supreme court of the United States in Railway Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. Rep. 510:

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible, and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

The jurisdiction of the circuit court in this case rests solely on the ground of diverse citizenship. No federal question is presented. It is settled by many authorities that the fact of diverse citizenship must affirmatively and clearly appear, and cannot be inferred argumentatively. Brown v. Keene, 8 Pet. 112; Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. Rep. 193; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. Rep. 873; Kellam v. Keith, 144 U. S. 568, 12 Sup. Ct. Rep. 922; Roberts v. Lewis, 144 U. S. 653, 656, 12 Sup. Ct. Rep. 781; Wolfe v. Insurance Co., 148 U. S. 389, 13 Sup. Ct. Rep. 602; and cases cited in these various opinions. The citizenship of a corporation is that of the state which created it. Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. Rep. 935. There is in the complaint no other averment of the citizenship of the defendant than that quoted in the foregoing statement. That is not an express allegation of its citizenship. It does not affirm in what state the defendant was incorporated; non constat but that it was a corporation created under and by the laws of the state of Texas, and operating a railroad in Arkansas. The statutes of Arkansas regulating foreign corporations operating railroads in that state, whatever of penalty they may impose for disobedience, do not of themselves work a local incorporation; and besides, the fact of incorporation and citizenship cannot be argumentatively inferred. Neither is there anything in the record elsewhere which throws any light on the question of the citizenship of the defendant. Whatever may be the fact in respect thereto, no amendment can be permitted in this court. Insurance Co. v. Rhoads, 119 U. S. 237, 240, 7 Sup. Ct. Rep. 193.

The judgment must be reversed, and the cause remanded for further proceedings.

UNITED STATES v. HARSHA, (three cases.)

(Circuit Court of Appeals, Sixth Circuit. June 15, 1893.)

Nos. 90, 91, 117.

1. FEDERAL COURTS — CIRCUIT COURT AND CIRCUIT COURT OF APPEALS—SAME PERSON MAY BE CLERK OF BOTH.

The clerk of a circuit court does not vacate his office, within the meaning of Act June 20, 1874, § 2, (18 Stat. 109,) by merely accepting the position of clerk of the circuit court of appeals for the same circuit.

2. SAME—CIRCUIT COURT CLERK—POWERS OF TREASURY DEPARTMENT.
The question of a person's right to the office of clerk of a circuit court, and to the compensation belonging thereto, cannot be determined by the auditing of his account in the treasury department.

3. OFFICERS — CLERK OF UNITED STATES COURTS — SAME PERSON RECEIVING TWO SALARIES.
Rev. St. § 1763, does not prohibit a person receiving $3,000 per annum as clerk of a circuit court of appeals from receiving further compensation as clerk of a circuit court, when he lawfully holds both offices. Converse v. U. S., 21 How. 463; U. S. v. Saunders, 7 Sup. Ct. Rep. 467, 120 U. S. 126; U. S. v. McCandless, 13 Sup. Ct. Rep. 465, 147 U. S. 692, followed.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Petitions by Walter S. Harsha to recover from the United States certain sums alleged to be due to him as clerk of a circuit court. The petitioner was adjudged entitled to recover. The United States bring error. Affirmed.

Statement by SEVERENS, District Judge:

These are three cases under the same title. They have been submitted together, and the questions involved are identical in all of them. They were severally instituted by petition in the court below by the defendant in error, who is the clerk of the circuit court of the United States for the eastern district of Michigan, for the recovery of a certain amount alleged to be due to him for services as such clerk, rendered during the last half of the year 1891, to the amount of $781.25, as claimed in the first petition; for like services rendered during the first half 1892, to the amount of $837.50, as claimed in the second petition; and for the like services during the third quarter of 1892, to the amount of $415.90, being the sum for which the third petition was filed.

