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Crews v. Taylor: A Testator's Intent Can Be No Less Than His Command

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and a substantially increased risk of harm must be present the scope of kidnapping behavior should be sharply reduced.

The discretion of prosecutors will also be restricted. In California the prosecution was given considerable discretion once the necessity of movement across a state or county line was removed.[33] Conversely, this decision will limit the discretion of prosecutors. A district attorney will find it far more difficult to use the threat of kidnapping conviction as a means of extracting a guilty plea from a defendant. The defendant will be more eager to stand trial for offenses formerly connected to kidnapping. Or, if he chooses to enter a guilty plea, his sentence will be less severe.

In all probability, a kidnapping indictment will no longer permit escalation of penalties for the commission of an outrageous crime. Previously, where a trivial movement was sufficient, the public could pressure the prosecution into bringing a charge of kidnapping. If a defendant forced a group of children off the school playground and into a classroom where he sexually assaulted them, he could have been tried and convicted of kidnapping as well as assault. Since kidnapping probably carried the larger sentence, the net effect was a longer prison term even if the sentences ran concurrently. However, where a substantial asportation and a substantial risk of harm are necessary, an escalation of penalties in this fashion should occur much less frequently. Penalties for crimes related to kidnapping may come to be regarded as inadequate deterrents to the more offensive types of conduct previously punished as kidnapping.[34] The decision in *Dix* could force the legislature of North Carolina and of other states to reconsider the penalties which are imposed for these offenses.

Crews v. Taylor: A Testator's Intent Can Be No Less Than His Command?

In *Crews v. Taylor*,[1] a recent case decided in the North Carolina Court of Appeals, the court was presented with several important issues concerning the testamentary intent and the "words of art" which a testator utilizes to demonstrate this intent. The provision of the instrument which preciptated the action before the court read

1. 21 N.C. App. 296, 204 S.E.2d 193 (1974).

33. Note, 35 S. CAL. L. REV. at 215.

34. Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540, 558 (1953).

> FOURTH: I have advanced to my son, Rosco T. Taylor, Jr. at various times $5,000.00, and it is my desire that he account to my Estate for this amount without interest and that the same be paid before he participates in the division of the real estate.[2]

In another portion of the same will, the testator, Roscoe T. Taylor, Sr., the father of the appellant, directed that the property in question be actually partitioned among the parties to this proceeding, and that each devisee receive a one-third undivided interest in the property in fee simple. When the respondent-executor, another son of the testator, refused to allow the partition, the appellant initiated this action to determine his legal status as a devisee under the will of his father.

The court held that the testator "intended" Item Fourth of the will to be imperative and mandatory rather than precatory and therefore only morally obliging; and that the appellant was required to re-pay the sum of five-thousand dollars to the estate of his father. On its own motion, the court entered judgment on the pleadings for the respondent-executor, Thomas Taylor.

Subsequently the North Carolina Court of Appeals reversed the lower court judgment, not because the language in the will was precatory in nature, but because it found error in the lower court's acting on its own motion to grant judgment to the respondent.[3] The appellate court stated that the critical issue before it was whether or not the language used by the testator was precatory or legally imperative. Nonetheless, the court subsequently avoided this issue and dismissed it summarily.[4] The court noted that

> [I]t is well-settled in this jurisdiction that the intent of the Testator is the primary consideration in determining a patent ambiguity in a will . . . A patent ambiguity arises from the use of the words "it is my desire" as to whether these words are precatory or mandatory. They are susceptible of either interpretation depending on the connotation in which they are used. Under the circumstances of this will, we think it is clear that the testator intended them to be mandatory.[5]

The case law both in North Carolina and in other jurisdictions is in conflict with this recent decision of the Court of Appeals.

Precatory language is that language used by a testator

> . . . having the nature of a prayer, request, entreaty; conveying or

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2. WILL OF ROSCOE T. TAYLOR, SR., WILL BK. # 17 at p. 137, ORANGE COUNTY, NORTH CAROLINA, REGISTER OF DEEDS.

3. Kessing v. Mortgage Corporation, 278 N.C. 523, 180 S.E.2d 823 (1971); Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); N.C. GEN. STAT. § 1-A-1, Rule 56(b).

