198 of the Code

of 1898. The decisions under the former provision seem to have been accepted as binding even after 1898 when it was replaced by the widely different provisions of the Criminal Procedure Code of that year which are now embodied in section 253 (B).

As the conclusion I have formed is against the current of authority I shall briefly discuss the cases under two categories, viz.—

(*a*) those under the Criminal Procedure Code of 1883, and

(*b*) those under the Criminal Procedure Code of 1898.

The decisions under the Criminal Procedure Code of 1883 are reconcilable with the provisions of section 236 of that Code which reads :—

> " If in any case instituted on complaint, a police magistrate acquits the accused under section 223 or section 232, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay to the accused, or to each of the accused when there are more than one, such compensation, not exceeding ten rupees, as the police magistrate shall think fit.
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> The sum so awarded shall be recoverable as if it were a fine. Provided that, if it cannot be realized, the imprisonment to be awarded shall be simple, and for such term not exceeding thirty days, as the police magistrate directs at the time of awarding compensation. In any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.
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> If in any case enquired into or tried before a police magistrate the complaint be not proceeded with within such time as the police magistrate may deem reasonable, or if the complaint is declared by the magistrate to have been frivolous, it shall be lawful for such police magistrate to make an order for the complainant to pay by way of Crown costs a sum not exceeding five rupees, such sum to be recovered as if it were a fine ; and against such order there shall be no appeal."

The above provision has three distinct limbs. The first authorises a magistrate to award compensation in a case in which he is of opinion that the complaint is frivolous or vexatious. The second goes to prescribe the method of recovery of the compensation. The third and last provides for the cases in which Crown costs may be imposed, and declares *uno flatu* that there shall be no appeal from an order to pay Crown costs.

The cases of *Hendrick v. Babun*[1] and *Kanapathipillai v. Vellayan and another*[2] which hold that the prohibition against an appeal from an order to pay Crown costs does not extend to an order to pay compensation under section 236 (1) have, in my opinion, if I may say so with the greatest respect, been rightly decided. But they cannot be regarded as binding on the interpretation of section 253 (B) as they are decisions on section 236 of the Code of 1883 which is so different from it. The only other reported decision which falls within this period is *Janse v. Costa* [3] wherein Justice Lawrie holds that an appeal lies from an order to pay

[1] *(1885) 7 S. C. C. 49.* [2] *(1886) 7 S. C. C. 200.*

[3] *(1897) 2 N. L. R. 299.*

Crown costs in a case in which the order is made without jurisdiction. I find myself unable to agree with this decision, for I cannot see how a person aggrieved by an order made without jurisdiction can obtain a remedy which is expressly denied to one aggrieved by the same order when made with jurisdiction. The remedy of a person aggrieved by an order to pay Crown costs when made without jurisdiction is *certiorari*.

When the Criminal Procedure Code of 1898 replaced the Criminal Procedure Code of 1883 section 236 of the latter Code was replaced by the following provisions of the former :—

"197 (1) If in any case instituted on complaint under section 148 (1) (*a*) which a Police Court has power to try a Magistrate acquits or discharges the accused and declares that the complaint was frivolous or vexatious, it shall be lawful for such Magistrate to order the complainant to pay by way of Crown costs a sum not exceeding five rupees, and he may in addition at the same time order the complainant to pay to the accused, or to each of the accused when there are more than one, such compensation not exceeding ten rupees to each person as the Magistrate shall think fit, which sum if paid or recovered shall be taken into account in any subsequent civil suit relating to the same matter.

(2) Any sum awarded under this section shall be recoverable as if it were a fine and if it cannot be recovered the imprisonment to be awarded shall be simple and for such term, not exceeding in the case of a sum awarded by way of compensation thirty days and in the case of a sum awarded by way of Crown costs fourteen days, as the Magistrate directs at the time of awarding such sum.

(3) Before making any such order the Magistrate shall record and consider any objection which the complainant may urge against the making of the order, and if he makes such order he shall record his reasons for making the same.

