ing the amounts to be subsequently determined. This is not new or unusual in leases or agreements.

To take the position that the lessors could wait perhaps months or years for the decision of the arbitrators would be extremely unfair and unreasonable to the lessee. At the end of his term, he would not know whether he was a lessee or what he was. What would be his position? What estate would he have? I confess I do not know. The hold-over could not be a tenancy at will. The lessee could not leave the premises or give up the tenancy without forfeiting the buildings. He would be held in suspense at the will of the lessor or the arbitrators for an indefinite time; a suspense against his will. He could not give subleases; his subtenants would have no assurance of staying on; he would have an empty building on his hands, awaiting the slow measure of arbitration machinery. Neither could he make improvements or repairs if he were a manufacturer; value was to be determined as of the end of the term. This uncertainty would be hanging over his head with no means whatever of making it certain until the decision of the arbitrators. At any moment they might fix the value and the renewal rent; the lessors then could take the buildings, or offer a lease at their "election." *The time, however*, when they could do these things, would be absolutely beyond the determination of man, whereas the lease prepared by these parties *fixed* a definite time for such determination, to wit, the end of the term.

The courts below, in my judgment, have properly disposed of this case in holding that the lessors having taken the position that they would not "elect," even within a reasonable time after the expiration of the lease, the lessee had the right to "elect" for himself. I feel that no injustice will be done by the affirmance of this judgment.

POUND, LEHMAN, and KELLOGG, JJ., concur with HUBBS, J.

CRANE, J., dissents in opinion.

O'BRIEN, J., not voting. CARDOZO, C. J., not sitting.

Judgments reversed, etc.

(250 N. Y. 479)

MURPHY v. STEEPLECHASE AMUSEMENT CO., Inc.

Court of Appeals of New York. April 16, 1929.

1. Theaters and shows ⇐6—Damages for injury by fall from moving belt of amusement device held not recoverable on ground of sudden jerk.

One stepping on moving belt of amusement park device, which normally ran smoothly, *held* not entitled to recover damages for injuries by fall therefrom on ground that it threw him with a sudden jerk, in absence of evidence that it was out of order, especially as fall was very hazard invited and foreseen.

2. Theaters and shows ⇐6—One stepping on moving belt of amusement device accepts obvious and necessary dangers.

One taking part in sport of trying to keep his footing on moving belt of amusement park device accepts dangers inhering therein, so far as they are obvious and necessary.

3. Theaters and shows ⇐6—Nurse's testimony that she had attended patrons injured at certain amusement device, but that none had suffered broken bones, as did plaintiff, held insufficient to show that it was trap for unwary.

In action for injuries to one falling from moving belt of amusement park device, testimony of nurse at park hospital that she had attended patrons injured at such device on other occasions, but that she could not say how many and that none had been badly injured or suffered broken bones as did plaintiff, *held* insufficient to show that it was a trap for the unwary, in view of evidence that 250,000 visitors were at device in year.

4. Theaters and shows ⇐6—One injured by fall from moving belt cannot recover on theory of defective padding where case went to jury on theory of sudden jerk.

One injured by fall from moving belt of amusement park device *held* not entitled to recover on ground that canvas padding was not kept in repair to break force of fall, where case went to jury on theory that negligence was dependent on a sharp and sudden jerk.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by James Murphy, an infant, against the Steeplechase Amusement Company, Inc. From a judgment of the Appellate Division (224 App. Div. 832, 231 N. Y. S. 826), affirming by a divided court a judgment of the Trial Term on the verdict of a jury for plaintiff, defendant appeals. Reversed, and a new trial granted.

Gardiner Conroy and Reginald S. Hardy, both of Brooklyn, for appellant.

Charles Kennedy, of New York City, for respondent.

CARDOZO, C. J. The defendant, Steeplechase Amusement Company maintains, an amusement park at Coney Island, N. Y. One of the supposed attractions is known as "the Flopper." It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and

with padded flooring beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

[1] Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as every one understood, than the slowly moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there. The very name, above the gate, "the Flopper," was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even to stand and keep their footing; others jumped or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. "I took a chance," she said when asked whether she thought that a fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb, in that it stopped and started violently and suddenly and was not properly equipped to prevent injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard, or other device to prevent a fall therefrom. No other negligence is charged.

We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment. Matter of Case, 214 N. Y. 199, 108 N. E. 408; Dochtermann v. Brooklyn Heights R. R. Co., 32 App. Div. 13, 15, 52 N. Y. S. 1051; Id., 164 N. Y. 586, 58 N. E. 1087; Foley v. Boston & M. R. R. Co., 193 Mass. 332, 335, 79 N. E. 765, 7 L. R. A. (N. S.) 1076; Work v. Boston Elevated R. Co., 207 Mass. 447, 448, 93 N. E. 633; N. & W. Ry. Co. v. Birchett (C. C. A.) 252 F. 512, 515, 5 A. L. R. 1028. But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen. Lumsden v. L. A. Thompson Scenic Ry. Co., 130 App. Div. 209, 212, 213, 114 N. Y. S. 421.

