

763.

KIDNAPPING—DEFINITION OF WORD "KIDNAP"—CHILD OF TENDER YEARS INCAPABLE OF CONSENTING TO ITS OWN ABDUCTION—QUESTION OF FACT.

SYLLABUS:

1. *To determine the meaning of the word "kidnap" as used in Section 12424, General Code, resort should be had to the common law definition of "kidnapping", which is defined as a false imprisonment, aggravated by conveying the imprisoned person to some other place.*

2. *A child of tender years is incapable of consenting to its own abduction, and when taken from its rightful guardian it must be deemed to have been taken without its consent, as a matter of law.*

3. *Where a child of over thirteen years of age is taken to another state with the consent of such child but without the consent of the parents with whom such child was residing, whether or not such child is legally capable of giving such consent is a question of fact to be determined by the jury, under proper instructions of the court, from all the facts and circumstances as shown by the evidence, including the relation of the parties, the child's age in years, her development, actual capacity, state of mind, etc.*

COLUMBUS, OHIO, July 22, 1927.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Receipt is acknowledged of your recent communication which reads as follows:

"The facts in the case which I briefly detailed to you over the telephone are as follows:

A girl between 13 and 14 years of age, an illegitimate child, her natural mother having a second husband, he being stepfather of the child, is involved.

It seems that for some time a half sister of the girl's mother has been writing to the girl wanting her to come and live with her in Detroit, Mich., and it also seems that the girl has been willing to go, as likely the half sister could furnish her a better home than she now has.

The mother of the girl had recently written the half sister advising her that she could not have the child, and that she did not want her to write any more letters about it. On the fourth of July, while the mother of the girl was in town attending the celebration, and the stepfather of the girl in the fields working, the half sister, accompanied by another party, drove out to the girl's home in the country, and she left with them presumably for Detroit, Mich. The girl left a memorandum to the effect that she was going away with this party, that she wanted to go, and that she was not intending to come back.

The only question involved is whether an affidavit under Section 12424 of the General Code would be proper. Section 12425 of the General Code, defining child stealing, speaks of a child under the age of 12 years. The principal question is can a child over the age of 12 years and still of tender years consent to be taken away from her parent, so as to make Section 12424 of the General Code inapplicable to such a state of facts.

If Section 12424 of the General Code cannot be applied to this set of facts, then, the only other section of the Code that might be involved would be the one defining the crime of contributing to the delinquency of a minor child.

Kindly advise me relative to this matter at your earliest convenience, as there is urgent reason for making an arrest at the earliest possible time.

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It is familiar law that parents are entitled to the custody and control of their children. In the case of an illegitimate child, under the law, the mother of such child is charged with the care, nurture, welfare, and education of such child. In Section 1306 Rockel's Probate Practice, it is said:

"In the case of illegitimate children, the mother is the natural guardian."

In a foot note to the section the author observes that the mother of such child is entitled to the custody thereof.

From the facts stated in your letter, the child was at the mother's home; was between the ages of 13 and 14 years; the mother was temporarily absent attending a celebration and while she was away the half-sister of the mother drove to the home and took possession of the child, taking her to Detroit, Michigan, the child leaving a note for her mother to the effect that she was going away and wanted to go and that she did not intend to come back.

Section 12424, General Code, reads:

"Whoever kidnaps, or forcibly or fraudulently carries off, detains or decoys a person, or unlawfully arrests or imprisons a person with the intention of having such person carried out of this state, shall be imprisoned in the penitentiary not less than one year nor more than twenty years."

It is apparent that the above section defines more than one crime, the first one being the crime of kidnapping. It is this offense with which we are here concerned, there being no evidence in the statement of facts submitted of any forcible or fraudulent carrying off or detention or decoying, and no evidence showing an unlawful arrest or imprisonment "with the intention of having such person carried out of this state."

The section contains no definition of the word "kidnapping" nor is there any definition of this word in any other section of the Penal Code. To determine therefore what the legislature meant by the words "whoever kidnaps" it is necessary to resort to the common law, for while there are no common law crimes in Ohio, nevertheless, when a common law word is incorporated into a statute, the common law definition and the meaning of that word, in so far as it has not been expressly changed by statute, is intended. See *Mitchell vs. State*, 42 O. S. 383. In that case the court said as follows:

"In order that this statement may not mislead, it is proper to say, that while the rule is well settled that a statute defining a crime and prescribing punishment therefor must be strictly construed (*Denbow vs. State*, 18 Ohio, 11; *Hall vs. State*, 20 Ohio, 1; *Shultz vs. Cambridge*, 38 Ohio St. 659), still, where the legislature in defining a crime adopts the language employed by writers of recognized authority in defining the crime at common law the presumption is that it was intended the commission of acts which at common law would constitute such crime should constitute a crime under the statute, and the statute will be so construed."

