

REGINA v. MELLON

(1900), 7 C.C.C. 179 (also reported: 5 Terr. L.R. 301)
North-West Territories Supreme Court, Rouleau J., 18 June 1900

*Indian Act--Selling intoxicating liquor to "treaty" half-breed--Knowledge of licensee—
Indian Act, R.S.C. 1886, ch. 43, sec. 94.*

1. The sale of intoxicants to a half-breed who, by reason of having "taken treaty," was an Indian within the "Indian Act" (Can.), is not an offence under that Act unless the seller knew or had reason to suspect that the half-breed had "taken treaty."

DECIDED: JUNE 18, 1900.

Appeal from a summary conviction of the defendant by two justices of the peace for the North-West Territories, for having on the 19th January, 1900, supplied intoxicating liquor to one Charles Pepin, then being a treaty Indian.

Section 94 of the Indian Act, R.S.C. 1886, ch. 43, as amended by 51 Vict. ch. 22, sec. 4, and 57-58 Vict. ch. 32, sec. 6, is as follows:--

94. Every one who by himself, his clerk, servant or agent, and every one who in the employment or on the premises of another, directly or indirectly on any pretence or by any device sells, barter, supplies or gives to any Indian or non-treaty Indian, any intoxicant, or causes or procures the same to be done, or attempts the same or connives thereat, or opens or keeps, or causes to be opened or kept, on any reserve or special reserve, a tavern, house or building in which any intoxicant is sold, bartered, supplied or given, or who is found in possession of any intoxicant in the house, tent, wigwam or place of abode of any Indian or non-treaty Indian, or of any person, or upon any other part of the reserve or special reserve, or who sells, barter, supplies or gives to any person, on any reserve or special reserve, any intoxicant, shall, on summary conviction before any Judge, police Magistrate, Stipendiary Magistrate or two justices of the peace, or Indian agent, upon the evidence of one credible witness, other than the informer or prosecutor--or in the Province of Manitoba, the Province of British Columbia, the North-West Territories or the District of Keewatin, upon the evidence of the informer alone, if he is a credible person be liable to imprisonment for a term not exceeding six months and not less than one month, with or without hard labour, or to a penalty not exceeding three hundred dollars and not less than fifty dollars, with costs of prosecution, or he shall be liable to both penalty and imprisonment in the discretion of the convicting Judge, Magistrate, Stipendiary Magistrate, justices of the peace or Indian agent; and a moiety of every such penalty shall belong to the informer or prosecutor, and the other moiety whereof shall belong to Her Majesty, to form part of the fund for the benefit of that body of Indians or non-treaty Indians, with respect to one or more members of which the offence was committed.

(2) In this section the expression "Indian," in addition to its ordinary signification as defined in section two of this Act, shall extend to and include any person, male or female, who is reputed to belong to a particular band, or who follows the Indian mode of life, or any child of such person.

CALGARY, June 18, 1900.

ROULEAU, J.:--It is admitted by Mellon that he supplied intoxicating liquor to Charles Pepin; but he said that he never knew, and had no means of knowing, that Pepin was a treaty Indian.

Daignault, who was present when Charles Pepin got the liquor, swore that he never knew that Charles Pepin "took treaty," although he knew that he was a half-breed.

Charles Pepin himself was examined before me, and he swore that he never dressed like an Indian; that he had worked for one Donald McLeod freighting between Calgary and Edmonton for two summers; that he never wore moccasins; that he was driving a pair of horses and selling posts the day he got the liquor. In fact, Pepin speaks English fluently and dresses better than many ordinary white men; there is no indication whatsoever in his appearance, in his language, or in his general demeanour, that he does not belong to the better class of half-breeds. It is a fact, though, that he "took treaty" about fifteen years ago, and, according to *Regina v. Houson*, 1 Terr. L.R. 492, 1 N.W.T. Rep. 44, a half-breed having taken treaty is an Indian within the meaning of the Indian Act.

In *Fowler v. Paget*, 7 T.R. 509, Lord Kenyon says: "It is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea*. The intent and act must both concur to constitute the crime.

I find this principle fully discussed in all its phases in the case of *Regina v. Tolson*, 58 L.J.M.C. 97, and the conclusion arrived at by the Court there is, that there can be no crime without a tainted mind. Although this is not an inflexible rule, as in the case of by-laws passed by municipal corporations, still an enactment must be construed with the qualifications ordinarily imported into the construction of criminal statutes, and the various circumstances that may make the one

construction or the other reasonable or unreasonable. Would it be reasonable in this case to think that the licensee was guilty of an offence which he had no intention to commit, or which he had no means to ascertain?

Of course if there was any evidence to shew that he was not acting in good faith, or that he might have had some reason to think that this man was an Indian, or that he was suspicious and ran his chances, I should not then hesitate to affirm the conviction. Mellon was not doing anything morally or legally wrong when he sold liquor to Charles Pepin; he was doing only what he was entitled to do, in ordinary circumstances, according to the terms of his license.

I find a case very much *ad rem* with this case in *Sherras v. De Rutzen*, [1895] 1 Q.B. 918, where it was decided that in order to convict the licensee of a public house under sub-sec. 2 of sec. 16 of the Licensing Act, 1872, for serving a constable with liquor or refreshment while on duty, *mens rea*, or knowledge on the part of the defendant that the constable was on duty, must be proved. The clause referred to in this decision is: "If any licensed person supplies any liquor or refreshment whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable, he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding for the second or any subsequent offence, twenty pounds."

In conclusion I may add that Wright, J., said in the case just referred to: "In the present case, if knowledge were unnecessary, no publican would be safe."

Conviction quashed.