4. 21 N.C. App. at 297, 204 S.E.2d at 194.

5. *Id.* at 298, 204 S.E.2d at 194.

> embodying a recommendation or advice or the expression of a wish, but not a positive command or direction; employed in wills, as distinguished from direct or imperative terms.[6]

This definition is quite general and imports little more than a direction, that when "words of art" usually deemed to be precatory are used by a testator, the intent of the testator does not command that a certain thing be done, but only that there be a moral or ethical obligation placed upon the devisee or legatee under the will. Thus, there is no legal mandate that the devisee or legatee take a specific mode of action.

In a vintage North Carolina case, *Hardy v. Hardy*,[7] the plaintiff brought an action to recover the purchase money for property sold to the defendant, who refused to accept the deed to the property contending that the title to the property was not marketable. The defendant grounded his refusal of the deed based upon a provision in a will in which the plaintiff was a devisee. The provision stated

> It is my last wish and desire that my old home shall remain intact as it now stands and that my son . . . shall eventually own it by buying his sister's interests as set out above by all of them coming to a mutual agreement.[8]

The North Carolina Supreme Court held the plaintiff's title marketable and ordered the defendant to pay the agreed purchase price. The court then enunciated its position concerning the use of precatory words and phrases, which is presently followed by a majority of the jurisdictions.

> Under the early English and American authorities, language in a will, expressive of the wish or desire of the testator as to the disposition of his property, was generally held to raise a trust, or limit the estate devised, unless a contrary intent was manifest from a consideration of the whole will; but the tendency of modern authority is to reverse this rule, and to hold that precatory words are not to be regarded as imperative unless it is plain from the context that the testator intended them.[9]

Precatory words are not in and of themselves words of legal mandate when used in wills and do not place a legal obligation upon a devisee or a legatee unless such is the command of the testator.[10] In *Hardy*, this concept was plumbed with sufficient clarity.[11]

In a subsequent decision, *Springs v. Springs*,[12] the testator devised

6. BLACK'S LAW DICTIONARY 1340 (4th ed. revised, 1968).
7. 174 N.C. 505, 93 S.E. 976 (1917).
8. *Id.* at 506, 93 S.E. at 977.
9. *Id.* at 506, 93 S.E. at 977.
10. Rouse v. Kennedy, 260 N.C. 152, 132 S.E.2d 308 (1963).
11. 174 N.C. 505, 93 S.E. 976.
12. 182 N.C. 484, 109 S.E. 839 (1921).

> To my sister Alice; When you are made acquainted with the contents of this will it is my wish that you make a will immediately and leave all of your property to our nephew John M. Springs. Should you marry afterward you can tear up the will. My object is to have my property given to you first, but should you die without children, I wish you to leave your property to Johnny Springs.[13]

The testatrix used the word of art "wish" within the provision of her will, and the court held that the word "wish" used in this context did not place an obligatory burden upon the devisee. The testatrix did not command that the same be done. Had the testatrix specifically mandated that the devisee prepare a will and leave the property in question to Mr. Springs, then the testatrix could have provided that the property "shall go" to that particular individual.[14] Yet, there was no legal obligation placed on Alice to act in accordance with the testatrix's wishes and desires, because the words of art she used in the context of the provision and the entire will were to be construed in light of their precatory nature. Had the testatrix reorganized her thoughts and her expressions to be obligatory, she would have succinctly commanded the same in her will without the use of the terms "wish" or "desire". Thus the court has framed its opinion to conform with the concept that a testator does not express in mandatory language that which he does not perforce command.

In a more recent decision, *Andrew v. Hughes*,[15] the plaintiff brought an action to enforce a trust in lands devised by the will of Charles F. Fox. The testator's provision read as follows:

> I will and devise to my beloved wife . . . all of my real estate that I may own at the time of my death to have and to hold during the term of her natural life, and at her death I will and devise that Clatie Andrew, my trsuted niece, shall have all of my real estate. . .and I do hereby give and devise to my wife, the remainder of all of my real estate not hereinafter devised, to her, her heirs, and assigns in fee simple forever. I do this because I want my sister to have the benefit of said land, if she is living after the death of my wife; and if not, then her children will get the benefit and I want my niece . . . to have full control of said land and use it as she may see fit for her mother, brother, sisters, herself, or any other relative, and that is why I am devising it to Clatie Andrew in fee simple. . . .[16]

