

decree" given by HOLLOWAY, J., in his very able judgment in *Arunachellathudayan v. Veludayan*(1). My answer to the question referred is in the affirmative.

AYLING, J.—It appears to me that some meaning must be attached to the word "final" as qualifying "decree" in clause (7) of section 3 of the Madras Estates Land Act: and, that, in the connection in which it is used, it must be taken to indicate a decree which has ceased to be liable to be modified on appeal. I would answer the reference in the affirmative.

This Second Appeal coming on for final hearing on the 13th day of December 1910, after the expression of the opinion of the Full Bench, the Court consisting of KRISHNASWAMI AYYAR and AYLING, JJ., delivered the following:—

JUDGMENT.—In accordance with the ruling of the Full Bench, we set aside the decree of the Courts below, except as regards the amount of profits decreed and dismiss the suit with reference to the prayer for ejectment. We make no order as to costs.

KANAKAYYA  
D.  
JANARDHANA  
PADHI.

KRISHNA-  
SWAMI  
AYYAR, J.  
AYLING, J.

KRISHNA-  
SWAMI  
AYYAR AND  
AYLING, JJ.

## APPELLATE CRIMINAL.

*Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.*

Re N. JALADU AND ANOTHER (PRISONERS),  
APPELLANTS.\*

1911.  
October.  
16 and '14.

*Indian Penal Code (Act XLV of 1860), sec. 90—'Consent' obtained on misrepresentation, illegal—Indian Penal Code (Act XLV of 1860), sec. 366—Kidnapping a girl with such consent obtained from guardian.*

The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping.

A consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of section 90, Indian Penal Code, and as such is not useful as a consent under the Penal Code. A misrepresentation as to intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a "fact" within the meaning of section 3 of the Evidence Act.

*Per Curiam*—Equally useless as a defence is a consent obtained by a fraud or coercion.

*R. v. Hopkins* (1842) Car & M. 254, followed.

(1) (1870) 5 M.H.C.R., 215 at pp. 221—223. \* Criminal Appeal No. 353 of 1911.

Re  
JALADU.

APPEAL against the order of E. H. WALLACE, the Acting Sessions Judge of the Nellore Division in Sessions Case No. 8 of the calendar for 1911.

In this case, the appellants were convicted under section 366, Indian Penal Code, of the offence of kidnapping a girl (prosecution witness No. 1) of about ten years of age from the guardianship of her mother prosecution witness No. 2) with intent that she might be compelled to marry against her will. The facts found by the Lower Court are that the second accused, a relation of prosecution witnesses Nos. 1 and 2, asked prosecution witness No. 2 and prosecution witness No. 3 her (prosecution witness No. 2's) grand-mother to send the girl for three days for *Bogikolusu* (or present gathering at a festival) but really with the intention of disposing of the girl in marriage to the first accused without the consent of the girl and prosecution witness No. 2 and prosecution witness No. 3, the great grand-mother, let her go. More than a week after the second accused had taken the girl to her village she led her to another village on a false pretext. She then took her to a temple there, where the first accused was waiting and there the girl was married to the first accused against her will.

The defence was that the girl was taken and married to the first accused with the consent of prosecution witness No. 2 and prosecution witness No. 3. The Sessions Judge convicted both the accused under section 366, Indian Penal Code, holding the defence to be false. Hence the appeal for appellants.

*P. R. Grant* for the Public Prosecutor.

SUNDARA  
ATTAR AND  
SPENCER, JJ.

JUDGMENT.—In this case the appellants have been convicted under section 366, Indian Penal Code of the offence of kidnapping a girl (prosecution witness No. 1) of about 10 years of age from the guardianship of her mother prosecution witness No. 2 with intent that she might be compelled to marry against her will. The facts found by the Lower Court are that the second accused a relation of prosecution witnesses Nos. 1 and 2, asked prosecution witness No. 2 and prosecution witness No. 3, her (prosecution witness No. 2's) grand-mother to send the girl for three days for *Bogikolusu* (or present gathering at a festival) but really with the intention of disposing of the girl in marriage to the first accused without the consent of the girl and prosecution witness No. 2 and prosecution witness No. 3. Prosecution witness No. 3, the girl's great grand-mother, let her go. More than a week after the second accused had taken the girl to her village she

led her to another village on a false pretext. She then took her to a temple there, where the first accused was waiting, and there the girl was married to the first accused against her will.

The defence was that the girl was taken and married to the first accused with the consent of prosecution witness No. 2, and prosecution witness No. 3.

