HANY VS. STATE.

In an indictment for gaming, it was charged in two of the counts that the defendant and four other persons did *bet together and against each other* at a game of cards, &c.; and in the other count that the said defendant and the said other persons *did bet together* at a game of cards, &c. HELD that proof that the four persons named in the indictment played the game of cards, and defendant stood by and bet with one of them; that three of the players bet with each other, but the fourth player did not bet at all, was not sufficient to sustain a verdict of guilty against defendant. That the charge in the indictment, though made with unnecessary complication, should have been proven as aleged.

Appeal from the Circuit Court of Yell County.

Indictment for gaming against Loony McDaniel, Thomas Morse, Jackson Smith, Abraham McCarly and the appellant, John Hany, determined in the Yell circuit court in September Term, 1847, before the Hon. W. W. FLOYD, judge.

There were three counts in the indictment. The first charged that the said McDaniel, Morse, Smith, McCarly and Hany, on, &c., at, &c., did *bet together and against each other* divers large sums of money, *to wit*: the sum of fifty cents, at and upon a certain unlawful game at cards commonly called seven up, against the peace, &c.

The second count charged that said McDaniel, Morse, Smith, McCarly and Hany, afterwards, *to wit:* on, &c., at &c., *did bet together* divers other large sums of money, *to wit*: the sum of fifty cents, at and upon a certain other unlawful game at cards commonly called seven up, against the peace, &c.

The third count charged that said defendants, on, &c., at, &c., did *bet together and against each other* divers other large sums of money, *to wit*: the sum of fifty cents, at and upon a certain other unlawful game at cards, commonly called three up, against the peace, &c.

The defendant, Hany, was tried on the plea of not guilty and convicted. He moved for a new trial, on the grounds that the verdict was contrary to law and evidence, and that the court erred in charging the jury. The motion was overruled and he excepted. From his bill of exceptions, it appears that on the trial the State introduced Loony McDaniel as a witness, who testified that about the time alleged in the indictment, he, the witness, and Thomas Morse, Jackson Smith and Abraham McCarly played at a game of cards, in Yell county, called seven up: that he, the witness, and defendant, Hany, bet twenty-five cents on the game: that Hany was a by-stander, and did not bet *with or against any other person,* but that the players all, except McCarly, bet at the game—that McCarly did not bet at all. This was all the evidence given on the trial. Whereupon, the court charged the jury, "that if they were satisfied from the testimony, that the defendant did bet, in manner and form as charged in the indictment, together with one or more of the persons as charged to have engaged in the game, they should find the defendant guilty."

W. WALKER & BERTRAND, for appellant. The jury was mislead by the instructions of the court, as the evidence does not warrant the finding, or sustain the offence as laid in the indictment.

The indictment, in two of the counts, charges that the *appellant and four others* "did bet together and against each other" divers sums of money, &c. The other count charges that the *appellant and four others* "did bet together" large sums, &c. The proof is that the four played at a certain game, and that the appellant and one of the four bet twenty-five cents: that the appellant was a by-stander and did not bet with or against any other person: that, of the four playing the game, but three of them bet at it.

WATKINS, *Att. Gen'l*, contra.

SCOTT, J. In the first and third counts of this indictment it is charged that the appellant and four other persons, whose names are disclosed, "did bet together and against each other divers large sums of money, to wit: the sum of fifty cents, at and upon a certain unlawful game of cards," &c.; and in the other count it is charged that the same five persons "did bet together divers other large sums of money," &c. The evidence presented by the bill of exceptions to the opinion of the court overruling the motion for a new trial, establishes that the appellant stood by while the other four played cards, and that the appellant and one of the card-players bet twenty-five cents on the game, but that he (the appellant) did not bet with any other person, and that two others of the card-players bet on the game, but that the remaining card player did not bet at all. So that only three other persons besides the appellant bet on the game, and not four others, as charged in all the counts of the indictment.

The indictment is predicated upon the *5th section* of the *3d article* of the *6th Division* of the statute of Criminal Jurisprudence, *Revised Statutes*, 274; and, unfortunately for the State, the offence is charged in a manner so unnecessarily complicated as

to be extremely difficult of proof; but having charged it in this manner, it was devolved upon her to prove it as charged. It is true that the presumption of law is in favor of the verdict, and that unless the record affirmatively overthrows this presumption, it must not be disturbed. But in a case like this it is manifest that wrong and injustice might grow out of the verdict, if not overthrown, since another indictment might be framed and a second conviction had (if attempted within the time limited by law for the prosecution of the offence) upon the identical same testimony: Wherefore, although the testimony abundantly shows that the appellant violated the law, it does not establish the charge as laid in the indictment and support the verdict and judgment thereon. And consequently, as the court below erred in overruling the appellant's motion for a new trial, the judgment of that court must be reversed, and the cause remanded to be proceeded in.