

THE COMPANIES ACT, 2013

COMPANY: MEANING AND ITS FEATURES

SECTION 2(20) OF THE COMPANIES ACT, 2013 defines the term company. "Company means a company incorporated under this act or under any previous company law"

In the words of professor Haney "A company is an incorporated association, which is an artificial person created by law, having separate legal entity, with a perpetual succession and a common seal".

FEATURES OF COMPANY:

- ♣ **SEPARATE LEGAL ENTITY:** A member does not even have an insurable interest in the property of the company.
- ♣ **PERPETUAL SUCCESSION.**
- ♣ **LIMITED LIABILITY:**
 - (i) **Company limited liability by shares:** To the **unpaid amount** of the shares.
 - (ii) **Company limited by guarantee:** The **members are liable only to the extent of the amount guaranteed by them and that too only when company goes into liquidation.**
 - (iii) **Unlimited company:** The liability of members is **unlimited.**
- ♣ **ARTIFICIAL LEGAL PERSON**
- ♣ **COMMON SEAL:** **Common seal is optional for the company, the company does not have a common seal, the authorization shall be made by two directors or by a director and the Company secretary, wherever the company has appointed a company secretary.**

CORPORATE VEIL THEORY

- ♣ **CORPORATE VEIL:** The term corporate veil refers to the concept the members of a company are shielded from liability connected to the company's actions. If the company incurs any debt or contravenes any laws, the corporate veil concept implies that members should not be liable for those errors. In other words, they enjoy corporate insulation. Thus, the shareholders are protected from the acts of the company.
- ♣ **LIFTING OF CORPORATE VEIL:** The following are the cases where company law disregards the principal of corporate veil and that too, when questions of control are involved rather than merely a question of ownership.
 - (1) **To determine the character of the company i.e. to find out whether co-enemy or friend.**
 - (2) **To protect revenue/tax:**
 - (a) **Where corporate entity is used to evade or circumvent tax**
 - (b) **Where the company was formed and shares was purchased to transfer the income by way of dividend and interest.**
 - (3) **To avoid legal obligation.**
 - (4) **Formation of subsidiaries to act as agent.**
 - (5) **Company formed for fraud/improper conduct or to defeat law.**

CLASSES OF COMPANIES UNDER THE ACT

♥ ON THE BASIS OF LIABILITY:

- ♦ **Company limited by shares:** When the liability of the members of a company is limited by its MOA to the amount unpaid on the shares held by them.

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- ◆ **Company limited by guarantee:** When the liability of the members of a company is limited by its MOA to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up.
- ◆ **Unlimited company:** A company not having any limit on the liability of its members. In such a company, the liability of a member ceases when he ceases to be a member.

♥ **ON THE BASIS OF MEMBERS:**

- ✦ **ONE PERSON COMPANY:** OPC is a private limited company with the minimum paid up share capital as may be prescribed and has at least one member.

Significant points:

- Only one person as member.
- Minimum paid up capital – no limit prescribed.
- The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with the registrar of companies at the time of incorporation.
- Such other person may be given the right to withdraw his consent.
- The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the registrar.
- Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- **Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 120 days during the immediately preceding financial year)-**
 - Shall be eligible to incorporate a OPC;
 - Shall be a nominee for the sole member of a OPC.
- ♠ No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- ♠ No minor shall become member or nominee of the OPC or can hold share with beneficial interest.
- ♠ Such company cannot be incorporated or converted into a company under section 8 of the act. Though it may be converted to private or public companies in certain cases.
- ♠ Such company cannot carry out NBFC including investment in securities of anybody corporate.
- ♠ OPC cannot convert voluntary into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.
- ♠ If OPC or any officer of such company contravenes the provisions, they shall be punishable with the fine which may extend to ten thousand rupees

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and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

❖ **PRIVATE COMPANY:** Means a company having a minimum paid-up share capital as may be prescribed, and which by its articles-

i. *Restrict the right to transfer its shares;*

ii. *Except in case of OPC, limits the number of its members to two hundred:*

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purpose of this clause, be treated as a single member:

Provided further that-

(a) *Persons who are in the employment of the company; and*

(b) *Persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and*

iii. *Prohibits any invitation to the public to subscribe for any securities of the company;*