Accounts for these several amounts, showing the nature of the services, were duly presented and proved, and were allowed by the circuit court, but were disallowed by the first comptroller of the treasury upon grounds hereinafter stated. Upon the instituting of the proceedings in the court below, the district attorney of the United States appeared and answered, setting forth the same objections. The court below found the facts to be that the petitioner was the duly-appointed clerk of that court, and was the incumbent of the office during the whole period covered by the accounts; that he rendered the services specified; and that the fees charged therefor were lawful. The court also found that, as alleged in the answer of the United States, the petitioner was in June, 1891, appointed to the office of clerk of this court, the principal office of which is located in Cincinnati, Ohio; that he assumed the duties of that office, and has since that date executed those duties, and has received the salary prescribed by law therefor. Upon these facts the conclusion was that the petitioner was entitled to recover the amounts claimed.

Theodore F. Shepard, U. S. Dist. Atty.

Walter S. Harsha, in pro. per.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, (after stating the facts.) The objections urged against the petitioner's right of recovery are two:

First, it is said that, by the acceptance of the office of clerk of the circuit court of appeals, he vacated the office of clerk of the circuit court. Reference is made to section 2 of the act of June 20, 1874, which provides that the clerk of the circuit court shall per-

manently reside in the district where his duties are to be performed, and shall give his personal attention thereto, and that, if he shall fail in complying with these requirements, his office shall be deemed vacant; and it is insisted that by his assumption of the duties of the clerkship of the court of appeals, which must require his attention out of the district, the petitioner ceased to be clerk of the circuit court.

But there is no such incompatibility in the duties of the two offices as makes it legally impossible that one person could execute them, and that without any violation of the requirements of the statute referred to. The circuit court of appeals conceived there was no practical inconsistency, or conflict of duty, when it appointed its clerk. There is no such requirement in the act creating the circuit courts of appeals, and it cannot be doubted that the residence of the clerk within the circuit would be quite sufficient to satisfy any possible implication in that regard. We are referred to no statute which prevents the holding of the two offices by the same person, and, in the absence of such statute, we know of no rule of law which forbids it. In fact, it is well known that the holding of more than one office by the same person is a common thing, in almost all branches of the public service. Besides all this, it cannot be admitted that the question of the right to this office can thus be determined by the comptroller of the treasury. The clerk is the actual incumbent, and it would be strange, indeed, if his right could be determined, as upon a quo warranto, on the auditing of his account in the treasury department. The consequences to the court and its suitors, if the clerk's status could be thus decided, would be very serious.

But, secondly, it is further urged that because of the provisions of section 1763, Rev. St., that "no person who holds an office, the salary or annual compensation attached to which amounts to the sum of $2,500, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law," the petitioner's assumption of the office of clerk of the circuit court of appeals, and his reception of the salary of $3,000 attached thereto, prevented his lawful right to receive compensation as circuit clerk.

The true construction of this section of the statutes has been repeatedly declared by the supreme court, and it has been held to apply only to the case of an officer who, having a salaried office, is charged with duties not originally within the scope of that office, but which may, in some lawful mode, be added to, or connected with, the regular duties of the place he holds, and not to the case of one who lawfully holds two offices. Converse v. U. S., 21 How. 463; U. S. v. Saunders, 120 U. S. 126, 7 Sup. Ct. Rep. 467; U. S. v. McCandless, 147 U. S. 692, 13 Sup. Ct. Rep. 465.

The question as to what this statute means is therefore no longer an open one, and we are relieved from any discussion of it.

We think there is no error in the records, and that the judgments in the three cases should be affirmed.

IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. June 26, 1893.)

No. 255.

NEW TRIAL AS OF RIGHT—COLORADO STATUTE—TIME FOR APPLICATION.

Under Code Proc. Colo. c. 23, § 272, giving a defendant in ejectment a right to a new trial upon application therefor and payment of costs within a limited time after judgment is rendered, such application must be made within the statutory period after judgment at nisi prius. The beginning of the period is not deferred until the mandate of the appellate court affirming the judgment is entered in the trial court.

In Error to the Circuit Court of the United States for the District of Colorado.

At Law. Action of ejectment in the district court of Lake county, Colo., by the Iron Silver Mining Company against the Mike & Starr Gold & Silver Mining Company. The cause was removed to the United States circuit court for the district of Colorado, and judgment there given for plaintiff. This was affirmed by the supreme court. 12 Sup. Ct. Rep. 543, 143 U. S. 394, 430. Plaintiff thereafter moved for a new trial as of right, under the Colorado statute, which motion the circuit court overruled. Plaintiff brings error. Affirmed.

