matters. We hold, however, that no costs pertaining to the case which was dismissed against appellant should be made a charge against him in this case; and we also hold that no witness is entitled to mileage for more than one trip, going and coming, at any one term of court, and is entitled to his per diem only for the days on which he actually attended the court, including the time consumed in going and coming; and the clerk below will revise and retax the costs in this case in accordance with the views herein expressed. The motion for rehearing is overruled.

PRENDERGAST v. STATE.[1]

(Court of Criminal Appeals of Texas. Dec. 18, 1899.)

INDICTMENT AND INFORMATION—DUPLICITY—LOTTERY—ESTABLISHMENT — CONVICTION — APPEAL—EVIDENCE — INSTRUCTIONS — GAMING DEVICE—ACCOMPLICE.

1. It is not error to refuse to quash an indictment which charges that appellant did unlawfully establish a lottery, and did by said lottery dispose of certain personal property, since, though it charges two separate offenses, they are each different phases of the same transaction, and not repugnant to each other, and are punishable in the same manner, and hence may be charged conjunctively.

2. One convicted of establishing a lottery under an indictment which charged him with establishing a lottery, and with disposing of certain property thereby, on appeal cannot allege, as a ground of reversal, the fact that the indictment did not state to whom the ticket was sold, where the evidence sustains the allegation charging the establishment of the lottery, since such proof is not necessary to sustain a conviction.

3. A nickel in the slot machine was so constructed that if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose. *Held*, it was not error to charge the jury that such machine constituted a lottery.

4. That one keeping and maintaining a nickel in the slot machine was indictable for maintaining a gaming device is no reason why he should not also be indicted for establishing a lottery.

5. Defendant placed a nickel in the slot machine in his saloon. One who worked for defendant put nickels therein, and played the machine. *Held*, the latter was not an accomplice to the establishment of a lottery, so as to require an instruction on the question of accomplice testimony in connection with his testimony.

6. Defendant placed a slot machine in his saloon. The machine was so constructed that by placing a five-cent piece in the slot and pressing a lever the machine would work automatically, and if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The machine was so constructed that the nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose. *Held* sufficient to support a verdict finding defendant guilty of establishing a lottery.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

James Prendergast was convicted of establishing a lottery, and he appeals. Affirmed.

James B. & Charles J. Stubbs, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of establishing a lottery, and his punishment assessed at a fine of $100, and he prosecutes this appeal.

Appellant moved to quash the indictment on the ground, as alleged by him, that both counts in same were duplicitous, in that it charged that appellant did unlawfully establish a lottery, etc., and did then and there by said lottery dispose of certain personal property, etc.; the contention being that the establishing of a lottery, and disposing of property by lottery, are two distinct offenses, and cannot be charged in the same count. While it is true that they are distinct offenses, yet they are different phases of the same transaction, and not repugnant to each other. Duplicitous or repugnant matter will not be tolerated in the same count; but where there are several ways set forth in the same statute by which an offense may be committed, and are all embraced in the same general definition, made punishable in the same manner, while they are distinct offenses they may be charged conjunctively in the same count. Willis v. State, 34 Tex. Cr. R. 148, 29 S. W. 787; State v. Randle, 41 Tex. 292.

Appellant also contends that the indictment, or at least that part of the count charging the disposition of the ticket, should give the name of the party to whom the ticket was sold. It is not necessary to discuss this question, inasmuch as the count for establishing the lottery is good, and the proof appears to sustain said charge.

Appellant complains that the court instructed the jury that a slot machine was a lottery, on the ground that this was taking a question of fact from the consideration of the jury. This question resolves itself into the proposition as to what the proof showed. The evidence establishes these facts without controversy: That the alleged lottery was operated by means of a slot machine, which was about five feet high; that on the inside thereof was certain machinery, so constructed as to make it work automatically when it was in running order; that there were five slots, of different colors; that if you put a nickel into the slot of either red or black colors, and in falling into the machine it happened to touch a certain spring, it would set the machinery in motion, open a certain valve, and pay out a dime into a little pocket on the side of

[1] Rehearing denied June 29, 1900.