198. No appeal shall lie against any order for payment of Crown costs."

Though these two sections were repealed in 1921 they were combined and re-enacted at the same time as section 253 (B). I am unable to reconcile the decisions under the Code of 1898* which hold that an order for the payment of compensation under section 197 is appealable with the plain words of section 198 when read with section 197. Some of them† seem to proceed on the same footing as *De Silva v. Gregoris* [1] and hold that the decisions of this Court under section 236 of the Criminal Procedure Code of 1883 are binding. Others ‡ proceed on the basis of *Gunasekera v. Dines Appu* [2] which holds that although the right of appeal from an order for the payment of Crown costs has been expressly taken away

[1] (*1906*) *1 A. C. R. 29.* [2] (*1905*) *2 Bal. Rep. 69.*

* *Silva v. Joana (1905) 2 Bal. Rep. 60.*
Gunasekera v. Dines Appu (1905) 2 Bal. Rep. 69.
De Silva v. Gregoris (1906) 1 A. C. R. 29.
Bastian Perera v. Peiris Appu (S. C. Minutes of 26/2/1909—P. C. Panadure 29,561).
Suppramaniapattar v. Muthiahpattar (1912) 6 Leader 34.
Nomis v. Tamel (1914) 17 N. L. R. 265.
Ratnapala Unnanse v. Marthelis Perera (1909) 2 Weerakoon 78.

† *Bastian Perera v. Peiris Appu S. C. M. 1909—P. C. Panadure 29,561.*
Ratnapala Unnanse v. Marthelis Perera (1909) 2 Weerakoon 78.
Gunasekera v. Dines Appu (1905) 2 Bal. Rep. 69.

‡ *Suppramaniapattar v. Muthiahpattar (1912) 6 Leader 34.*
Nomis v. Tamel (1914) 17 N. L. R. 26[illegible]

in the absence of a similar provision in regard to an order for the payment of compensation an appeal lies; still others following *Janse v. Costa* (*supra*) and *Silva v. Joana*[1] hold that an appeal would lie even from an order to pay Crown costs if the order is made without jurisdiction. From all these decisions I beg most respectfully to differ for reasons given hereinbefore in my observations under section 253 (B). Though, on the question of the right of appeal, I have reached a conclusion against the appellants and must therefore reject the appeal. I shall examine the case in the exercise of the powers conferred on this Court by section 357 of the Criminal Procedure Code in view of the fact that the previous decisions of this Court hold that an appeal lies from an order to pay compensation under the provision of the Code of 1898 which is almost the same as the present section 253 (B).

The complainant came into Court on the footing that the accused forcibly harvested the paddy crop of the field he had cultivated, and removed the paddy. In the course of his evidence he admitted that although the first accused was not present he had informed the Kirama Vidane that he saw the first accused reaping. The complainant also claimed that he possessed the field and cultivated the crop that had been harvested. The Kirama Vidane stated in evidence that the complainant and the accused (he does not say which accused) were in possession of the land since June, 1946. He also stated that he saw the accused ploughing the land after June, 1946, when the accused disputed the complainant's right to cultivate the field. It was after this witness's evidence that the proctor for the complainant moved to withdraw the case with a view to institute a civil action.

In this state of the facts I am not prepared to say that there is no evidence to support the view formed by the learned Magistrate.

Learned counsel for the appellant urged that the learned Magistrate's record indicated that he had not appreciated the difference between a false case and a vexatious case. Although the learned Magistrate at one stage says the charge appears to be false and later characterizes it as absolutely false he leaves no room to doubt that in his view it was vexatious. In *Searinno v. Muttusamy*[2] (3 Judges) Justice de Sampayo observes at p. 114 :—

> " It is undoubtedly true that every false case is not necessarily vexatious. The complainant may prefer the charge on the information of others, and the falsity of the charge may not for that or some other reason be known to him, and the charge may be made, not with the intention of harassing the accused, but with a view to justice. In such cases the complainant will hardly be guilty of vexatious prosecution. But if the facts constituting the charge are deposed to by the complainant as from his personal knowledge, and the charge turns out to be false, and is shown to have been made with the deliberate intention, not merely of punishing the accused, but of harassing him, I think the proceedings are vexatious in every sense of the word, and are within the statutory provision of section 197 (1). "

The action of the complainant in this case, when examined in the light of the meaning given to the expression " vexatious " by Justice de Sampayo, affords no ground for interference with the order of the learned Magistrate.

[1] *(1905) 2 Bal. Rep. 60.* [2] *(1917) 20 N. L. R. 111.*

I cannot refrain from drawing the learned Magistrate's attention to his omission to observe meticulously the requirements of sections 195 and 253 (B) of the Criminal Procedure Code in that he has not recorded a verdict of acquittal. Section 195 requires that it should be done when permission is given to withdraw a case. Section 253 (B) also requires that an order of acquittal or discharge should precede a declaration that a complaint is frivolous or vexatious. These omissions have not in this instance in my view occasioned a failure of justice. I affirm the order of the learned Magistrate.

Order affirmed.