It is clear that the will in *Andrew* provided for an absolute and unconditional fee simple devise to Clatie Andrew. The words of art that followed this devise were expressive of suggestion not mandate, and they

13. *Id.* at 485, 109 S.E. at 839.
14. *Id.* at 486, 109 S.E. at 840.
15. 243 N.C. 616, 91 S.E.2d 591 (1956).
16. *Id.* at 617, 91 S.E.2d at 592.

were held to be precatory in nature. The devisee was given the ultimate discretion as to the disposition of the property. In the absence of a command by the testator, there was no legal requirement that the devisee act in any particular manner. In this type of testamentary trust situation, courts generally hold that no trust will arise unless there is specific language that is not precatory in nature.[17]

In such a situation, the testator-settlor generally uses words of art such as "wish", "desire", "hope" or "request" which, as the various commentators note, does not require that a trust be created. Had the testator intended a trust to arise, he would have to use language of a mandatory nature.[18]

> The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee or himself to control or direct the disposition intended. . .the words "request", "desire, and the like do not naturally import a legal obligation. . .When it is alleged that precatory words showed an intent to have a trust the courts consider the language of the entire instrument and all of its provisions, and also the situation of the alleged settler. . . .[19]

The facts and circumstances in *Crews* do not present any question as to whether the testator intended to create a trust. However, if precatory language is used by a testator in his attempt to dispose of or direct the use of his property after his death, or to direct a particular devisee to act in a particular manner, then the legal significance of the precatory language is similar, even if no trust is intended by the testator. Moreover, the general thrust of North Carolina case law follows this line of reasoning.[20]

In another North Carolina decision, *Rouse v. Kennedy*,[21] the testator used this language "it is my express wish an desire"[22] that certain farmlands owned by the testator be sold first to provide the necessary funds to carry-out the provisions of a testamentary trust created in the will. The trustee in *Rouse* was vested with broad managerial powers including the power to make dispositions of the property if he so decided. The question presented was whether or not the testator's language in vesting such powers in the trustee commanded the trustee to follow his chronological scheme for the disposition of his property. The court cited *Hardy*, and ample secondary authority[23] in stating that

17. BOGERT, THE LAW OF TRUSTS at 28, § 19 (4th ed. 1963).
18. 260 N.C. 152, 132 S.E.2d 308.
19. *Supra*, note 17.
20. 174 N.C. at 506, 93 S.E. at 977.
21. 260 N.C. 152, 132 S.E.2d 308.
22. *Id.* at 153-54, 132 S.E.2d at 310.
23. 54 AM. JUR., TRUSTS, § 55, at 65.

> . . . precatory words are presumably indicative of no more than a request or an expectation, and do not create a trust unless the context of the surrounding circumstances at the time of the making of the trust instrument show that the testator, although he used the language of request, really meant to leave the trustee no option in the matter . . . .[24]

Thus, from the language in this opinion, and from the above-cited cases, it must be concluded that words which the court commonly defines as precatory, such as "wish", "desire" or "request", cannot simply be extracted from their testamentary encampment, be labelled as precatory, and then be deemed only as morally obliging. To do such would dislodge the cohesive quality of every will by merely extracting provisions solely for their precatory nature and effect. Consequently, it is incumbent upon a court not only to examine the particular words used by the testator, but also to scrutinize the clause in which the words appear and to survey the four corners of the entire will and the circumstances surrounding its creation when there is an ambiguity in the testamentary intentions of the testator or testatrix.[25]

Often a testator devises property to a particular devisee in fee simple, and then later in the will he imposes some restriction as to the free alienation of the property originally devised. The question which arises in this frequent type of situation, is whether the devisee is the fee owner of the property or whether there is a legal obligation placed upon him to act in accordance with the delimiting directions of the testator. The North Carolina Supreme Court has held that the devisee need not follow the expressions later directed to the devisee when the language used by the testator following the absolute devise is precatory.[26] This principle has been codified in the North Carolina General Statutes to cover several particular situations.[27]

Words and phrases such as "I want my house and lot sold, the money to be put in the bank to go to Robert L. Christmas, and used for his education" is not precatory, but clearly mandatory pursuant to the testator's testamentary command.[28] "I want" imports an unconditional imperative upon the one to whom the command is directed, and is not precatory language.[29] There is a difference in testamentary construction among "I want" and "I desire" or "I direct" and "I request".

