trates the potentialities of the relatively new S. 181 of the Companies Act, 1965, the difficult issues which this section may give rise to and the way these issues have been resolved or at least adverted to. S. 181 is without doubt a brave new weapon for minority shareholders whose full use has yet to be carefully but purposely charted by future cases.

Of the full impact and ramifications of S. 181, Afterman theorised as follows:

> "It may be said of S.181 (and similar provisions) that it is so broad and open ended that it is difficult, if not impossible, to anticipate what type of actions would fall under the categories of "oppression", "disregard of interest", "unfair discrimination", and "prejudice". The fact that all four of these terms have been used in the same section indicates that they are to be interpreted separately. Under S.C.A., S.181, [i.e. Singapore Companies Act] therefore almost all internal corporate disputes are judically cognizable, and almost any remedy is permissible."[29]

Re Kong Thai Sawmill (Miri) Sdn. Bhd. shows how true the above last sentence is.

M.H.K. Lim*

Sau Soo Kim v. *Public Prosecutor*[*]
AUTREFOIS ACQUIT DOUBLE JEOPARDY

One of the fundamental liberties provided in the Malaysian Constitution is that a person who has been acquitted or convicted shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted – clause (2) of article 7.

This common law rule against double jeopardy or better known as autrefois acquit or autrefois convict has been reiterated by the Criminal Procedure Code F.M.S. Cap. 6 in section 302(i) which provides:

> "A person who has been tried by a court of competent jurisdiction for an offence and acquitted of such offence shall, while such acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge

[29] *Company Directors and Controllers*, (1970) p. 222.

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[*] [1975] 2 M.L.J. 134.

from the one made against him might have been made. . ."

The principle upon which a plea of autrefois acquit should be dealt with was stated by Lord Reading in the case of *Rex* v. *Barron* (10 Cr. App. R. 81 at p. 87). He said: "The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus, an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter."

The principle is also stated in Archbold's Criminal Pleading, Evidence and Practice, 34th ed., p. 147 in these words: "The principle on which the right to plead autrefois acquit depends is that a man may not be put twice in jeopardy for the same offence. . ."

In *Sau Soo Kim* v. *Public Prosecutor* [1975] 2 M.L.J. 134, the appellant and one Tan Soo Har were jointly charged for an offence under the Firearms (Increased Penalties) Act, 1971. At the conclusion of the trial the appellant was acquitted but Tan Soo Har was convicted. Subsequently, Tan Soo Har appealed to the Federal Court and the Court declared the trial a nullity. The appellant and Tan Soo Har were later separately tried and on different charges for offences arising out of the same facts and circumstances as the earlier case. The appellant pleaded guilty and was convicted accordingly. Subsequently, the appellant appealed to the Federal Court stating as one of his grounds the defence of autrefois acquit and quoted section 302(i) of the Criminal Procedure Code.

The questions to be considered here are first, whether the trial court was of competent jurisdiction; secondly, whether when the second charge was brought against the appellant the acquittal was still in force; and thirdly, whether the second charge which was brought for a different offence but based on the same facts could be defeated by the defence of autrefois acquit.

On the question whether the trial court was competent, the Federal Court referred to a Privy Council case of *Yusofalli Mulla Noorboy* v *The King* (AIR 1968 S.C. 147). That case discussed the effects of section 403 of the Indian Criminal Procedure Code which is in pari materia with section 302 of our Code. The trial there was held to be a nullity because the court was not of competent jurisdiction. In the present case, the ground for nullity of the trial was not known. Ali F.J., when discussing this issue, referred to Sir John Beaumont's judgement in *Yusofalli's* case at pg. 266 on section 403(1) of the Indian Criminal Procedure Code as follows: "The whole basis of section 403(1) is that the first trial should have been before a court competent to hear and determine the case and to

record a verdict of conviction or acquittal."

One of the grounds of nullity is want of competent jurisdiction. There may be others. But his lordship directed his mind only to the first ground when, referring to the quotation by Sir John Beaumont, he said: "If that is also the basis of section 302(i) of our Code then it is implicit from the order of the Federal Court declaring Tan's trial a nullity that the court before which the trial was held was not a court of competent jurisdiction within the meaning of the subsection." It is difficult to perceive the underlying reason of this conclusion of his Lordship. Does his Lordship mean to say that all courts are of incompetent jurisdiction if the trials that they conduct are declared to be null and void?

Suffian L.P., (dissenting) was of the opinion that *Yusofalli's* case is distinguishable. There the accused could have been tried only if the prosecution had obtained a proper sanction, which they had not done. Here, on the other hand, there was no question of sanction to prosecute. The prosecution was valid and therefore the trial court was one of competent jurisdiction. The other reasons referred to above might have been responsible for nullifying the earlier trial and these do not affect the competency of the court.

Was the second charge brought when the acquittal was in force? To answer this, there is need to look into the effects of the nullity order made by the Federal Court. The learned Chief Justice of Borneo held that since Tan Soo Har and the appellant were tried jointly and as a result of that joint trial Tan appealed and the Federal Court declared it a nullity, it logically followed that no order made in such trial by the trial court would be of any effect. On the other hand, there is need to look at the order of nullity made after the hearing of the appeal. It said: "This court doth declare that the trial of the appellant (Tan Soo Har) is a nullity and it is ordered that the conviction and the sentence imposed upon the appellant be and are hereby set aside." The present appellant's name was overlooked and Suffian L.P. rightly pointed out that this formal order of the Federal Court referred only to the trial involving Tan Soo Har and it did not purport to quash the acquittal of the appellant.