Statement by THAYER, District Judge:

The plaintiff in error brought an action of ejectment against the defendant in error in the district court for Lake county, Colo., on the 20th of February, 1885. Subsequently the action was removed to the United States circuit court for the district of Colorado, and was tried before a jury in that court, the trial resulting in a verdict for the defendant. A motion for a new trial for errors alleged was filed and overruled in the circuit court, and a judgment was rendered in favor of the defendant on November 21, 1885. To reverse such judgment the plaintiff below prosecuted a writ of error to the supreme court of the United States, but the record does not show when such writ of error was sued out. It does disclose, however, that a mandate from the supreme court, affirming the judgment of the circuit court, was filed in the circuit court on November 29, 1892. 12 Sup. Ct. Rep. 543. Section 272 of chapter 23 of the Code of Procedure of Colorado, which chapter is entitled, "Of Actions for Possession and Damages," is as follows:

"Whenever judgment shall be rendered against either party under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case, and neither party shall have but one new trial in any case, as of right without showing cause. And after such judgment is vacated, the cause shall stand for trial, the same as though it had never been tried. * * * "

Acting under this provision of the Colorado Code, the plaintiff in error, on December 22, 1892, filed a motion in the circuit court to vacate the judgment theretofore rendered in the cause, and to grant a new trial. The motion averred (and the fact is conceded) that the judgment of affirmance was rendered by the supreme court of the United States on February 29, 1892, and that thereafter and prior to the first day of the next succeeding term of the circuit court for the district of Colorado the plaintiff paid all the costs recovered in the action, as the statute requires.

The circuit court overruled said motion, whereupon the plaintiff duly excepted to such action, and sued out the present writ of error.

Harvey Riddell, (Frank W. Owers, James C. Starkweather, and Edward L. Dixon, on the brief,) for plaintiff in error.

Thomas M. Patterson, for defendant in error.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The controversy before us turns on the construction of the above-quoted section of the Colorado Code of Procedure, and the question to be determined is this: When, within the meaning of the statute, is a judgment rendered, so that the time limited for the payment of costs, in order to secure a new trial, begins to run? It is not questioned that the provision requiring the payment of costs prior to the first day of the next succeeding term after the judgment is rendered is a condition precedent to the right to have the judgment vacated. On the one hand, however, it is contended that on the facts disclosed by the present record the judgment was not rendered until it was affirmed by the supreme court on February 29, 1892, and that the costs were paid in time if paid prior to the next succeeding term of the United States circuit court for the district of Colorado; on the other hand, the contention is that the time limited to pay the costs began to run from November 21, 1885, when the judgment was first entered in the circuit court.

The courts of Colorado do not appear to have construed the statute to which the discussion relates, but it was stated in argument (and the statement is not denied) that the universal practice in that state has hitherto been to treat the judgment as rendered on the day it was entered in the trial court, for the purpose of computing the time when costs must be paid to entitle the losing party to a new trial. Indeed, it was broadly stated in argument that this is the first time that an attempt has been made in that state, to obtain a ruling, that, where a judgment has been rendered at nisi prius, and a writ of error has been sued out, and the judgment affirmed, the time limited for the payment of the costs only begins to run when the judgment of affirmance is entered.

In passing, we may remark that the practical construction of a statute such as this, in the state where it was enacted,—that is to say, the interpretation that has been generally placed upon it by the members of the bar in the trial of litigated cases,—is certainly entitled to great weight.