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24. 260 N.C. at 157, 132 S.E.2d at 311.

25. YMCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972); Bank v. Home for Children, 280 N.C. 354, 185 S.E.2d 336 (1972); 7 STRONG'S NORTH CAROLINA INDEX 2d, *Wills*, § 28, at 595-98.

26. Quickel v. Quickel, 261 N.C. 696, 136 S.E.2d 52 (1964).

27. N.C. GEN. STAT. § 31-38 (1973).

28. Laws v. Christmas, 178 N.C. 359, 100 S.E. 587 (1919).

29. Anders v. Anderson, 246 N.C. 53, 97 S.E.2d 415 (1957).

Although a cohesive holding in *Crews* required the court's construction of "desire" in the context of the will,[30] the court overlooked the circumstances surrounding the creation of that instrument. The appellant was the son of the testator, and in an early provision of the will the testator devised a fee simple title in one-third of his real property to the appellant.[31] The testator expressly directed that after his wife's death such property vest in the parties to this action in fee simple. In the fourth item of the will is framed the word "desire", directed towards the appellant and to no one else. "Desire," standing alone, is construed as a precatory word. However, it must be remembered, that the law regarding precatory words and phrases and their application must not be arbitrary. Thus, the court must look to the entire instrument and the circumstances surrounding its creation for guidance when such patent ambiguities appear. Simply labelling a word as precatory without interpreting the entire instrument is at best both arbitrary and illusory.[32] Yet it was just this type of arbitrariness which permeated the opinion of the Court of Appeals and undermined the well-established principle that a testator does not make mandatory that which he does not command.

> Considering the will in its entirety, it seems that he wished item 4 to be imperative rather than precatory; and therefore, the monies advanced to the petitioner [appellant] must be accounted for before the property is partitioned . . . Under the circumstances of this will, we think it is clear that the testator intended them to be mandatory.[33]

Ultimately, the Court of Appeals reversed the lower court judgment, only because the trial court granted summary judgment for the respondent on its own motion. Counsel for the appellant attempted to graphically illustrate the linguistic and grammatical diagram of Item Fourth in order to illustrate to the court that the word "desire" pervaded the entire provision, and that the precatory nature of the provision did not legally oblige the appellant to re-pay the advancement. However, the court concluded that the property of the testator could not be partitioned until the appellant accounted to the testator's estate for the purported five-thousand dollar lifetime advancement.

Testamentary intention is the polar star which must guide the inter-

30. 21 N.C. App. 296, 204 S.E.2d 193.

31. WILL OF ROSCOE T. TAYLOR, SR., WILL BK. # 17 at 137, ORANGE COUNTY, NORTH CAROLINA, REGISTER OF DEEDS:

> SECOND: To my beloved wife, Nora Wagner Taylor, I give, devise and bequeath all of my real estate to be hers for and during the term of her natural life. Upon the death of my beloved wife, I give, devise and bequeath my real estate to my children, to wit: Thomas Taylor, Sue Taylor Crews, and Roscoe T. Taylor, Jr., share and share alike in fee simple.

32. 261 N.C. 696, 136 S.E.2d 52.

33. 21 N.C. App. at 298, 204 S.E.2d at 195.

pretation of all wills; and when it is ascertained, such intent will be given effect unless it is law-violative or contrary to public policy.[34] The testamentary intention is derived from the words and phrases utilized by the testator in constructing his will.[35] It appears that the North Carolina Court of Appeals' resolution of the problem of the patent ambiguity in the testator's use of the word "desire", coupled with the facts and circumstances surrounding the creation of the will was clearly erroneous. Such error is reflected in the courts' finding that the "desire" of the testator meant that the appellant was required to account to the testator's estate. Enlightened case precedent outside of North Carolina flatly rejects the decision of the North Carolina court.

