> be exercised without recourse to the courts, only when the retaking can be done peaceably. If it becomes necessary to resort to force, then the courts of the state are open for the protection of his rights. An agreement permitting a family's home to be broken open and entered for the purpose of forcibly taking possession of property therein is contrary to good public policy and void to that extent.[60]

Girard is anomalous in that most other jurisdictions have sanctioned repossession under similar instances on the basis that no violence and concomitant breach of the peace can occur when the debtor is absent.[61] Indeed, most automobile repossessions are accomplished by surreptitious means and have found little opposition in the courts of law.[62] Although in the minority, the prescience of *Girard* seemingly makes it a more effective tool against the questionable techniques utilized in repossession.[63]

The great majority of creditors employ acceptable means in their attempt to encourage the debtor to pay his debt. On many occasions their chore is not easy because the debtor does not have the resources to pay or does not respond to requests to pay. The paucity of recent actions filed alleging creditor harrassment might seem to indicate that prevailing practices have either transcended tort culpability, local officials have acquiesced in the techniques used, or the debtor has become more calloused to creditor harassment. Although all of these may be valid to some degree, it should not be overlooked that it is among the poor that the need for protection is the most crucial and it is the poor who are so often ignorant of their legal rights or have become alienated from the very nature of the adjudicative process.[64] As collection methods become more sophisticated and less obstreperous, the duty to protect the debtor becomes no less crucial. Regardless of the theory on which the debtor sues, it will be difficult to formalize a general rule differentiating permissible collection practices from those generating liability. Delicate judgments are to be made which must be flexible in the ability to respond to the endless mutations of facts presented.

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60 Girard v. Anderson, 219 Iowa 142, 148, 257 N.W. 400, 402 (1934).

61 *See, e.g.*, Cherno v. Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S.2d 114 (1967).

62 Comment, *Non-Judicial Repossession—Reprisal in Need of Reform*, 11 B.C. IND. & COM. L. REV. 435 (1970).

63 Those jurisdictions which sanction repossession when no violence occurs allow the creditor to justify his act after the fact. If no one is present when he breaks into the house to repossess the piano or when he wires the ignition and drives away with debtor's automobile, he has committed no wrong. But if someone is present and violence occurs, the courts will find him liable. "Do it if you can get away with it" is the result, and stealth is not adequately discouraged. *Girard*, in contrast, prohibits such repossession tactics and finds them antithetical to good public policy.

64 Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROB. 641 (1968).

Trusts—WHEN APPLIED TO TRUSTS, THE GENERAL RULE OF CONSTRUCTION OF WRITTEN INSTRUMENTS THAT AN AMBIGIOUS INSTRUMENT WILL BE CONSTRUED AGAINST THE MAKER REQUIRES A CONSTRUCTION IN FAVOR OF THE BENEFICIARY AND AGAINST THE SETTLOR.—*Brenneman v. Bennett* (8th Cir. 1970).

In a trust established in 1918, wherein the settlors were also the initial trustees and original life beneficiaries, the remaindermen beneficiaries claimed that their remainder interests were unaffected by an attempted termination of the trust in 1923 by the settlor trustee. This attempted revocation was pursuant to a paragraph in the 1918 trust instrument which read: "While both said grantors live, they do hereby expressly reserve the right and privilege to sell, transfer, exchange, incumber or dispose of said premises or said lease thereon as they may see fit without any obligation on the part of the purchaser to see to the application of the purchase money . . . ." Plaintiffs, adopted children of one of the settlor's daughters, brought an action to determine interests in a certain parcel of real estate, for an accounting, and for the partition and sale of the property which was the subject matter of the trust. The United States District Court for the Southern District of Iowa granted plaintiff's motion for summary judgment. Defendants appealed to the United States Court of Appeals for the Eighth Circuit. *Held,* affirmed. When applied to trusts, the general rule of construction of written instruments that an ambigious instrument will be construed against the maker demands contsruction in favor of the beneficiary and against the settlor. *Brenneman v. Bennett,* 420 F.2d 19 (8th Cir. 1970).

