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The explanation attached to the section says that the words 'lawful guardian' in this section includes any person who is lawfully entrusted with the care or custody of such minor or other person.

In addition to this, there is an exception too attached to the section which states that this provision does not apply to the act of any person who believes in good faith that he is the father of an illegitimate child, or who believes in good that he has a legal right to the lawful custody of such child. But in either of the abovementioned cases the act on his part should not be committed for either an immoral or an unlawful purpose. The offender must either take or entice a person. The victim must be under the age of sixteen years if he is a male, under the age of eighteen years if she is a female, or of any age if he or she is of unsound mind. The taking or enticement must be out of the keeping of the lawful guardian of the victim. The lawful guardian of the victim must not have given his or her consent for the taking or enticement.

The explanation under the section gives an inclusive explanation, and not an exhaustive definition, of the expression lawful guardian by stating that the expression includes any person to whom the care or custody of such minor or person of unsound mind has been lawfully entrusted. The exception provided under the section specifically states that any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child cannot be held guilty of this offence even if his act falls under the language of this section, unless it is proved that he committed such act either for an immoral or for an unlawful purpose. The object of the section is to protect the

interests of children and persons of unsound mind from undesirable and improper activities by others against them, as well as to protect the rights of parents and other guardians having lawful charge or custody of such children or persons.

Initially the age of a minor male child was mentioned in the section as fourteen years and that of a minor female child as sixteen years. But the same were raised to sixteen and eighteen years respectively by the Indian Penal Code and the Code of Criminal Procedure (Amendment) Act, 1949, and the amendment came into force with effect from July 15, 1949. Takes or entices There must be proof of taking or enticing. Taking means physical taking. It may not be by force, actual or constructive. To take means to cause to go, to escort or to get into possession, and it includes inducing the victim to leave.

The offender must take some active part in the leaving of the victim. It is not necessary that the offender must himself go to fetch the victim; his earlier act of inducing or soliciting the victim may also amount to taking if there exists a causal relationship between the earlier act and the ultimate result of the victim going to the offender. Persuasion by the accused which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section. Except the act of physical taking nothing more, like trespass, or anything of that nature, need be proved. Enticing need not be confined to a single form of allurement. It may not always be distribution of sweets or money only.

It may even be an offer of sexual relations. It is an act on the part of the offender by which the victim is induced to go to the offender by himself or herself. Force or fraud may not be present always in taking or enticement. Taking is different from enticing.

The mind of the minor is of no consequence in the former; the minor may be a willing party or may not be so. But enticing involves an idea of inducement by exciting hope or desire in the other on the basis of which the victim does something which he or she- would not have done in the absence of the enticement. The Supreme Court is of the view¹ that the two words 'takes' and 'entices' are intended to be read together so that each takes to some extent its colour and content from the other. If the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in section 361. But if the guilty party has laid a foundation by inducement, allurements or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. Keeping The word '

keeping' in this section means that the minor or the person of unsound mind is under the control or protection of the lawful guardian.

It must be seen that the latter has an overall charge over the former. The keeping of the lawful guardian continues even when the minor or such person has moved out of the home temporarily. Keeping of the lawful guardian does not depend on the distance the victim has been taken to by the offender. If the minor has been taken away for even a short distance of twenty or thirty yards by the offender, it would amount to taking her out of the lawful guardian's keeping and if other essentials of the offence are present, this offence would be held to be committed. Similarly, the duration of the detention is also immaterial and the victim would be presumed to be under the keeping of her lawful guardian even if she has been taken away for a short or long duration and then left. The word 'keeping' has been deliberately preferred over the word 'possession' which is connected with inanimate objects. Keeping is compatible with independence of action and movement in the object kept. It implies neither apprehension, nor detention but rather maintenance, protection and control, manifested not by continual action but as available on necessity arising.