SMALL COMPANY: Which means a company other than a public company-

(i) *Paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than **ten crore** rupees: and*

(ii) *Turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than **one hundred crore** rupees:*

Exceptions: this section shall not apply to:

- *A holding company or a subsidiary company;*
- *A company registered under section 8; or*
- *A company or body corporate governed by any special act*

For the purpose of sub-clause (i) and sub-clause (ii) of clause (85) of section 2 of the Act, paid up share capital and turnover of the small company shall not exceed rupees two crores and rupees twenty crores respectively (Amended)

(c) **PUBLIC COMPANY:** Means a company which-

• *Is not a private company; and*

• *Has a minimum paid up share capital, as may be prescribed:*

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this act even where such subsidiary company continues to be a private company in its article;

♥ **ON THE BASIS OF CONTROL:**

♥ **HOLDING AND SUBSIDIARY COMPANIES:**

A company is a holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies. Company include body corporate.

Subsidiary company in relation to any other company (that is to say the holding company), means a company in which the holding company-

(i) *Controls the composition of the board of directors; or*

(ii) *Exercises or controls more than **one-half of the total voting power** either at its own or together with one or more of its subsidiary companies;*

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Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation – for the purposes of this clause, -

- (a) A company shall be deemed to be a subsidiary company of the holding company if the control referred to in sub-clause (i) or sub clause is of another subsidiary company of the holding company;*
- (b) The composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or removal all or a majority of the directors;*
- (c) The expression "company" includes body corporate;*
- (d) "layer" in relation to a holding company means its subsidiary or subsidiaries;*

- ♥ **ASSOCIATE COMPANY:** *In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.*

Explanation – for the purpose of this clause -

- *The expression "significant influence" means control of at twenty per cent of total voting power, or control of or participation in business decisions under an agreement;*
- *The expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.*

- ♥ **ON THE BASIS OF ACCESS TO CAPITAL**

- (a) Listed company: Company which has any of its securities listed on any recognised stock exchange.*
- (b) Unlisted company: Means other than listed company.*

- ♥ **OTHER COMPANIES:**

- ♦ **GOVERNMENT COMPANY:** Government company means *any company in which not less than 51%* of the paid up share capital is held by-

- (i) The central government*
- (ii) By any state government or governments, or*
- (iii) Partly by the central government and partly by one or more state governments,*

And the section includes a company which is a subsidiary company of a government company

Explanation – for the purpose of this clause, the "paid up share capital" shall be constructed as "total voting power", where shares with differential voting rights have been issued."

- ♦ **FOREIGN COMPANY:** it means any company or body corporate *incorporated outside india* which-

- (i) Has a place of business in india* whether by itself or through an agent, physically or through electronic mode; and
- (ii) Conducts any business activity in India* in any other manner

- ♦ **FORMATION OF COMPANIES WITH CHARITABLE OBJECTS ETC. (SECTION 8):**

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Deals with the formation of companies which are formed to

- *Promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc.*

Such company intend to apply its profit in

- Promoting its objects and
- Prohibiting the payment of any dividend to its members.

Examples of section 8 companies are FCCI, ASSOCHAM, national sports club of India, CII etc.

Significant points:

- ♣ *Requirement of minimum share capital does not apply*
- ♣ *Does not declare dividends to members*
- ♣ *Operate under the license from central government*
- ♣ *Need not use the word LTD/Pvt. LTD in its name and adopt a more suitable name such as club, chambers of commerce etc.*
- ♣ *License revoked if conditions contravened*
- ♣ *On revocation, central government may direct it to*
 - ✚ *Converts its status and change its name*
 - ✚ *Wind-up*
 - ✚ *Amalgamate with another company having similar object.*
- *Can call its general meeting by giving a clear 14 days notice instead of 21 days.*
- *Requirement of minimum number of directors, independent directors etc. Does not apply.*
- *A partnership firm can be a member of section 8 company.*

Penalty/punishment in contravention: *if a company makes any default in complying with any of the requirement laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees.*

Provided that *when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447 (Amended)*

- ◆ **DORMANT COMPANY:** *Where a company is formed and registered under this act for a future projects or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the registrar in such manner as may be prescribed for obtaining the status of a dormant company.*

"Inactive company" *means a company which has not been carrying on any business or operation, or as not made any significant accounting transaction during the last two years, or has not filed financial statements and annual returns during the last two financial years.*

"Significant accounting transactions" *means any transaction other than-*

- (i) Payments of fees by a company to the registrar;
- (ii) Payments made by it to fulfil the requirements of this act or any other law;

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(iii) Allotment of shares to fulfil the requirements of this act; and

(iv) Payments for maintenance of its office and records.