the machine, which was the winning. If the nickel was placed in the green slot, and in falling touched a certain spring, it would pay out a quarter; and so of the white, a half; and the yellow, a dollar. If the nickel did not happen to touch the right spring to make it pay, it would not pay anything. Of course, the person depositing the nickel in one of the slots would not always win, and whether such person won or lost would depend upon the internal mechanism and appliances inside of the machine, and whether in falling it would touch a certain groove or spring, or something else, that would open the value below and let the nickels out. If the nickel did not touch the right spring, and did not win, nothing would fall out. It was only when the particular spring or groove or mechanism was reached by the nickel that was put in the slot that the machine would release any money. The highest amount that could be won at any one time was a dollar. Every person who played did not win. The nickels that were put into the machine and did not win would remain in the machine, in the general fund. Every person who put a nickel in the machine had an equal opportunity of winning a prize. The machine kept its own capital, and was self-sustaining. The witness says: There was no keeper, banker, or exhibitor presiding over it in charge of the machine. It was automatic, and did all its own work. After the nickel was deposited, the handle was pushed down, and said interior mechanism set in motion, and it allowed the nickel to wander through the grooves or openings; and if it happened to strike the right spot there would be a winning, and if it did not there would be a loss, to that player. (This witness could not say to whom the money went that was lost.) That Prendergast (appellant) owned the saloon where the machine was kept. It was further shown that he allowed it to be placed in his saloon, and he was there every day, and saw its operation, and allowed it to be used there, and in the manner described. This statement, according to our understanding of the definition, constitutes a lottery; that is, a game of hazard or chance, in which small sums are ventured for the chance of obtaining a larger sum of money. State v. Randle, 41 Tex. 292; Randle v. State, 42 Tex. 580; 13 Am. & Eng. Enc. Law, p. 1164. Nor, in our opinion, does the definition given by Judge Roberts in Stearnes v. State, 21 Tex. 699, fit the evidence in this case: "A raffle is a game of perfect chance, in which every participant is equal with every other in the proportion of his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances in proportion to his risk. Whether they be developed with dice or some other instrument is not material. The successful party takes the whole prize, and all the rest lose. The element of one against the many, the keeper against the bettors, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibitor." In this machine it does not appear that there was no keeper or exhibitor. On the contrary, the owner of the saloon was the keeper, and all persons were not interested in the common fund. The machine retained the major part of the common fund, else it could not be self-sustaining. Nor was this a game of perfect chance. The machine was automatically constructed in favor of the keeper, and a man might play (that is, put his nickel into the slot), and not win anything. Consequently there would be no prize distributed to him when he played it. Evidently there was some effort here in the proof to show a similarity between this and a raffle, but in our view the evidence showed a distinct difference. Moreover, the fact that this machine would be indictable as a gaming device is no reason why the keeper was not also indictable for establishing a lottery. If there had been any controversy as to the essential features in the testimony which make the device a lottery, it would have been error on the part of the court to have instructed the jury on the assumption that it was a lottery; but, in our opinion, the proof conclusively showed that it was a lottery.

It is contended that Walter Sheppard was an accomplice, because he worked in the saloon, and is shown to have put nickels in the machine. This, in our view, did not constitute him an accomplice in the establishment of the lottery. The said witness was not a participant in the establishment of the lottery, and, in order to constitute him an accomplice, he must have participated in the crime itself, with the same intent and purpose as appellant. The court consequently did not err in failing to submit the question of accomplice testimony in connection with Sheppard's testimony. Nor did the court err in refusing to submit the question of raffle to the jury. We have already discussed this matter heretofore, and it is only necessary to refer to the previous discussion on this subject. The testimony sufficiently supports the verdict, and the judgment is affirmed.

DAVIDSON, P. J., absent.

SAN ANTONIO EDISON CO. v. BEYER.[1]

(Court of Civil Appeals of Texas. June 13, 1900.)

STREET RAILROADS—NEGLIGENCE—PERSONAL INJURY—EVIDENCE.

1. In an action for damages for a personal injury received by plaintiff by reason of his horse becoming frightened at defendant's street

[1] Motion for a rehearing overruled June 29, 1900.