

The court has treated the motion thus far as if the defendants' affidavits were regularly before it, thinking it for the interest of both parties that this should be done. These affidavits cannot, however, properly be considered under the decision of *Buerk v. Imhaeuser*, 10 O. G. 907, Fed. Cas. 2,107a, for the reason that, with one exception, they are not entitled in the cause. The circuit court of this circuit there said regarding similar papers:

"Perjury could not be assigned on these affidavits by reason of the want of the title. They appear to be mere extrajudicial oaths, and are not receivable in this court."

See, also, *Hawley v. Donnelly*, 8 Paige, 415.

If the complainant is convinced that the defect is the result of an oversight and is one which can be readily remedied, it is possible that some agreement looking to a waiver of the objection can be reached.

It follows that the restraining order heretofore granted must stand, without prejudice to the defendants, upon properly entitled affidavits, to move to vacate the same.

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In re SAITO.

(Circuit Court, D. Massachusetts. June 27, 1894.)

**ALIENS—NATURALIZATION OF JAPANESE.**

A native of Japan, of the Mongolian race, is not entitled to naturalization, not being included within the term "white persons" in Rev. St. § 2169.

Application by Shebata Saito for naturalization.

J. Henry Taylor, for applicant.

**COLT**, Circuit Judge. This is an application by a native of Japan for naturalization.

The act relating to naturalization declares that "the provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Rev. St. § 2169. The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term "white persons."

These words were incorporated in the naturalization laws as early as 1802. 2 Stat. 154. At that time the country was inhabited by three races, the Caucasian or white race, the Negro or black race, and the American or red race. It is reasonable, therefore, to infer that when congress, in designating the class of persons who could be naturalized, inserted the qualifying word "white," it intended to exclude from the privilege of citizenship all alien races except the Caucasian.

But we are not without more direct evidence of legislative intent. In 1870, after the adoption of the thirteenth amendment to the constitution, prohibiting slavery, and the fourteenth amendment, de-

claring who shall be citizens, the question of extending the privilege of citizenship to all races of aliens came before congress for consideration. At that time, Charles Sumner proposed to strike out the word "white" from the statute; and in the long debate which followed the argument on the part of the opposition was that this change would permit the Chinese (and therefore the Japanese) to become naturalized citizens, and the reply of those who favored the change was that this was the very purpose of the proposed amendment. Cong. Globe, 1869-70, pt. 6, p. 5121. The amendment was finally rejected, and the present provision substituted, extending the naturalization laws to the African race.

Again, in the first revision of the statutes, in 1873, the words "being free white persons" were omitted, probably through inadvertence. Under the act of February 18, 1875, to correct errors and supply omissions in the first revision, this section of the statute was amended by inserting or restoring these words. In moving to adopt this amendment in the house, it was stated that this omission operated to extend naturalization to all classes of aliens, and especially to the Asiatics; and reference was made to the fact that, a few years before, the proposition of Mr. Sumner, in the senate, to strike out the word "white," had been defeated, and that the committee only proposed, by restoring these words, to place the law where it stood at the time of the revision. The debate which followed proceeded on the assumption that by restoring the word "white" the Asiatics would be excluded from naturalization, and the amendment was adopted with this understanding of its effect. 3 Cong. Rec. pt. 2, p. 1081.

The history of legislation on this subject shows that congress refused to eliminate "white" from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races.

And this is true from a scientific point of view. Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies at the foundation of the classification which scientists have adopted. Blumenbach, in 1781, divided mankind into five principal types,—the Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay

or brown. Cuvier simplified this classification into Caucasian, Mongol, and Negro, or white, yellow, and black races. Other writers make a still larger number of distinct races. It is said that Prof. Huxley's division of mankind is the most satisfactory. He distinguishes four principal types, and he points out the marked physical characteristics of each. These types are the Australioid (chocolate brown), Negroid (brown black), Mongoloid (yellow), and Xanthochroic (fair whites). To these he adds a fifth variety, the Melanochroic (dark whites). The "fair whites" are the type of the prevalent inhabitants of northern Europe; and the "dark whites," of southern Europe. All these physical differences do not exist in the case of each individual, and "innumerable varieties of mankind run into one another by insensible degrees;" but, taking the race or type as a whole, their peculiarities are sufficiently distinct to form the basis of well-recognized classification. Enc. Brit. tit. "Anthropology."

Before the act of May 6, 1882 (22 Stat. 58, 61), which prohibited the naturalization of Chinese, or when the Chinese and Japanese stood on the same footing under the law, the question of the right to naturalize a Chinaman came before Judge Sawyer in the case *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, and, in a well-considered opinion, the court denied the application. See, also, *In re Camille*, 6 Sawy. 541, 6 Fed. 256; *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41; *Fong Yue Ting v. U. S.*, 149 U. S. 698, 716, 13 Sup. Ct. 1016.

Whether this question is viewed in the light of congressional intent, or of the popular or scientific meaning of "white persons," or of the authority of adjudicated cases, the only conclusion I am able to reach, after careful consideration, is that the present application must be denied.

Application denied.

## CAIRO, V. &amp; C. RY. CO. v. BREVOORT.

(Circuit Court, D. Indiana. June 9, 1894.)

No. 8,993.

## 1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—RIPARIAN RIGHTS.

The right of an owner of land on one side of a navigable river, which forms the boundary between two states, to make a new bank for the river, or, by artificial structures, to turn the waters upon land on the opposite side of the river, is not a local question, but one depending for determination on the general principles of the law, on which decisions of the state courts are not binding on the federal courts.

## 2. SURFACE WATER—RIGHTS OF LANDOWNER.

The superabundant waters of a river, at times of ordinary floods, spreading beyond its banks, but forming one body and flowing within their accustomed boundaries in such floods, are not surface waters which a riparian owner may turn off as he will.

## 3. EMINENT DOMAIN—RIGHTS OF LANDOWNER.

A riparian proprietor who has conveyed to a railway company all the right, title, and estate in a strip of his land which could have been acquired by condemnation thereof for a right of way, has no right to construct along the river bank, over such right of way, a levee which will raise the water flowing in the stream at times of ordinary floods so as to endanger the bridge and other structures of the railway, and will also throw such water upon lands on the opposite side of the river, thereby subjecting the railway company to suits for damages.

This was a suit by the Cairo, Vincennes & Chicago Railway Company against Brevoort, to restrain the construction of a levee along the bank of the Wabash river across complainant's right of way. Defendant demurred to the bill.

C. S. Conger and Elliott & Elliott, for complainant.  
Reily & Emison, for defendant.

BAKER, District Judge. The questions for decision arise upon a demurrer to the bill of complaint. The grounds of demurrer are that the bill of complaint does not state facts entitling the complainant to any equitable relief. The facts stated are that the complainant has constructed, owns, and operates a line of railway along the bank of the Wabash river, in the state of Illinois, opposite to a tract of land owned and occupied by the defendant, which is situated in Knox county, in the state of Indiana; that the complainant is a corporation organized under the laws of the state of Illinois, and is a citizen of that state; that it owns and operates a branch or short line of railroad which crosses the Wabash river from the Illinois side, and extends thence over lands in Knox county, Ind., to the city of Vincennes, in said county; that the branch line of railway is constructed upon and across the lands of defendant, where the railway crosses the Wabash river into Knox county, Ind.; that on the Indiana side, where said railway is constructed from the Indiana bank of the river for a short distance, the branch railway is built upon trestlework, in such manner that the water overflowing the Indiana side of the river, in times of floods, passes through the trestlework; that the defendant has built a levee on his lands upon and along the banks of the river, on the Indiana