- ◆ **NIDHI COMPANIES:** *in this section, "Nidhi" or Mutual benefit society" means a company which the central government may, by notification in the official Gazette, declare to be a Nidhi or Mutual benefit Society, as the case may be.*
- ◆ **PUBLIC FINANCIAL INSTITUTIONS:** The following are regarded as public financial institutions LIC, IDFC, UTI, institution notified by the central government.
Conditions for an institutions to be notified as PFI: no institution shall be so notified unless-
 - (a) It has been **established or constituted by or under any central or state act** other than this act or the previous companies law; or
 - (b) **Not less than fifty one percent of a paid up share capital is held or controlled by the central government or by any state government or government or partly by the central government and partly by one or more state governments.**

MODE OF REGISTRATION/INCORPORATION OF COMPANY

PROMOTERS: Means a person-

- (a) Who has been *named as such in a prospectus or is identified by the company in the annual return*
- (b) Who has *control over the affairs of the company, directly or indirectly* whether as a shareholder, director or otherwise; or
- (c) In accordance with *whose advice, directions or instructions the board of directors of the company is accustomed to act.*

FORMATION OF COMPANY: Public company- 7 or more, Private company- 2 or more, OPC- 1

INCORPORATION OF COMPANY: Provides for the procedure to be followed for incorporation of a company.

♣ **FILLING OF THE DOCUMENTS AND INFORMATION WITH THE REGISTRAR:**

- The memorandum and articles of the company duly *signed by all the subscribers to the memorandum.*
- A declaration by *person who is engaged in the formation of the company and by a person named in the articles.*
- A declaration from *each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles*
- The *address for correspondence* till its registered office is established
- The *particulars of the persons mentioned in the articles* as the subscribers to the memorandum

♣ **ISSUE OF CERTIFICATE OF INCORPORATION ON REGISTRATION.**

♣ **ALLOTMENT OF CORPORATE IDENTITY NUMBER (CIN).**

♣ **MAINTENANCE OF COPIES OF ALL DOCUMENTS AND INFORMATION:** At registered office.

♣ **FURNISHING OF FALSE OR INCORRECT INFORMATION OR SUPPRESSION OF MATERIAL FACT AT THE TIME OF INCORPORATION (i.e. at the time of incorporation):** He shall be liable for action for fraud under section 447.

♣ **COMPANY ALREADY INCORPORATED BY FURNISHING ANY FALSE OR INCORRECT INFORMATION OR REPRESENTATION OR BY SUPPRESSING ANY MATERIAL FACT (I.E. POST INCORPORATION):**

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➤ **ORDER OF THE TRIBNAL:** Where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the tribunal may, on an application made to it, on being satisfied that the situation so warrants,-

- (a) Pass such orders, as it may think it, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- (b) Direct that liability of the members shall be unlimited; or
- (c) Direct removal of the name of the company from the register of companies; or
- (d) Pass an order for the winding up the company; or
- (e) Pass such other orders as it may deem fit:

Provided that before making any order,-

- The company shall be given a reasonable opportunity of being heard in the matter; and
- The tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted payment of any liability.

EFFECT OF REGISTRATION: According to section 9, from the date of incorporation (mentioned in the certificate of incorporation), the subscribers to the memorandum and all other persons, who may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum. Such a registered company shall be capable of exercising all the functions of an incorporated company under this act and having perpetual succession with the power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

EFFECT OF MEMORANDUM AND ARTICLES: Where the memorandum and articles when registered, shall bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and an agreement to observe all the provisions of the memorandum and of the articles. All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

CLASSIFICATION OF CAPITAL:

- ♥ **NOMINAL OR AUTHORISED OR REGISTERED CAPITAL.**
- ♥ **ISSUED CAPITAL.**
- ♥ **SUNSCRIBED CAPITAL**
- ♥ **CALLED UP CAPITAL**
- ♥ **PAID UP CAPITAL**

SHARES

◆ ***Nature of shares:*** Share which means a share in the share of a company and included stock.