The adjudged cases that have an immediate bearing upon the point that we have to decide are the following: Bank v. White, 23 N. Y. 347; Railway Co. v. McBroom, 103 Ind. 310, 2 N. E. Rep. 760; Boyce v. Circuit Judge, 79 Mich. 154, 44 N. W. Rep. 343; Clark v. Green, 62 Mich. 355, 28 N. W. Rep. 894; and Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. Rep. 353. The first of these cases is a direct adjudication, under a New York statute in all respects similar to the Colorado statute, that when a judgment

is rendered at nisi prius, and an appeal is taken, the time limited to pay costs to entitle the losing party to a new trial, begins to run from the time the judgment is rendered at nisi prius, and not from the time the judgment is affirmed on appeal. The decision in the Indiana case above cited also proceeds upon the assumption that the statute of that state which grants a new trial if the losing party, within one year after the rendition of judgment, gives security to pay all costs and damages, requires such security to be given within the year succeeding the rendition of the judgment at nisi prius, and not within a year after the affirmance of such judgment on appeal. The decision in Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. Rep. 353, merely holds that, if a new and different judgment is directed to be entered in the trial court by the mandate sent down from the appellate court, then the period limited to pay costs under the Illinois statute begins to run from the time that such new and different judgment is entered pursuant to the direction of the appellate tribunal. It may be conceded that the Michigan case above cited (Boyce v. Circuit Judge, 79 Mich. 154, 44 N. W. Rep. 343) fully supports the contention in behalf of the plaintiff in error.

In this condition of the authorities we are left at liberty to determine which is the better construction of the statute in question, and, in our judgment, the weight of reason is in favor of the contention that the judgment referred to in the statute, from the rendition of which the time to pay costs begins to run, is the judgment which is rendered in the trial court, rather than the judgment which happens to be rendered on writ of error. This is certainly the better view when, as in the case at bar, the judgment of the trial court is not modified in any respect by the appellate tribunal, but is simply affirmed. An order of that nature is in reality a judgment rendered in a new suit, which is instituted in the appellate court by suing out a writ of error; and we can discover nothing in the Colorado statute which seems to indicate that the time limited to pay costs is to be computed from the rendition of the judgment in such new and independent proceeding. It is fair to presume that the statute refers to that judgment to which the motion to vacate and for a new trial must be addressed, rather than to the judgment rendered in the new suit, that is brought to correct errors in the record.

Furthermore, we think that counsel for the plaintiff in error take undue liberty with the statute in question when they supply words so as to make it read, "whenever judgment shall be (finally) rendered," etc., and when they assert that a judgment at nisi prius is not rendered, within the meaning of the statute, if the losing party has a right to prosecute a writ of error, until it has been thus reviewed, and until the proper appellate tribunal has declared that there is no error in the record. If that view is sound, it follows logically that a judgment is not rendered, within the contemplation of the statute, until the time allowed to sue out a writ of error has expired, although long prior thereto the judgment may have

been enforced on execution. A view that leads to such a singular, not to say absurd, result, ought not to prevail.

And finally, we entertain the opinion that litigants ought not to be encouraged to try the experiment in the first instance of obtaining a new trial for cause in an appellate court, by conceding to them the privilege after such attempt, and, after years of litigation, to then demand a new trial as a matter of right.

It follows that the circuit court properly denied the motion to vacate the judgment of November 21, 1885, and its action in that behalf is hereby affirmed.

IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. June 26, 1893.)

No. 256.

In Error to the Circuit Court of the United States for the District of Colorado.

Harvey Riddell, (Frank W. Owers, James C. Starkweather, and Edward L. Dixon, on the brief,) for plaintiff in error.

Thomas M. Patterson, for defendant in error.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This case was submitted in connection with case No. 255, which was a suit between the same parties. 56 Fed. Rep. 956. The record in the two cases discloses the same state of facts; and the questions discussed are the same. On the authority of our decision in No. 255 the judgment in the present case is hereby affirmed.

FLANNAGAN et al. v. CALIFORNIA NAT. BANK et al.

(Circuit Court, S. D. California. June 19, 1893.)

No. 534.

NATIONAL BANKS—CASHIER—PROMISE TO PAY DRAFT.

Rev. St. § 5136, empowers a national bank to "exercise, by its board of directors or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, * * * and other evidences of debt; * * * by loaning money on personal security," etc. *Held*, that the cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft.

At Law. Action by P. Flannagan and J. W. Bennett, partners in business under the firm name of Flannagan & Bennett, against the California National Bank and others. Judgment for defendants.

Burnett & Gibbon, for plaintiffs.

M. T. Allen, for defendants.