We agree with the Lower Court in holding that the evidence adduced on behalf of the defence is not worthy of credit and that no consent was given by either prosecution witness No. 2 or prosecution witness No. 3 to the marriage. The Sessions Judge convicted both the accused under section 366, Indian Penal Code. He held that "if, as alleged by the prosecution, prosecution witness No. 2 allowed second accused to take her only for Bagikolu, and second accused took her and got her married in violation of her legal guardian's authority the offence of kidnapping is complete." This statement of the law cannot be accepted as correct. The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping. So far as the first accused is concerned it was not alleged by the prosecution that he was a party to the taking away of the girl from the guardianship of prosecution witness No. 2 nor was it alleged that he took her away from the custody of the second accused. The District Judge finds that he "acted in concert with her and assisted in the kidnapping." We do not find any evidence that he instigated or aided her in the taking of prosecution witness No. 1 nor is there any charge or proof of conspiracy as regards this part of the transaction. There is no evidence that prior to the time of the marriage the girl had been removed by the first accused from the custody of the second accused, who took her from prosecution witnesses Nos. 2 and 3. The offence charged has not been made out against the first accused. His conviction cannot, therefore, be sustained.

It remains to be considered whether the second accused is guilty under section 366 or not. Prosecution witness No. 2 said that she refused to consent to the second accused taking the girl and that she had gone away from the house when she actually took her, but prosecution witness No. 3 does not

Re  
JALADU.  
SENDARA  
AYYAR AND  
SPENCER, JJ.

Re  
 JALADU.  
 SUNDARA  
 AYYAR AND  
 SPENCER, JJ.

corroborate her in this statement; and the girl prosecution witness No. 1 clearly says that her mother prosecution witness No. 2 sent her. We are of opinion on the evidence that prosecution witness No. 2 also consented to the girl going with the second accused. But it appears that the second accused obtained the consent of the girl's guardian by falsely representing that the object of taking her was only to gather presents for a festival. The question is, whether in these circumstances it can be said that the guardian gave her consent to the taking of the girl within the meaning of section 61, Indian Penal Code. Section 90, Indian Penal Code provides "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or *under a misconception of fact*, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception." We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In section 3 of the Evidence Act illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in *R. v. Hopkins*(1), that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury's Laws of England, volume 9, page 623. In Stephen's Digest of the Criminal Law of England (sixth edition, page 217), the learned author says with reference to the law relating to "Abduction of girls under sixteen" "thus . . . If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person." And he gives the following illustration No. (5): "A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C." The illustration is founded on the case of *R. v. Hopkins*(1), already referred to. Although in cases of contracts a consent obtained by coercion or fraud is

(1) (1842) Car. and M., 254.

only voidable by the party affected by it, the effect of section 90, Indian Penal Code, is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence. The second accused must, therefore, be held to have removed the girl from the guardianship of prosecution witness No. 2 without her consent.

In the result, we confirm the conviction and sentence with respect to the second accused and reverse the conviction of the first accused and direct that he be set at liberty.

Re  
JALADU.  
SUNDARA  
AYYAR AND  
SPENCER, JJ.

## APPELLATE CRIMINAL.

*Before Mr. Justice Benson.*

G. G. JEREMIAH (ACCUSED) APPELLANT,  
v.

F. S. VAS (COMPLAINANT), RESPONDENT.\*

1911.  
Oct. 3, 4, 12  
and  
Nov. 23.

*Evidence Act (I of 1872), ss. 21 and 81—Evidence of publication of a newspaper by a particular person, merely by production of the paper—Sufficiency of, Criminal Procedure Code (Act V of 1898), ss. 255, 256, 271, 272 and 428—'necessariness' meaning of in—Mistake of Court, as to prima facie case—Retrial.*

Per SUNDARA AYYAR and PHILLIPS, JJ.—

Merely exhibiting a copy of a private newspaper containing a libellous statement without any sort of proof such as the production of an authenticated copy of a declaration under section 7 of Act XXV of 1867 is no proof of publication of the libel by the person by whom the paper purports to have been published.

Evidence that a certain copy of the paper "appears to be printed and published by A" is no proof of publication, by him.

If there be proof of publication of a newspaper by A then section 81, Evidence Act, presumes that what purports to be a newspaper of a particular name is that paper and that every copy of it was issued by the publisher of that paper.

*Gathercole v. Miall* [(1846) 15 M. & W. 319], *Rea v. Forsyth*, [(1814) Russ and R. 274] and *Watts v. Fraser*, [(1837) 7 Ad. & E. 223], considered.

A statement in a complaint that the accused published the libel is no evidence against the accused as it was not made in the presence of the accused. The fact that the accused never denied publication by him of the libel does not relieve the prosecution from the necessity of proving affirmatively that the accused published the libel, an essential fact necessary to establish the guilt of the accused.

Additional evidence under section 428, Criminal Procedure Code, can be ordered to be taken only if the appellate court thinks it necessary.

*Quere.*—Whether if the admission by the accused of publication is contained in his written statement, that would relieve the prosecution from the defect in letting in evidence of publication.

\* Criminal Appeal No. 104 of 1911.