[2] Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. Pollock, Torts (11th Ed.) p. 171; Lumsden v. L. A. Thompson Scenic Ry. Co., supra; Godfrey v. Connecticut Co., 98 Conn. 63, 118 A. 446; Johnson v. City of New York, 186 N. Y. 139, 148, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824; McFarlane v. City of Niagara Falls, 247 N. Y. 340, 349, 160 N. E. 391, 57 A. L. R. 1; cf. 1 Beven, Negligence, 787; Bohlen, Studies in the Law of Torts, p. 443. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

[3] A different case would be here if the dangers inherent in the sport were obscure or unobserved (Godfrey v. Connecticut Co., supra; Tantillo v. Goldstein Bros. Amusement Co., 248 N. Y. 286, 162 N. E. 82), or so serious as to justify the belief that precautions of some kind must have been taken to avert them (cf. O'Callaghan v. Delwool Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407). Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different

case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at an emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say. None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap for the unwary, too perilous to be endured. According to the defendant's estimate, 250,000 visitors were at the Flopper in a year. Some quota of accidents was to be looked for in so great a mass One might as well say that a skating rink should be abandoned because skaters sometimes fall.

[4] There is testimony by the plaintiff that he fell upon wood, and not upon a canvas padding. He is strongly contradicted by the photographs and by the witnesses for the defendant, and is without corroboration in the testimony of his companions who were witnesses in his behalf. If his observation was correct, there was a defect in the equipment, and one not obvious or known. The padding should have been kept in repair to break the force of any fall. The case did not go to the jury, however, upon any such theory of the defendant's liability, nor is the defect fairly suggested by the plaintiff's bill of particulars, which limits his complaint. The case went to the jury upon the theory that negligence was dependent upon a sharp and sudden jerk.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

POUND, CRANE, LEHMAN, KELLOGG, and HUBBS, JJ., concur.

O'BRIEN, J., dissents on the authority of Tantillo v. Goldstein Bros. Amusement Co., 248 N. Y. 286, 162 N. E. 82.

Judgments reversed, etc.

(250 N. Y. 484)

BAKER v. HULL et al.

Court of Appeals of New York. April 16, 1929.

1. Sales ⇐469, 474(1)—At common law, no title passed to buyer under conditional sales contract until price was paid, and neither execution nor levy created lien on chattel sold.

Under common law, conditional sale contract did not pass title to buyer until contract price was paid, and hence neither execution issued against property of buyer nor levy thereunder gave right to lien on chattel sold.

2. Sales ⇐474(2)—Conditional sales contract does not pass title subject to lien of execution, except as to buyer's creditors acquiring lien by levy or attachment before contract is filed (Personal Property Law, §§ 64, 65).

Under Personal Property Law (Consol. Laws, c. 41) §§ 64, 65, condition of conditional sales contract remains valid, and no title passes to become subject to lien of execution as to all creditors of buyer except those who acquire lien by levy or attachment before contract is filed, not merely by issuance of execution.

3. Sales ⇐474(2)—Conditional sales contract, filed after execution, but before levy by buyer's creditor, survived execution and levy (Personal Property Law, §§ 64, 65).

Under Personal Property Law (Consol. Laws, c. 41) §§ 64, 65, condition in conditional sales contract, filed after execution by creditor of buyer, but before levy, survived issuance of execution without filing, and survived levy with filing.

4. Execution ⇐109—Civil Practice Act, binding debtor's chattels by execution, does not create lien with issuance of execution, irrespective of levy (Civil Practice Act, § 679).

Civil Practice Act, § 679, making goods and chattels of judgment debtor bound by execution where not exempt, does not bestow lien not theretofore existing, and does not create lien by issuance of execution irrespective of levy.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by George Baker against Henry Hull and another. From a judgment of the Appellate Division, Second Department (223 App. Div. 859, 228 N. Y. S. 748), affirming a judgment of the Trial Term, which dismissed the claim on the merits, plaintiff appeals by permission. Reversed, and new trial granted.

Samuel W. Eager, Jr., of Middletown, for appellant.

Herbert B. Royce, of Middletown, and Philip A. Rorty, of Goshen, for respondents.

KELLOGG, J. On the 10th day of June, 1927, the plaintiff sold and delivered an automobile to Jesse B. Earle. Contemporaneously Earle executed and delivered to the plaintiff a conditional sale contract. The instrument engaged Earle to pay to the plaintiff an agreed purchase price; it provided that title to the automobile should remain in the plaintiff until payment had been made. On the 22d of July, 1927, Samuel T. Randall recovered a judgment against Earle, which was docketed in the county of Orange, within which Earle resided. An execution against the property of Earle was issued on the 23d