In 1918, the plaintiffs' grandparents executed a trust deed which conveyed property to themselves as trustees. Income was to be distributed to the settlors and their two daughters as beneficiaries. The deed provided for the termination of the trust on the death of the settlors and when one of their daughter's children reached thirty-five. Upon termination of the trust, the "heirs" of the daughters, subject to the daughters' power of disposal by will, were to become the owners of the trust property by having each set of heirs take one half of the property. In 1923, the settlors sought to revoke the 1918 trust by conveying the trust property to one of their daughters for nominal consideration. The daughter immediately reconveyed the property to the settlors who then executed another trust deed again conveying the property to themselves as trustees. This deed expressly reserved to the settlors the power to modify or amend the trust and provided for the disposition of the trust property in those "children" who were living at the time of their mother's death. Subsequently, in 1925, the settlors, pursuant to the authority reserved to them in the 1923 instrument, attempted to terminate it and execute a new trust. The 1925 trust limited the right of succession of the trust property to the "heirs of the body" of the settlor's two daughters. This trust, if effective, would preclude the adopted children of one of the daughters from sharing in the trust proceeds.

The federal district court construed the trust instrument by following the

law of Iowa, the state in which the settlors resided and in which the trust corpus was located.[1] It is elementary that the intention to reserve a power of revocation need not be manifested by an express provision but can be indicated by the use of language from which it may be inferred.[2] The Iowa supreme court has acknowledged that a trust settlor may retain the power of revocation if he so provides in the trust instrument.[3] The retained power of revocation may be evidenced by either express language[4] or in language in which it is clearly apparent.[5] In *In re Tolerton's Estate*,[6] for example, the Iowa supreme court stated that "it must appear from the instrument that there was an intention upon the part of the grantor to reserve the right of revocation; otherwise no such right remained in the grantor."[7] Consequently, "the settlor has no power to revoke the trust and procure the return of the trust property to him, whether the trust was created voluntarily or for consideration, unless he expressly reserved such a power . . . ."[8] General rules of construction apply to all written instruments, whether they are trusts, contracts, deeds, or wills.[9] Trust instruments must be construed as a whole, and individual parts must be considered by reading each in the light of the whole instrument.[10] As the Iowa court pointed out in *Dunn v. Dunn*:[11] "In construing this particular paragraph, it must be done in light of the evident meaning and intent of the whole instrument. . . ."[12] In the present case, the court was confronted with an instrument in which the principals were cast in three roles—the settlors, the initial trustees, and the initial beneficiaries.[13] "Examination of the 'trust deed' in its entirety shows that the settlors used the words 'grantors' and 'trustees' interchangeably, rather loosely, and at times not in harmony with the power reserved or the right created."[14] Faced with this dilemma, the court relied on the general rule of construction of written instruments that an ambiguous instrument will be construed against the maker.[15] The Iowa supreme court has also applied the general

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1 Harrison v. City Nat'l Bank, 210 F. Supp. 362 (S.D. Iowa 1962); United Bldg. & Loan Ass'n v. Garret, 64 F. Supp. 460 (W.D. Ark. 1946).

2 A. SCOTT, TRUSTS § 330.1 (3d ed. 1967) [hereinafter cited as SCOTT].

3 Anderson v. Telsrow, 237 Iowa 568, 21 N.W.2d 781 (1946); Dunn v. Dunn, 219 Iowa 349, 258 N.W. 695 (1935).

4 Young v. Young-Wishard, 227 Iowa 431, 288 N.W. 420 (1939); Dunn v. Dunn, 219 Iowa 349, 258 N.W. 695 (1935).

5 In re Tolerton's Estate, 168 Iowa 677, 150 N.W. 1051 (1915).

6 168 Iowa 677, 150 N.W. 1051 (1915).

7 *Id.* at 689, 150 N.W. at 1054.

8 C. BOGERT, LAW OF TRUSTS § 148 (4th ed. 1963).

9 Storkan v. Ziska, 406 Ill. 259, 94 N.E.2d 185 (1950); In re Mann's Estate, 156 Neb. 457, 56 N.W.2d 621 (1953). *See also* 54 AM. JUR. *Trusts* § 17 (1945). For an amusing and enlightening discussion of the construction of statutes, *see* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

10 Funsten v. Commissioner, 148 F.2d 805 (8th Cir. 1945); In re Estate of McCulloch, 243 Iowa 449, 52 N.W.2d 67 (1952); In re Estate of Ulhlein, 11 Wis. 2d 219, 105 N.W.2d 351 (1960).

11 219 Iowa 349, 258 N.W. 695 (1935).

12 *Id.* at 356, 258 N.W. at 699.

13 Brenneman v. Bennett, 420 F.2d 19 (8th Cir. 1970).

14 *Id.* at 23.