This relation between the minor and the guardian is not dissolved so long as the minor can at will take advantage of it and place herself within the sphere of its operation. Use of word 'keeping' in section 361 shows that the section is designed to protect the sacred right of the guardians with respect to their minor wards. Lawful guardian The expression 'lawful guardian' has been preferred to the words 'legal guardian'. The former is much wider in its ambit. Any person who has been lawfully entrusted with the care or custody

of a minor or a person of unsound mind is a lawful guardian. A relationship of a guardian and ward established by lawful and legitimate means would mean that the guardian is a lawful guardian.

It has been observed that the explanation is not intended to limit the protection which the section gives to parents and minors; it is intended to extend that protection by including in the expression 'lawful guardian' any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child in custody of a servant or friend, for a limited purpose and time, cannot determine her father's rights as guardian or his legal possession for the purposes of the criminal law. If the facts are consistent with the father's legal possession of the minor, the minor must be held to be in the father's possession or keeping even though the actual physical possession should be temporarily with a friend or other person. Under this section a de facto guardianship is sufficient to hold that the guardian is a lawful guardian. Explanation The explanation gives an extended meaning to the expression 'lawful guardian' and it includes any person lawfully entrusted with the care or custody of such minor or other person. The word 'entrusted' means giving, handing over, or confiding of something by one person to another.

The person entrusting reposes a confidence in the other. Nothing of this may be in writing as far as section 361 of the Code is concerned. There must be a person who reposes the confidence, another in whom the confidence is reposed, and a minor or a person of unsound mind who is the subject matter of the trust. A person is lawfully entrusted with the care or custody of a minor if he has acquired control over him or her lawfully and in such

circumstances as would imply trust even though he may not have been formally entrusted with the same by a third person. The entrustment may be inferred from a well-defined and consistent course of conduct of the parties and the surrounding circumstances of the case; Exception Vide an exception stated in the section, a person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose, is protected by the section and cannot be held guilty of committing this offence. Judicial decisions In *Varadrajan v. State* the Supreme Court has held that there must be proof of taking. Where a minor girl left her home and joined the accused on her own without any inducement or persuasion on his part, the accused could not be held to have committed the offence of kidnapping from lawful guardianship as there was no active participation or active step on his part to cause the girl to leave her home.

There is a distinction between taking or enticing and allowing a minor to accompany a person. Where the minor leaves her father's protection knowing, and having capacity to know, the full import of what she is doing, and voluntarily joins the accused, he cannot be said to have taken or enticed her away from the keeping of her lawful guardian. Also there is no legal obligation on him to return the minor to her father's custody. But where there is evidence of ample earlier allurements by him to the minor girl, the mere circumstance that his act was not the immediate cause of her leaving her parental home or lawful guardian's custody on that day would not mean that he had not taken or enticed her, and therefore, this would mean that he

committed this offence. Since this offence is committed when a minor or person of unsound mind is taken or enticed from the keeping of the lawful guardian, the first person who does such an act commits the offence of kidnapping from lawful guardianship. But when another person takes or entices the victim from the keeping of the first kidnapper, he does not commit this offence because the first kidnapper is not the lawful guardian of the victim. The same principle would apply for subsequent takings or enticements. Therefore, the offence of kidnapping is limited to the act of the first kidnapper only.

In other words, kidnapping is not a continuing offence and it is restricted to the initial act of taking or enticement. Once the minor is taken or enticed away the act is complete. Where a minor girl is kidnapped, it is no defence to say that she had consented to go with the accused, or that she looked a major, or that she had told the accused that she was not a minor. Since the accused in such a case commits a mala in se., mistake of fact cannot be available to him as a defence. Where a minor leaves the custody of her lawful guardian voluntarily the guardianship continues, and anyone who takes or entices her without the consent of her lawful guardian, his act amounts to kidnapping from lawful guardianship. Similarly, when a minor is kidnapped and kept for some time by someone, and is then left or turned out, and then she is kidnapped again by another person, the second kidnapper is also guilty of committing kidnapping because the law presumes that as soon as she is left or turned out, her lawful guardianship again goes back to her original lawful guardian in whom it belonged before she was first kidnapped.