In this case, the majority of the Federal Court held that the earlier trial was a nullity and it followed that the nullity order covered the acquittal of the appellant as well. It is interesting to note that the Court overlooked the fact that at the hearing of the appeal, the present appellant Sau Soo Kim was not present in the court. The order of nullity which purportedly affects the appellant was made without his being given the opportunity to be heard. Could this very important principle of natural justice be ignored? The writer respectfully submits that a breach of the rulles of natural justice should not be ignored and treated lightly and in this case Sau Soo Kim ought to be acquitted even if the nullity order should cover the first acquittal.

It may be possible that emotional considerations could have interfered with a clear view of the facts. The current security situation in this country might have prompted the court's decision. Nevertheless, it cannot be denied that even when the country is in a state of Emergency, the rules of natural justice and, particularly, the audi alteram partem rule should be observed.

Although the second charge against the appellant was not similar to the first one, it was formed on the basis of the same facts and circumstances as the earlier case. It would appear that the defence of autrefois acquit was available to the appellant after all. The words of section 302(i) of the Criminal Procedure Code are self-explanatory and there was outright contravention.

In *Jagjit Singh* v. *Regina* [1962] M.L.J. 326, Chua J. held that "[T]he only cases in which a previous acquittal can effectively be pleaded in bar to a subsequent indictment are: —

(i) where the acquittal was for the exact offence charged in the subsequent indictment; or

(ii) where the subsequent indictment is based on the same acts or omissions in respect of which the previous acquittal was made and some statute directs that the prisoner shall not be tried or punished twice in respect of the same acts or omissions."

The English situation as to same facts and circumstances is slightly different. For this, reference may be made to the case of *Connelly* v. *DPP* (1964) 2 All. E.R. 401. The appellant took part in an armed robbery. In the course of that robbery one of the robbers shot and killed a man. Clearly those facts were capable of giving rise to two charges against the appellant — murder and robbery. He was tried and convicted of murder, but by reason of a misdirection this conviction was quashed by the Court of Criminal Appeal. He was subsequently charged for robbery.

Lord Reid observed: "Refusal to allow a new trial has always been put on the ground of fairness to the accused and I cannot see why, if it is unfair to allow a retrial for the same offence, it is fair to allow a fresh trial on the same facts merely because the offence now charged is different.

"I must, however, take the law as I find it. Numerous authorities show that many generations of Judges have seen nothing unfair in holding that the plea of autrefois acquit must be given a limited scope. . . it has been held proper in a very large number of cases to try a man a second time on the same criminal conduct where the offence charged is different from that charged at the first trial."

It is fortunate that in Malaysia the wider scope has been incorporated into the Criminal Procedure Code.

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Director-General of Inland Revenue v. *L.C.W.*[1]

STOCK VALUATION:

Stock valuation for income tax purposes has always raised complex points of law. *Director-General of Inland Revenue* v. *L.S.W.* raises the question whether a transfer of a fixed asset of a business to the trading account should be made at the original cost of the asset when purchased or the market value of the asset at the time of transfer to the trading account.

The facts in brief are as follows. L.C.W., a businessman dealing in timber and rubber, bought a piece of land for $20,000 in 1953. This piece of land was subsequently surrendered to the Government by a Deed dated 21st May, 1958 in exchange for another piece of land. The taxpayer's intention was to construct flats on the land for the purpose of renting them out as an investment. He had no intention of developing the land for sale or to construct flats thereon for sale. In 1963 plans for construction of the flats were approved by the Town Board and by 1966 the building of the flats were approved by the Town Board and by 1966 the building of the flats were completed. Out of a total of 24 flats built 19 were sold as at 30th June, 1967. The financial year of the taxpayer ended on 30th June. The land which was always recorded as a fixed asset of the sole proprietorship was transfered from the fixed asset account to the trading account wherein the value thereof was entered at the market value in 1963, that is, $480,000.00.

Two points of law arose from the above set of facts, namely, (i) whether the taxpayer was carrying on a trade or an adventure or concern in the nature of a trade, and if so (ii) whether for purposes of computing the trading profits the value of the land should be taken as $20,000 (the actual purchase price in 1953) or $480,000/= the market price in 1963.

No comment is made in this note on point (i) that is, the finding of the Federal Court that the profits from sale of the flats are assessable under Section 4(a) of the Income Tax Act, 1967 as being profits from a business for the reason that this is not the first case in Malaysia on the subject of what constitutes trading and there is sufficient authority to support the decision.

Point (ii) cited above calls for comment for the reason that it is the first time that Section 35 of the Income Tax Act, 1967 has been judicially considered. Further, there is a lack of case law authority on the point raised.

Lee Hun Hoe, C.J. Borneo, who delivered the only detailed judgement based his conclusion that the market value is the proper value to be taken on the ground that the phrase "its cost price to the relevant person" in the

[1] [1975] 1 M.L.J. 250.