15 Harrison Sheet Steel Co. v. Morgan, 268 F.2d 538 (8th Cir. 1959); Stanley J. How & Associates, Inc. v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963).

rules of construction of written instruments to trusts.[16] The Iowa supreme court has consistently recognized that contracts are to be construed most strongly against the party drafting them.[17] When this rule is applied to trusts, it requires a construction in favor of the beneficiary and against the settlor.[18] In *Brenneman*, the critical issue was whether the settlors reserved the power to sell or otherwise dispose of the trust property as grantors or as trustees. The import of this distinction is readily apparent. If the power to revoke was reserved to the settlors as grantors, the subsequent attempted revocation would be effective, and the plaintiffs' adopted children would be prevented from sharing in the trust corpus. However, if the revocation power was reserved to the settlors as trustees, a subsequent attempted revocation would have resulted in a breach of fiduciary duty[19] and would render such an attempt ineffective.

The natural children of the daughter beneficiary claimed that the terms of the paragraph in question in the 1918 trust instrument indicated that the power to sell or otherwise dispose of the property was retained in the settlors as grantors and was not conveyed to the trustees. While the court agreed that this position was not without merit, it found that neither the term "grantors" nor the term "trustees" was invariably used to designate the principals in their respective capacities as settlors or first trustees, and therefore it rendered the trust instrument ambiguous. "Cases involving construction of trusts necessarily turn on their own peculiar facts thereby diminishing the precedential value of previous case law."[20] However, courts have held that where broad, general powers of sale or other means of disposition were given to the trustee and were not retained by the settlor, the trust was irrevocable.[21]

In *Osborn v. Banker's Trust Co.*,[22] the Supreme Court of New York County examined the trust instrument and concluded that the reservation of power to revoke was ambiguous. As a result, the court chose to construe the trust in favor of the beneficiaries and held the trust irrevocable. In *Emma B. Maloy*,[23] the Board of Tax Appeals was confronted with a similar contention that a broad reservation of power rendered the trust revocable. The board stated:

> If such a power [the power to revoke] had been retained, it would have been of great importance. Its exercise could have nullified the trusts. No such power is expressly reserved, although had that intent existed it would have been a simple matter to retain it in definite and unmistakable language. We think no construction of this provision as including such right, when it was not explicitly reserved, could have

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16 In re Work Family Trust, 260 Iowa 898, 151 N.W.2d 490 (1967).

17 Pazawich v. Johnson, 241 Iowa 10, 39 N.W.2d 590 (1949); Vorthman v. Great Lakes Pine Co., 228 Iowa 53, 289 N.W. 746 (1940).

18 Funsten v. Commissioner, 148 F.2d 805 (8th Cir. 1945). *See also* 90 C.J.S. *Trusts* § 161(e) (1955).

19 RESTATEMENT (SECOND) OF TRUSTS § 183 (1959). "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."

20 Brenneman v. Bennett, 420 F.2d 19 (8th Cir. 1970).

21 Estate of Willard V. King, 37 T.C. 973 (1962); Carrier v. Carrier, 226 N.Y. 114, 123 N.E. 135 (1919).

22 168 Misc. 392, 5 N.Y.S.2d 211 (1938).

23 45 B.T.A. 1104 (1941).

> been made without a disregard of the cardinal duty of the trustee to safeguard and conserve the corpora of these trusts in the interest of both the life tenant and the remainderman.[24]

The court in *Brenneman* construed the disputed clause as a reservation of the power of sale or disposal of the trust property in the trustees for the benefit of the beneficiaries. The court felt its construction was consistent with the other trust provisions and manifestations of the settlors' intent. This construction merely broadens the power tendered the original trustees by granting them the authorization to sell or dispose of the property in order to best serve the goals of the trust. The presence of the power is certainly desirable and is often necessary for unconstrained trust administration. Settlors often desire to reserve broad managerial powers to themselves as settlors.[25] In addition, settlors frequently wish to reserve such broad powers only to themselves or their first named trustees.[26] "The question whether powers conferred upon a trustee can be exercised only by the trustee originally named or can be exercised by successor or substituted trustees depends in the last analysis upon the manifestation of intention of the settlor."[27] Due to their knowledge and familiarity with the trust property, the settlors in the *Brenneman* case apparently believed that they were more competent than subsequent trustees to exercise the power of disposal.

