

# Nature of Trustee's "Power" in Trust Act

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According to the Trust Act, a trustee has the "power" to perform any act as required for achieving the purpose of the trust ( Article 26 of the Trust Act ). In cases where the trustee performed an act for the trust fund without the "power", the act may be rescinded ( Article 27 of the Trust Act ).

What does mean the trustee's "power" herein? There would be a thought that this "power" is of the same nature as the agent's authority. But it would be doubtful.

Whether an act as agent becomes effective or not depends on whether the act is within the scope of the authority granted to the agent. The act which does not belong to the agent's authority has no legal effect, unless the principal ratifies it or an apparent agency is recognized. The act within the scope of the agent's authority has the legal effect. This does the same in principle even if it constitutes a breach of the duties of the agent. In this case the principal is merely able to sue to the agent for damages if the former suffered any loss. In some cases, however, the legal effect of the act as agent within the scope of his authority may be denied by reason of the breach of his duties, for example in the case of the abuse of the agent's authority.

In contrast every act which is performed for the trust fund by the person who is appointed to the trustee becomes effective regardless of whether he has the "power" to do it for the trust fund or not. If he performed the act for which he did not have the "power" and by that act the trust fund was influenced, the beneficiary is able to sue to the trustee for

compensation of the loss which arose in the trust fund or for recovery of the trust fund, or in some cases the legal effect of the act may be denied by the rescission in order to protect the trust fund.

This suggests that the trustee's "power" is different in the nature from the agent's authority. In the agent's authority the problem is whether the agent "can" create the legal effects from his act as agent or not, and it is out of question whether he "may" perform the act as agent in the light of the purpose of the grant of the authority or not. The agent's authority is basically distinguished from the agent's duties. In the trustee's "power", it is out of question whether he "can" create the legal effects from his act as trustee or not—legal effects arise always from his act, the problem is whether he "may" perform the act for the trust fund in the light of the purpose of the trust or not. In short there is no essential distinction between the trustee's power and the trustee's duties.

It would be able to say that the fundamental purpose in every trust is to aim at the advantage of the beneficiary. Therefore any act of the trustee which injures the trust fund intentionally or seriously does not accord to the purpose of the trust and then the trustee does not have the "power" to do such acts. By this understanding it becomes possible to consider as follows; in the case that the trustee performed an act in some kind of the breach of his duties, especially in the breach of the duty of loyalty or in the serious breach of due care of a prudent manager, it means that he performed the act without the "power" as the trustee. Therefore such an act should be able to be rescinded under the requirements provided in Article 27 of the Trust Law.