Shares are a movable property: Shares are transferable as provided by the article of the company.

Shares shall be numbered: Every share shall be distinguished by its distinctive number.

◆ ***Kinds of share capital:***

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- (a) *Equity share capital*-
- 1) *With voting rights*; or
 - 2) *With differential voting rights* as to dividend, voting or otherwise in accordance with prescribed rules;
- (b) *Preference share capital*: which carries preferential right with respect to –
- 1) *Payment of dividend*
 - 2) *Repayment of capital*

MEMORANDUM OF ASSOCIATION

The memorandum of association of company is in fact its charter; it defines its constitution and the scope of the powers of the company with which it has been established under the act. It is the very foundation on which the whole edifice of the company is built.

Objects of registering a memorandum of association:

- It **contains the object** for which the company is formed and therefore identifies the possible scope of its operations beyond which its actions cannot go.
 - It enables shareholders, creditors and all those who deal with the company to know what its powers are and what activities it can engage in.
- A memorandum is **a public document** under section 399 of the companies act, 2013. Consequently every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.
- The shareholder must know the purposes for which his money can be used by the company and what risks he is taking in making the investment.

A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot enter into a contract or engage in any trade or business, *which is beyond the power conferred on it by the memorandum. If it does so, it would be ultra vires the company and void.*

As per section 4, memorandum of a company shall be drawn up in such form as is given in tables A,B,C,D and E in schedule I of the companies Act, 2013.

Table A is a form for memorandum of association of a *company limited by shares*.

Table B is a form for memorandum of association of a *company limited by guarantee and not having a share capital*.

Table C is a form for memorandum of association of a *company limited by guarantee and having a share capital*.

Table D is a form for memorandum of association of an *unlimited company*.

Table E is a form for memorandum of association of an *unlimited company and share capital*.

CONTENT OF THE MEMORANDUM: The memorandum of a company shall state-

- ♣ The name of the company (**NAME CLAUSE**) with the last word "**limited**" in the case of a public company, or the last words "**private limited**" in the case of a private limited company. This clause is not applicable on the companies formed under section 8 of the Act.

The name including phrase '**Electoral trust**' may be allowed for registration of companies to be formed under section 8 of the act. For the companies under section 8 of the act, the name shall include the words foundation, forum, association, federation, chambers, confederation, council, electoral trust and the like etc.

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A government company's name must end with the word "**Limited**". In the case of OPC, the word "OPC", should be included below its name.

- ♣ The state in which the registered office of the company (**REGISTERED OFFICE CLAUSE**) is to be situated;
- ♣ The objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof (**OBJECT CLAUSE**);
If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.
- ♣ The liability of members of the company (**LIABILITY CLAUSE**) whether limited or unlimited, and also state-
 - **In case of a company limited by shares;**
 - **In case of a company limited by guarantee.**
- ♣ The amount of authorised capital (**CAPITAL CLAUSE**) divided into share of fixed amounts and the number of shares with the subscribers to the memorandum have agreed to take, indicated opposite their names, which shall not be less than one share. A company not having share capital need not have this clause.
- ♣ The desire of the subscribers to be formed into a company. The memorandum shall conclude with the **ASSOCIATION CLAUSE**. Every subscriber to the memorandum shall take atleast one share, and shall write against his name, the number of shares taken by him.

In case of OPC, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

The memorandum must be printed, divided into paragraphs, numbered consequently, and signed by at least seven persons (two in the case of a private company and one in the case of OPC) in the presence of at least one witness, who will attest the signatures. The particulars about the signatories to the memorandum as well as the witness, as to their address, description, occupation etc., must also be entered.

It is to be noted that a company being a legal person can through its agent, subscribe to the memorandum. However, a minor cannot be a signatory to the memorandum as he is not competent to contract. The guardian of a minor, who subscribes to the memorandum on his behalf, will be deemed to have subscribed in his personal capacity.