In his scholarly work on Criminal Law, Bishop, in Section 750, Vol. II, 9th Edition, defines kidnapping as follows:

"Kidnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place. It is a continuous crime beginning with the taking and ending with the return of the kidnapped person."

The gravamen of this offense is the false imprisonment of the person kidnapped, accompanied by the aggravation above stated. That is to say, the primary wrong is done to the person imprisoned and not to another who might be entitled to the custody of the person taken.

Crimes of this latter nature are embraced in Section 12425, General Code, which provides as follows:

"Whoever leads, takes, carries, decoys or entices away a child under the age of twelve years, with intent unlawfully to detain or conceal such child from its parent, guardian, or other person having the lawful charge or custody thereof, or knowingly harbors or conceals a child so led, taken, carried, decoyed or enticed away, shall be imprisoned in the penitentiary not less than one year nor more than twenty years."

Under this latter section an essential element of the offenses denounced, is an "intent unlawfully to detain or conceal such child from its parent, guardian, or other person having the lawful charge or custody thereof." In other words, under Section 12425, supra, there is present not only the element of taking or enticing away the child under the age specified, but the unlawful intent to disturb the lawful custody thereof. Crimes under this section involve both the wrong done the child carried away and the injury to the parent or guardian, whose charge or custody is unlawfully disturbed. It will be noted that in this class of crimes the legislature has arbitrarily fixed the child's age at twelve years.

Coming now to your question as to whether or not a child over the age of twelve years but still of tender years can consent to be kidnapped, it will be observed that so far as this crime is concerned, the legislature has not fixed any age of consent as it has in Section 12425 and in other sections, as for example, Sections 12414, 12415, 12423-1 and certain other sections of the Code.

Resort again must be had, therefore, to the common law. As a general proposition it may be said that a child of tender years is incapable of consenting to its own abduction, and when taken from its rightful guardian it must be deemed to have been taken without its consent, as a matter of law. See *State vs. Farrar*, 41 N. H. 53 and note to *People vs. DeLeon* (109 N. Y. 226) 4 A. S. R. 444. In 8 R. C. L. 297, the law is stated in the following language:

"To constitute the offense, the asportation or carrying away must have been against the will and without the consent of the party injured, and without any lawful warrant or authority therefor; but a child of tender years is regarded as incapable of consenting to its own seizure and abduction, and when taken away from its rightful guardian it must be deemed to have been taken without its consent, as matter of law."

On this question Bishop in the work above referred to at Section 751 says as follows:

"The consent of a person of mature years and sane mind, on whom no fraud was practiced, would, of course, prevent an act otherwise wrongful from being kidnapping, but not so a young child. At what age the child becomes capable of consenting, or whether the question depends upon age

alone, or upon combination of years and actual capacity, is not easy exactly to determine. Children of four, five, six, and nine, and thirteen years respectively have been held to be too young to render their consent available in defense. Inducing a weak minded woman to go with them to the woods, though no physical force is used, may lay the foundation for a prosecution of kidnapping."

It seems clear that in the instant case whether or not the child taken away was of such tender years as to be incapable of consenting to be taken away is a question of fact to be determined by the jury, under proper instructions of the court, from all the facts and circumstances, as shown by the evidence, including the relation of the parties, the child's age in years, her development, actual capacity, state of mind, etc.

As stated by the court in the case of *Moody vs. The People*, 30 Ill. 315, in which case the defendant was indicted for kidnapping a child of the age of fourteen years:

"The third instruction on the part of the People was, that 'in determining the guilt or innocence of the defendants in this indictment, the jury should take into consideration the condition of the girl, Christiana Davis—her age, education, and state of mind at the time, the representations and conduct of the several defendants towards her, the effect of those representations and that conduct upon her, the object of the defendants in effecting her removal from the State, and all the circumstances surrounding the case, as detailed in evidence.' This instruction called the attention of the jury, very properly, we think, to the age and condition of the prosecuting witness, her intelligence, the representations of defendants to her and their conduct and object in her removal, and left them, from these and all the other circumstances in the case, to determine the guilt or innocence of the defendants. We are unable to perceive any error in this instruction."

In view of what has been said it is my opinion that:

1. To determine the meaning of the word "kidnap" as used in Section 12424, General Code, resort should be had to the common law definition of "kidnapping", which is defined as a false imprisonment, aggravated by conveying the imprisoned person to some other place.
2. A child of tender years is incapable of consenting to its own abduction, and when taken from its rightful guardian it must be deemed to have been taken without its consent, as a matter of law.
3. Where a child of over thirteen years of age is taken to another state with the consent of such child but without the consent of the parents with whom such child was residing, whether or not such child is legally capable of giving such consent is a question of fact to be determined by the jury, under proper instructions of the court, from all the facts and circumstances as shown by the evidence, including the relation of the parties, the child's age in years, her development, actual capacity, state of mind, etc.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*