Where a Hindu woman left her husband's house along with her minor daughter and went to the house of the accused, and on the same day the minor was married to the brother of the accused without her father's consent, it was held that the accused was guilty of abetting the offence of kidnapping under section 363 read with section 109 of the Code. Where the husband of a minor girl sold her to another man (unfortunately this practice was, and perhaps still is, prevalent in our country especially in some tribes) and she was living with that man when the accused persuaded her to leave that man and go with another man, it was held that the accused had committed the offence of kidnapping because the man with whom she was living after she was sold by her husband was her lawful guardian for the purposes of section 361. The taking or enticing a minor or a person of unsound mind out of the keeping of the lawful guardian must signify that the accused has done some act which may be regarded as the proximate cause of the minor or such person going out of the keeping of the lawful guardian; that is to say, that the act on the part of the accused must be such that but for the same the minor or such person would not have gone out of the keeping of the lawful guardian as the minor or such person did. Where the victim tells the court clearly that on the day of the incident she had voluntarily left parental home with the clear intention of never to return, the act of the accused of signaling the victim could not be held to be responsible for her leaving the home. Where a minor orphan girl voluntarily joined a woman and they went to a town and lived together by begging and selling grass, and the accused then persuaded her to leave the woman without telling her and come with him, after which she lived with him for some time and was then betrothed to his son, when she was again persuaded, this time

by the accused, to leave them and join him which she did, it was held that conviction of the accused for kidnapping must be set aside because at the time of his persuading her to leave and join him, the minor was not under the lawful guardianship of the man from whom she was persuaded to leave because her care or custody was not handed over to him lawfully. If a minor is taken with the consent of the lawful guardian but is subsequently married without his consent, such marriage by itself would not amount to kidnapping.

Where a minor girl runs away from home because of ill-treatment, and on a chance meeting on the road with the accused, agrees to serve as a coolie and goes with him, the accused does not commit kidnapping because there is no taking or enticement on his part. A minor may be incapable of giving consent for her taking but if she leaves her home voluntarily and thus rejects the protection of her lawful guardian, the law recognises that it is a voluntary act of hers, and, therefore, as far as the question of leaving the protection of the lawful guardian is concerned the alleged kidnapper cannot be held guilty and it becomes immaterial whether the ward is a minor or a major. A minor girl was going to the vegetable market in search of work when she was met by another woman, the first accused, who promised her work and asked the victim to accompany her. The first accused took the victim to her home and kept her there till evening when the second accused removed her to a bungalow where she was kept for two days and then the victim was allowed to return to her own home.

It was held that at the time she was initially taken by the first accused, her lawful guardianship continued to remain vested in her lawful guardian, and when she was later removed to a bungalow with the help of the other

accused, that guardianship had not come to an end. Both the accused had thus committed kidnapping. Where a person took away a minor girl from her husband's home to another's house and she was kept there for two days after which another man came there and took her away to his house and kept her there for about twenty days and later on removed her to the house of the accused from where he again along with the accused took her to many places ending in Calcutta, it was held that when the accused joined the main accused the lawful guardianship of the victim's husband had by then come to an end since the victim had already been taken out of the keeping of her husband by another person, and, therefore, there was no question of her being held guilty of kidnapping. Where the husband of a minor girl had turned out the victim from his house and had told her that she was free to go anywhere after which the accused took her away, it was held that the accused had not committed the offence of kidnapping. Where a person pledged his girl to the accused to secure a loan but failed to repay the same, and the accused pledged her to the second accused to secure the amount raised by him, it was held that the two accused were not guilty of kidnapping as there was no taking or enticement on their part. Even though such a contract was neither legal nor enforceable, the minor had been deposited with the accused by her lawful guardian and was retained by him with his consent and, therefore, taking or enticement was absent. Where the accused administered dhatara to a twenty year old woman, who became unconscious as a result of the poisoning, and then took her away, the charge of kidnapping must fail as becoming unconscious does not mean that she became a person of unsound mind for the kidnapping of whom no age restriction has been mentioned in the section.