In a recent Washington case, *In re Estate of Novolich*,[36] the testator inserted this provision in his last will and testament:

> In the event my wife is not living at the time of my death. I recommend that at the hearing upon the final account, that the Court partition among the persons, entitled thereto, the estate so that my daughter, Rose S. Griese, receives the land and farm property, and that my daughter Mary S. Larue, receives other property in lieu thereof . . . .[37]

The court held that Mrs. Griese was not entitled to the farm property described by the testator as a matter of right because the use of the word "recommendation" and of the phrase "I recommend" were deemed to be precatory and not legally commanding.[38] The court further noted that

> It is axiomatic that the testator's intent is paramount in construing a will and that such intention must come from the words he uses, construed in their natural and obvious sense.[39]

In a Rhode Island case, *Lux v. Lux*,[40] the testator made a provision similar to that made by the testator in the *Springs* case[41] where a chronological sequence couched in precatory phrases recommended the distribution of the testator's bounty. The Rhode Island Supreme Court held that

> The words "express desire" are purely precatory. We have said that precatory language will be construed as words of command only if it is clear that the testator intended to impose on the individual concerned a legal obligation to make the desired disposition. We think it clear that since Philomena's primary goal was to benefit her grand-

34. Clark v. Connor, 253 N.C. 515, 117 S.E.2d 465 (1960).
35. Price v. Price, 11 N.C. App. 657, 182 S.E.2d 217 (1971).
36. 7 Wash. App. 495, 500 P.2d 1297 (1972).
37. *Id.* at 497, 500 P.2d at 1298.
38. *Id.* at 497, 500 P.2d at 1300.
39. *Id.* at 500, 500 P.2d at 1300.
40. 109 R.I. 592, 288 A.2d 701 (1972).
41. 182 N.C. 484, 109 S.E. 839.

> children, we see nothing in the record that would justify a conclusion that she intended that the potential purchasers of her real estate be limited to the members of her family.[42]

Similar words were used in a will in Kentucky[43] and in Iowa,[44] and the courts there were completely in accord with the opinion of the Rhode Island court.

A New York court in the case of *In re Martin's Estate*[45] was presented with a question as to the interpretation of precatory words and phrases in a testator's last will. There, the testator used the word "request" and the phrase "I request" in designating a particular local Masonic Lodge to be the beneficiary of certain monies from the testator's residuary estate, should there be any residuary estate after distribution. The language of the New York court is indicative of how the construction of precatory words and phrases in wills should be resolved when there is a patent ambiguity in the meaning of such words and phrases. The principle that a testator does not express in less than mandatory language anything he does not command was discussed. The court stated that

> In construing the testamentary instrument, we should not be mesmerized by this single word but rather, mindful of the admonition that there is no more likely way to misapprehend the meaning of language, be it a constitution, statute, will or contract, than to read words literally, for getting the object which the document as a whole is meant to secure. Although words such as "request", "wish" and "desire" are ordinarily read as precatory, they will be taken to connote a hope or command depending on whether the author meant them simply to advise or inform a discretion which is vested in somebody or to direct a certain disposition in question—that is, the persons to take, the subject matter or amount of the gift, its terms and duration. . . .[46]

This holding appears to be on all fours with those of the courts of Louisiana,[47] Mississippi,[48] and Texas.[49]

In a California case, *In re Estate of Beauchamp*,[50] the court held that when words of recommendation or request are used in direct reference to the disposition of the decedent's estate they are *prima facie*

42. 109 R.I. at 602, 288 A.2d at 707.
43. Flynn v. Flynn, 469 S.W.2d 886 (1971).
44. *In re* Estate of Miguet, 185 N.W.2d 508 (1971).
45. 300 N.Y.S.2d 751, 32 N.Y. App. Div. 2d 849 (1969).
46. *Id.* at 754.
47. Succession of Barnett, 245 So. 2d 418 (1971).
48. Carlisle v. Estate of A.W. Carlisle, 233 So. 2d 803 (1970).
49. Taylor v. Republic National Bank of Dallas, 452 S.W.2d 560 (1970); Woods v. Wedgeworth, 453 S.W.2d 385 (1970); Everett v. Adams, 444 S.W.2d 789 (1969); Henry v. Curb, 430 S.W.2d 29 (1968).
50. 64 Cal. Rptr. 340, 256 Cal. App. 2d 563 (1967).

