were deputies under Marshal Fitzsimmons. The finding of the auditor on this subject is in these words:

"In the examination of this case it became necessary to go into the account of the deputies against the United States, and to ascertain the amount of their earnings, disallowances, reallowances, etc., and thus to ascertain the balance due them; and while, in accordance with the view I have taken of the case, the statement of these balances is not necessary to a proper understanding of the issues involved, yet I have thought proper to append a table, set forth in Exhibit L, covering two pages, showing the balance due the deputies there named from the United States."

He then appends a table of the amounts due the various deputies. This was not a matter referred to the auditor; and, as will be seen by the language he uses, he did not so consider it. The verdict in this case, which defendant desires now to have set aside, is in a suit between the United States, as plaintiff, and O. P. Fitzsimmons and the sureties on his official bond, as defendants. The deputy marshals were not parties to the case, and I understand that the finding of the auditor as to amounts due them was simply a voluntary statement of that which might be at some time beneficial to persons at interest. As a knowledge of the amount due by the government to these various deputies came to him in the course of his investigation, in auditing the account between the government and Fitzsimmons, he attached it to his report, not as a finding on matter referred to him, but because he probably thought it might be desirable for future reference. In a suit before my predecessor, Hon. H. K. McCAY, in the circuit court for this district, between some of these very deputies and O. P. Fitzsimmons and his sureties, a ruling was made by the court which may be of interest just here. The entire report of that case, which I find in 1 Ga. Law Rep. 116, is given, for the reason that that periodical seems to have been very short-lived, and probably but a few numbers of it are in existence. The case stated therein is as follows:

"*J. B. Gaston, L. G. Pirkle, and A. P. Woodward* vs. *O. P. Fitzsimmons et al.*

"(*U. S. Circuit Court, Northern District of Georgia.* November 14th, 1885.)

"BOND OF U. S. MARSHAL—SUIT ON BY DEPUTY MARSHALS FOR FEES—LIABLE WHEN—DEMURRER.

"A suit cannot be maintained against a U. S. marshal, and the sureties on his bond, for fees of U. S. deputy marshals paid over to him. Such claim is against the U. S.

"Gaston and two other deputy U. S. marshals brought suit against O. P. Fitzsimmons, U. S. marshal, and the sureties on his bond, in the United States circuit court, for the northern district of Georgia, claiming that various sums of money were due them for fees earned as such deputies; that said sum of money had been collected by said Fitzsimmons from the United States, and that he had failed to pay the same over to them. Defendants demurred to the declaration in said cause upon the following grounds: (1) That the court had no jurisdiction. (2) That, if a liability existed, it was an individual and not an official one. (3) That the deputies were co-obligors with the marshal. All of these cases were tried together on said demurrer.

"*J. C. Reed* and *Haight & Osborn*, attorneys for plaintiffs.

"*Brayles & Johnson, Jackson & King, Hopkins & Glen, R. B. Trippe,* and *Albert S. Johnson,* attorneys for defendants.

"Counsel for plaintiff insisted that their cause of action arose under section 784, Rev. St. U. S., and under the following clause thereof: 'In case of the breach of the condition of a marshal's bond, any person thereby injured may institute in his own name, and for his sole use, suit on said bond,' etc.

"McCAY, J., held that plaintiffs were not injured by the failure of the marshal to pay the money due over to them; that the United States still owed them; that their claim for fees was against the United States, and not discharged by a payment to the marshal; that the government should pay the deputies, then sue and recover on the marshal's bond any sum that might be due the government by reason of the marshal's failure to pay over fees due said deputies.

"The court passed the following order in each of the three cases: 'That the demurrer be sustained on the ground that the plaintiffs have no right of action against the United States marshal and the sureties on his bond; their claim being against the United States. Wherefore, it is ordered that this case be dismissed,' etc."

It will be seen that the above decision was rendered by Judge McCAY on November 14, 1885. The original declaration in the suit by the United States against Fitzsimmons and others, in which this motion for new trial is made, was filed on November 18th, so that it seems likely that the decision in the suit of the deputies against the marshal gave color to this case, and the management of it before the auditor. At all events, it seems never to have been suggested, even before the auditor, that there was any right in Fitzsimmons to set off the amount due the deputies against any amount that might be found against him in favor of the United States. The auditor states in his report that, in making his investigation, he treated Fitzsimmons as a disbursing officer of the government, charging him with all the money which went into his hands, and giving him credit for all disbursements to which he found him to be entitled. Except as to a few items, which were eliminated from the case on trial before the jury, I do not believe that any serious objection has ever been made by the marshal to the statement of account, calculation, and finding of the auditor, if it was proper to treat him as a disbursing officer of the government in making his investigation. Certain legal questions, it is true, were raised, as to whether the auditor pursued the correct course in his method of stating the account between the marshal and his deputies, all of which were disposed of by the court in the opinion heretofore filed in the case. There has been no argument as to that question on this motion, and I presume that it is considered as disposed of by the former decision of the court. I have carefully examined this case, and reflected upon it; and I am unable to see any error in the conclusions that were reached in passing upon the exceptions to the auditor's report, or in deciding the motion to strike the plea of set-off, which is copied above, or in the direction given to the case when it was for trial before the court and a jury. It may be proper, however, to allude to each of the grounds of motion for new trial. The first three are based upon the statutory grounds in Georgia,—that the verdict is contrary to law, contrary to evidence, and against the weight