The paragraph in question in the 1918 trust instrument also contained a provision which relieved the potential purchaser of the trust property of any obligation in regard to the application of the proceeds derived from any future sale of the trust property. This language or language of similar import is often inserted to facilitate the transfer of trust property by sale.[28] The purchaser, therefore, is under no duty to the beneficiaries to determine whether the trustee is acting within his fiduciary powers in affecting the transfer of the property.[29] A third party purchaser may be liable to the beneficiary if he participated with the trustee in a breach of the trustee's fiduciary duty.[30] If the court had accepted the natural children's proposed construction of the trust instrument, it would not have been necessary to insert the language relieving the potential purchaser of the duty to "see to the application of the proceeds," because the purchaser would have been under no such duty to the beneficiaries.[31] Obviously, if the court had accepted the natural children's construction, the proceeds clause would have been meaningless.

The settlors had it within their power to reserve to themselves as settlors the power to revoke the trust, but they chose ambiguous provisions. If settlors

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24 *Id.* at 1108.
25 SCOTT, *supra* note 11, at § 196.
26 *Id.*
27 *Id.*
28 *Id.* at § 190.3.
29 *Id.* at § 320.
30 *Id.* at § 292.
31 Brenneman v. Bennett, 420 F.2d 19 (8th Cir. 1970).

wish to reserve to themselves the right to revoke, they must utilize clear, concise language. For example, one suggested form reads: "The trustor shall have the right at any time to revoke this trust in whole or in part by an instrument in writing executed by the trustor and delivered to the trustee."[32] In drafting trust instruments, the careful draftsman must avoid using ambiguous language since the general rule of construction, that an ambiguous instrument will be construed against the maker, requires a construction in favor of the beneficiary and against the settlor.

ROBERT CLAUSS, JR.

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[32] 12 AM. JUR. *Legal Forms Annot.* § 1072 (1955). Other forms have proved workable: 9 C. NICHOLS, CYCLOPEDIA OF LEGAL FORMS ANNOT. § 9.546d (A) & (B) (1963):

> (A) Settlor may from time to time at any time or times revoke all or any part of this trust (provisions numbered — of this trust) herein created; provided that settlor may do so only by memorandum in writing (or the like) signed (and acknowledged) by settlor, delivered (addressed and mailed) to trustee at ———, at least — days before such revocation is to take effect.
>
> (B) At any time during the grantor's lifetime, grantor may revoke and terminate this agreement of trust, and may resume possession of the unconsumed corpus of the trust estate, by ——— (method).

See also JONES LEGAL FORMS § 65.131(A) & (B) (1962).

> (A) The grantor hereby reserves unto herself the right and power at any time, and from time to time, during her life, by any instrument executed and probated in the form required by the law of this state for recording a conveyance of real property, to revoke, in whole or in part, this trust indenture or to alter or amend any of the terms and provisions thereof. Upon the elapse of sixty days from delivery to the trustees by the grantor of such deed or other instrument, this trust indenture shall be deemed to have been revoked, altered or amended in the manner or to the extent therein set forth.
>
> (B) This trust agreement and all rights and interest and beneficiaries thereunder may at any time be cancelled and revoked by letter or other instrument in writing, signed by the party of the second part and delivered to the trustee, and upon such receipt of such letter or instrument in writing, this trust shall immediately cease and determine, and the trustee shall return and pay to the party of the second part the net principal of the trust estate.

In *Chase Nat. Bank of City of New York v. Tomagno*, 14 N.Y.S.2d 759, 172 Misc. 63 (1939), the plaintiff sought determination of its rights under a will and trust indenture involving an alleged modification of the trust inter vivos by the will of the settlor.

> Article Seven of the trust indenture reserved to the settlor the right to revoke the agreement absolutely at any time or to revoke it in part or to withdraw a part of the fund from time to time, to modify the agreement and the trust created in any manner that she saw fit at any time, to change the beneficiaries by leaving out any beneficiary or adding new ones, and to change the interest of any beneficiary in her discretion.

The article then provided that "any such revocation, withdrawal, change or modification shall be accomplished by a written notice filed with the Trustee executed by the Settlor and no other person shall be entitled to any notice thereof, and every right created thereby is subject to the foregoing reserved powers."

Threafter, the settlor made several modifications of the trust pursuant to the reserved power. The Supreme Court, Special Team, New York County, held that the modifications were valid according to the reserved power of revocation retained by the settlor.