testamentary and imperative, not precatory. While the desire of a decedent addressed to a devisee is construed as a mere request, case law generally holds that such an address must be construed as a command or legal mandate when the language used is addressed to his executor or his trustee. This principle appears to be the rule in North Carolina as well.[51] Yet, in *Crews* the Court of Appeals specifically determined that the word "desire" used in the testator's will was not precatory because of a patent ambiguity in the meaning of the words; and under the facts and circumstances of the will, more than one interpretation could be gleaned from the use of this precatory word in Item Fourth of the will.[52]

Conclusion

From the range of authorities cited herein, it is apparent that the North Carolina Court of Appeals erred in its construction of testamentary words of art when a patent ambiguity arose in a testamentary disposition. It is plausible that the word "desire", and the phrase "I desire" may be subject to several interpretations. However, the North Carolina court failed to look to the four corners of the instrument and the facts and circumstances surrounding the creation of the will when it decided *Crews*. The case law and precedent from outside this jurisdiction is both persuasive and well-established. The case law in North Carolina is still in the process of being shaped and formed. In light of the fact that it has been several years since the court has enunciated its present position on a testator's use of precatory words and phrases, it is submitted that the controversy in the *Crews* case presented a propitious time for an enlightened decision.

Perhaps the *Crews* case did not present issues of significant importance to the body of case law in North Carolina. However, it appears that practicing attorneys in North Carolina will now hesitate to prepare an estate for a client when the client does not want to command certain actions to devisees and to legatees, but chooses instead to only morally oblige that a certain mode of action be taken.

The Court of Appeals failed to look outside the borders of North Carolina to render a decision which could have clarified the construction of language utilized by attorneys in testamentary dispositions of property and unfortunately, did not express itself with the crystal clarity of the Supreme Court of Pennsylvania, when that court stated

> When precatory words are used merely for the purpose of advising or influencing, or as expressive of a wish or desire that the legatee make a certain use of the testator's bounty, they are not obligatory upon

51. 261 N.C. 696, 136 S.E.2d 52.
52. *See In re* Estate of Patterson, 75 Cal. Rptr. 439, 270 Cal. App. 2d 89 (1969).

those to whom they are addressed; but when used to express his manifest intention to control or direct, they are mandatory and will be so construed in saying what effect is to be given to them. . . .[53]

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Police Interrogation: Michigan v. Tucker

In the dramatic case of *Michigan v. Tucker*,[1] the Supreme Court decided that during an in-custody interrogation of a suspect all the warnings as outlined in the *Miranda*[2] decision need not be given. Even though the interrogation took place prior to *Miranda*, the Court mandated that an accused be given certain warnings before he is interrogated.

Tucker had been arrested on a charge of rape, and before the interrogation the police advised him that any statement he made could be used against him at trial. Furthermore, he was advised that he had a right to remain silent and a right to counsel. However, the police did not inform him that if he were indigent that counsel would be furnished for him. Respondent told police that he did not want an attorney and that he understood his constitutional rights. Nevertheless, during the course of the interrogation, Tucker informed the authorities that he was with a friend and divulged the identity of his alibi [Henderson]. The later statements of Henderson tended to incriminate Tucker and Henderson stated that respondent was not with him at the time of the crime. It is to be remembered that these events preceded *Miranda*.

Before his trial following the Supreme Court decision in *Miranda*, the respondent moved to suppress the expected incriminating testimony of Henderson; the reason being that the respondent had disclosed Henderson's identity without having received the full warnings required by *Miranda*.[3] The state court denied the motion and permitted Henderson to testify and respondent was convicted at the trial. Respondent

53. *In re* Estate of Corbett, 430 Pa. 54, at 57-58, 241 A.2d 524 at 525 (1968); *see also*, Canal National Bank v. United States, 258 F. Supp. 629 (D.C. Me., 1966); Good Samaritan Hospital and Medical Center v. United States National Bank of Oregon, 246 Ore. 478, 425 P.2d 541 (1967); Frederick v. Frederick, 355 Mass. 662, 247 N.E.2d 361 (1969).

1. 42 U.S.L.W. 4887 (June 10, 1974).
2. Miranda v. Arizona, 384 U.S. 436 (1964).
3. Miranda was decided by the Supreme Court after the interrogation of Tucker, but before his trial.