of the evidence, and without evidence to support it, and that it did not cover the true issue in the case, and which is unnecessary to discuss; and I shall allude to each special ground relied on. The fourth ground of the motion for new trial, with additional grounds, as contained in an amendment filed to the motion, raised two questions, as I understand it: *First*, that the court erred in treating the auditor's report as *prima facie* correct. There would seem to be no question whatever about the correctness of this action of the court. This case was referred to an auditor under the statute of Georgia, (Code, § 4202;) and the law under which it was referred provides that the report of the auditor shall be *prima facie* correct as to its finding of fact, (Code Ga. § 3097.) The *second* question raised in this fourth ground of the motion is as to the proper way to state the account between the marshal and his deputies, which question was disposed of by the court in determining the exceptions to the auditor's report; and to the conclusion there reached the court adheres. The fifth ground is that the court refused to charge the jury on a rule laid down in a circular issued by the first comptroller's office of the treasury department, December 5, 1885. This question was also disposed of in the former opinion filed in this case, and I see no reason to change the conclusion there reached. The sixth ground is:

"Because the evidence submitted before the auditor was not sent up with the report, and, though this exception was duly made and filed, the court overruled it, and proceeded with the case."

As to the question made in this ground of the motion the court's views were first expressed in the decision on the exceptions. The court expressed the opinion then, from the facts and statements of counsel made on that hearing, that there had been a waiver by the parties as to the auditor filing a stenographic report of the evidence as taken by him; but subsequently, upon examination of the record, the court held that, if it was the duty of the auditor to send up the evidence, he had done so in the brief of evidence submitted by him in connection with his report, and passed an order to that effect June 5, 1889. The seventh ground of the motion raised the question as to the right of the marshal to have credit for the amount due by the government to his deputies, which has been discussed and disposed of. The eighth ground makes substantially the same question as contained in the seventh ground.

The conclusion is that the motion for new trial must be overruled, and it is so ordered.

YOUNG v. McKAY.

(*Circuit Court, N. D. California.* April 18, 1892.)

NATIONAL BANKS—STOCKHOLDER'S LIABILITY—TRANSFER OF CERTIFICATES.

In an action by the receiver of a national bank to enforce an assessment under Rev. St. § 5151, against one credited on the transfer books as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal, that he indorsed the same, and requested the broker to inform the cashier of the transaction, and to have the stock transferred: that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company "by indorsement hereon and surrender of this certificate." *Held*, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder. *Whitney* v. *Butler*, 7 Sup. Ct. Rep. 61, 118 U. S. 655, followed. *Richmond* v. *Irons*, 7 Sup. Ct. Rep. 788, 121 U. S. 27, distinguished.

At Law. Action by S. P. Young, as receiver of the California National Bank of San Francisco, against McKay, as a stockholder, to recover an assessment on certain stock. Judgment for defendant.

A. R. Cotton, for plaintiff.

Edward R. Taylor and *John R. Jarboe*, for defendant.

HAWLEY, District Judge, (*orally*.) This is an action brought by the receiver of the California National Bank of San Francisco to recover the amount of an assessment levied by the comptroller of the currency at Washington upon 50 shares of stock alleged to be owned by the defendant. On the 20th day of October, 1886, the defendant subscribed for 100 shares of stock. On the 4th day of November he paid the first installment of $2,500 on 50 shares. The other 50 shares were then transferred by him upon the books of the bank to R. P. Thomas, the president of the bank. On January 6, 1887, he paid the second installment on 50 shares, and on April 18th he paid the final installment of $500, making in all the sum of $5,000, the par value of the stock. He held and owned the certificate for this 50 shares of stock until the 1st of January, 1888, when he sold it to S. R. Noyes for $6,000. At the time of the sale the bank was solvent, doing a good business, and its stock was above par, selling in the open market at a premium of $20 per share. The defendant, in detailing the facts concerning this sale of his stock, said that Mr. Noyes, a broker, came to his office and asked him if he had any shares of stock for sale; that he replied that he had, and asked $120 per share for it; that Mr. Noyes bought the 50 shares of him, and paid him $6,000 therefor; that he then indorsed the certificate, and handed it to Noyes, and said that he would go with him to the bank, and have the certificate transferred; that Noyes said that it was unnecessary to take that trouble; that he would attend to it himself, and have it transferred; that defendant then requested Noyes to inform the cashier of the bank that he had no longer any interest in the stock, and to be sure and have the certificate transferred. Mr. Noyes' testi-