DOCTRINE OF ULTRA VIRES

The meaning of the term ultra vires is simply "**beyond (their) powers**". The legal phrase "**ultra vires**" is applicable only to acts done in excess of the legal powers of the doers. This presupposes that the power in their nature are limited.

An ultra vires contract can never be made binding on the company. It cannot become "intravires" by reasons of estoppels, acquiescence (the reluctant acceptance of something without protest), lapse of time, delay or ratification.

The whole position regarding the doctrine of ultra vires can be summed up as:

- (i) **When an act is performed, which though legal in itself, is not authorized by the object clause of the memorandum, or by the statute, it is said to be ultra vires the company, and hence null and void.**

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- (ii) An act which is ultravires, the company cannot be ratified even by the unanimous consent of all the shareholders.
- (iii) An act which is ultravires the directors, but intravires the company can be ratified by the members of the company through a resolution passed at a general meeting.
- (iv) If an act is ultravires the articles, it can be ratified by altering the articles by a special resolution at a general meeting.

However, the disadvantages of this doctrine outweigh its main advantage, namely to provide protection to the shareholders and creditors. Although it may be useful to members in restraining the activities of the directors, it is only a nuisance in so far as it prevents the company from changing its activities in a direction which is agreed by all. Again, the purpose of doctrine of doctrine of ultravires has been defeated as now the object clause can be easily altered, by passing just a special resolution of the shareholders.

ARTICLES OF ASSOCIATION

The articles of association of a company are its rules and regulations, which are framed to manage its internal affairs. Articles are the internal regulations of the company. The articles of association are in fact the bye-laws of the company according to director and other officers are required to perform their functions as regards the management of the company, its account and audit.

Section 5 of the companies act, 2013 seeks to provide the contents and model of articles of association. The section lays the following law-

- ♣ Contains regulation.
- ♣ Inclusion of matters.
- ♣ Contain provisions for entrenchment.
- ♣ Manner of inclusion of the entrenchment provision.
- ♣ Notice to the registrar of the entrenchment provision.
- ♣ Forms of articles.
- ♣ Model articles.
- ♣ Company registered after the commencement of this act.

BASIS	MOA	AOA
OBJECTIVES	<i>Defines and delimits the objectives</i> of the company.	Lays down the <i>rules and regulations for the internal management</i> of the company.
RELATIONSHIP	<i>Company with the outsider world</i>	<i>Company and its members</i>
ALTERATION	<i>Only under special circumstances</i> and in the manner provided for in the act. In most cases permission of the regional director or the tribunal is required.	<i>By passing special resolution</i>
ULTRA VIRES	<i>Void and cannot be ratified</i>	<i>Can be ratifies by a special resolution not beyond the MOA.</i>

DOCTRINE OF INDOOR MANAGEMENT

Provides that any person can inspect by electronic means any document kept by the registrar, or make a record of the same, or get a copy or extracts of any document, including certificate of incorporation of any company, on payment of prescribed fees.

By constructive notice is meant:

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- (i) Whether a person reads the document or not, *he is presumed to have knowledge of the contents of the documents, He is not only presumed to have read the documents but also understood them in their true perspective, and*
- (ii) *Every person dealing with the company not only has the constructive notice of the memorandum and articles, but also of all the others related documents, such as special resolutions etc., which are required to be registered with the registrar.*

Thus, if a person enters into a contract which is beyond the powers of the company as defined in the memorandum, or outside the authority of directors as per memorandum or articles, he cannot acquire any rights under the contract against the company.

DOCTRINE OF INDOOR MANAGEMENT IS THE EXCEPTION TO THE DOCTRINE OF CONSTRUCTIVE NOTICE.

EXCEPTIONS TO THE DOCTRINE OF INDOOR MANAGEMENT:

- ♥ *Actual or constructive knowledge of irregularity: The rule does not protect any person when the person dealing with the company has notice, whether actual or constructive, of the irregularity.*
- ♥ *Suspicion of irregularity: The doctrine in no way, rewards those who behave negligently. Where the person dealing with the company is put upon an inquiry, for example, where the transaction is unusual or not in the ordinary course of business, it is the duty of the outsider to make the necessary enquiry.*
- ♥ *Forgery: The doctrine of indoor management applies only to irregularities which might otherwise affect a transaction but it cannot apply to forgery which must be regarded as nullity.*