

Syllabus.

were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily, expressed in the Robbins case. We do not propose to enter upon a renewed discussion of the subject at this time. If any further illustration is desired of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein, reference may be made to the still more recent case of *Leloup v. Port of Mobile*, 127 U. S. 640, which related to a general license tax on telegraph companies, and was decided by the unanimous concurrence of the court.

The judgment of the Court of Appeals of Texas is reversed, and the cause remanded, with instructions to discharge the plaintiff in error from the imprisonment complained of.

CHAPPELL v. BRADSHAW.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 1037. Submitted October 22, 1888. — Decided October 29, 1888.

To give this court jurisdiction to review the judgment of a state court under § 709, Rev. Stat. because of the denial by the state court of any title, right, privilege or immunity, claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time, in the proper way.

An action of trespass on the case for damages by fire to the plaintiff's vessel in a port of the United States, alleged to have resulted from the negligence of the defendant's servants in cutting a burning scow or lighter loose from a wharf, and allowing it to drift against the vessel, is "a common law remedy" which the common law "is competent to give," and which is saved to suitors by the provisions of § 563, Rev. Stat. conferring admiralty and maritime jurisdiction upon District Courts of the United States.

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MOTION TO DISMISS OR AFFIRM. The case is stated in the opinion of the court.

Mr. William A. Hammond and *Mr. B. Howard Haman* for the motion.

Mr. William A. Fisher opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Bradshaw recovered judgment December 6th, 1887, against Chappell in the Circuit Court for Howard County, Maryland, in an action of trespass on the case, after a trial by jury upon a plea of not guilty, for damages by fire to his (Bradshaw's) schooner, alleged to have resulted from the negligence of Chappell's servants in cutting a burning scow or lighter loose from Chappell's wharf and allowing it to drift against Bradshaw's vessel. From this judgment Chappell prosecuted an appeal to the Court of Appeals of Maryland, by which tribunal the judgment was affirmed on the 14th day of March, 1888.

On the 27th of March Chappell moved for a rehearing upon the ground, which had not been up to that time presented in any form, that the Circuit Court for Howard County should have limited the measure of damages to the value of the scow which occasioned the injury complained of, under the provisions of § 18, c. 121 of the act of Congress of June 26, 1884. 23 Stat. 57. The Court of Appeals overruled the motion, because, as the court states, "this act of Congress was not before the Circuit Court when the case was tried, nor before this court on appeal, and that no reference to it or construction of it was made in either court."

After an unsuccessful application therefor to the Chief Judge of the Court of Appeals a writ of error was finally allowed by one of the justices of this court, and now comes before us upon a motion to dismiss.

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immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was "specially set up or claimed" at the proper time in the proper way. "To be reviewable here," says Waite, C. J., in *Spies v. Illinois*, 123 U. S. 131, 181, "the decision must be against the right *so set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more." Tested by this well settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him.

As to the contention of plaintiff in error, also not brought forward below but suggested for the first time when application was made to the Chief Judge of the Court of Appeals to allow the writ of error, that the state court had no jurisdiction because the jurisdiction of the courts of the United States is exclusive in all cases of admiralty and maritime jurisdiction, and that this is necessarily such a case, it is sufficient to say that, as the action as brought and defended was a common law action without any of the ingredients of an admiralty or maritime cause, it was, as such, clearly within the provision of the ninth section of the Judiciary Act of 1789, as embodied in § 563 of the Revised Statutes, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

The motion must be granted and the writ dismissed, and it is so ordered.