Where a fourteen year old girl of easy virtue who was used to sexual intercourse was taken away by the accused without the consent of her lawful guardian, it was held to be a taking within the meaning of section 361 as the law does not authorise that such girls could be taken away without their lawful guardian's consent, and hence the accused would be guilty of kidnapping. Where the divorced mother of a minor girl had been given custody of the girl by the court, and the father of the child removed her from her school by force and took her to his home, it was held that he was not entitled to the custody of the child and had thus committed the offence of kidnapping. Where the accused engaged a minor girl as a maid servant without the consent of her lawful guardian, it was held that the offence of kidnapping was not committed. Where the father of a minor girl gave her into the custody of her prospective husband to be taken to the latter's home for solemnisation of ceremonies, and while she was being so taken by her prospective husband the accused persons en route took her away, it was held that they were guilty of kidnapping as she was in the custody of her lawful guardian, her prospective husband.

Where a person enticed a minor girl to come out of the terrace to the road and subsequently into a motor car into which another person was sitting so that the latter could drive away with her, it was held that kidnapping was committed only when the latter drove away with her. The Allahabad High Court has held⁵ that to help a minor girl with shelter or to take her to a hospital for treatment does not make one liable for the offence of kidnapping as such act on his part does not amount to taking within the meaning of section 361 of the Code. Hindu Law In Hindu Law the father is ordinarily the

lawful guardian and a mother who takes a child anywhere would be presumed to be acting with the consent of the father of the child. A mother was, therefore, held to have committed kidnapping where she took their child away from his home with a view to get the child married without the consent of the child's father. The Allahabad High Court has held that where a father of a Hindu minor less than five years of age took the child away without the consent of the mother of the child, he could not be held guilty of kidnapping as he was the natural guardian of the child, and this in spite of the fact that section 6, Hindu Minority and Guardianship Act, 1956 gives the custody of a child below five years of age to its mother ordinarily, and the mother could always claim its custody in a civil court. The parents of a Hindu minor girl have absolute right to her custody and no such right exists to anyone else. Similarly, the husband is her lawful guardian after marriage. Consequently, if the father of a Hindu married minor girl takes her away without the consent of her husband, he may be held guilty of kidnapping.

But where a Hindu married minor girl lived with her mother for five or six years, she could not be held to be in the keeping of her husband. The mother is the lawful guardian of a Hindu minor illegitimate daughter, and her father when she is legitimate, according a well known custom. In *Ashok Kumar Seth v. State of Orissa* the accused husband was charged with forcibly entering into the house of his father-in-law and taking away the minor child of the accused from the custody of accused's wife.

The Orissa High Court held that a father is the natural guardian of a minor under Hindu Law and since he was not legally prohibited by an order of the court debarring him from having custody of his child, no prima facie case of

kidnapping was made out against him. Therefore, cognizance under section 363 against him was quashed but that under section 452 for committing house trespass was maintained. Mohammedan Law In Mohammedan Law a father who takes away a son under seven years of age, or daughter, who has not yet attained puberty, if Sunni, or under seven years of age if Shia, or an illegitimate child from the custody of the mother may be held guilty of kidnapping since the law recognises the mother as the guardian. Where the parents of a minor Mohammedan girl are dead, her brother is her lawful guardian. According to the Sunni law the mother of a minor girl is her guardian till she reaches puberty which generally is fifteen years. But the Kerala High Court has held that where the father of a Sunni minor girl child aged two and a half years takes the child away without the consent of the mother of the child, he does not commit the offence of kidnapping because he does not take the child from the keeping of the lawful guardian, which a mother is not, even though she is entitled to the custody of the child up to her puberty. While the ordinary kidnapping from lawful guardianship is punishable under section 363, kidnappings with different guilty minds have been made punishable under subsequent sections of this part of the chapter.