THEY ARE ACQUITTED.

[Continued from First Page.]

such board entitled to draw against the appropriation provided for in this act shall keep an itemized account of all expenditures made by them and report the same with vouchers to the finance committee of the next legislature and no officer of institutions and no state officer shall indebtedness incur any beyond the amount appropriated in this bill except to prevent disaster." The testimony showsthat the respondent made no attempt tocomply with these provisions. The charge sare fully sustained.

3. The testimony tends to show that gross frauds were committed in the delivery of coal at the Lincoln insane asylum. The respondents claim to have been ignorant of these frauds until about September, 1892. It appears that from the last day of October, 1890, to the 26th day of March, 1891, the Whitebreast Coal and Lime Co., furnished coal for the asylum and were allowed therefor the sum of $11,551.95. To cover this claim an appropriation of $12,000 or so much thereof as might be necessary was made, and the claim was certified to the auditor by the respondents.

The coal was alleged to have been delivered on the cars at the asylum switch, but the number and initials of the cars on which it was alleged the coal was delivered are not given in a single instance. Dr. Knapp testifies in effect that he did not believe the amount of coal charged had been delivered. His bookkeeper testified to substantially the same facts. Neither of them however communicated their suspicion to the respondents. Knapp afterwards approved the vouchers and they were approved by the respondents and the warrant issued. The fact that an appropriation had been made to pay for this coal was not an adjudication of the claim as the legislature cannot adjudicate claims. State vs. Babcock, 22 Neb., 38. The very large amount of coal charged—sufficient to have supplied all the asylums in the state for the time charged certainly should have put the respondents upon inquiry. The reports for coal from other public institutions were before them and unless fraudulent vouchers were sent in from them also of which there is no claim a comparison should have shown the fraud. No examination was made however. A specimen is seen in a voucher for July 1891 as follows:

State of Nebraska, Hospital for the Insane, to Whitebreast Coal & Lime company.

				General Fund. Dr.
July	4,	32,000	Pea,.....a	$1 72	$ 27 52
"	6,	40,000	" .....a	1 72	34 40
"	7,	2,550	Canon,.....a	6 90	7 07
"	8,	112,000	Pea,.....a	1 72	96 32
"	10,	89,000	Lump, ...a	2 59	106 19
"	10,	41,000	Pea,.....a	1 72	35 26
"	11,	40,000	Lump,.....a	2 59	51 80
"	14,	41,000	Lump,.....a	2 59	53 09
"	14,	40,000	Pea,.....a	1 72	34 40
"	15,	2,730	Canon,.....a	6 90	9 38
"	16,	40,000	Pea,.....a	1 72	34 40
"	20,	86,000	Lump.....a	2 59	111 37
"	22,	2,680	Canon,.....a	6 90	9 24
"	23,	42,000	Lump.....a	2 59	54 36
"	24,	112,000	Pea,.....a	1 72	96 32
"	25,	70,000	Pea,.....a	1 72	60 10
"	26,	104,000	Pea,.....a	1 72	89 44
					$910 79

I hereby certify that the above account is for supplies actually furnished the above named institution.

(Sign here)

WHITEBREAST COAL & LIME CO.
JNO. T. DORGAN.

Examined and adjusted, auditor public accounts, per deputy. Approved: Secretary of state, per deputy.

Received of T. H. Benton, auditor of public accounts, warrant No. —

(Sign here also)

WHITEBREAST COAL & LIME CO.
JOHN T. DORGAN.

DUPLICATE.

Hospital for the Insane, Lincoln, July 31, 1891.—I certify that the within account is just and correct and that it is a proper and necessary expense and has not been paid.

W. M. KNAPP, Superintendent.

Examined and approved August 3, 189, by the board of public lands and building, and account to be charged to appropriation for fuel and lights.

J. C. ALLEN, Secretary. ——— President.

Endorsed: Nebraska Hospital for the Insane, Lincoln, Neb., voucher No.— $910.79. Warrant issued on account of fuel and light to Whitebreast Coal & Lime Co.

T. H. BENTON, Auditor of public accounts."

Betts, Weaver & Co., seem to have adopted the Whitebreast style of vouchers in November 1891. The voucher for December, 1891 is as follows:

"General Fund.

State of Nebraska.
Hospital for the Insane.

To Betts, Weaver & Co.:

To 434,500	Tons	Pea....	$1 70.....	$738 22
" 313,120	"	Lump.	2 70.....	846 72
" 14,780	"	Canon.	6 00.....	86 33
				$1,671 28

Approved Jan. 4th, 1892." Other vouchers in that form were approved.

Let Every Three Months.

Contracts for coal were let every three months and the Whitebreast Coal & Lime Co., and Betts, Weaver & Co., seem to have monopolized the business. From October 1, 1890, to December 31, 1892, and the month of February 1891, the amount of coal alleged to have been delivered to the asylum at Lincoln was 17,551,907 pounds and the amount actually received so far as the evidence shows was 7,589,600 pounds, leaving a shortage of 9,962,307 pounds which cost $12,855.47. The proof fails to show that the respondents in any manner profited by these frauds. The respondents introduced evidence tending to show that last October they submitted the whole matter to the grand jury of Lancaster county and thereby sought to bring the guilty parties to justice. It is but fair however, to state that Governor Boyd requested them to lay the matter before the grand jury and it is evident that the matter had acquired such publicity it could not be avoided. On this trial they in effect deny the frauds, or that if such existed they had any notice thereof in any form and therefore are not chargeable therewith. They seem also to exhibit no very friendly sentiments towards the witnesses by whom the frauds were proved, and certainly no disposition to aid in procuring proof of the same. Some reliance is placed on the approval of the asylum officers by the governor in his message of Jan. 1891. This no doubt is entitled to considerable weight but it could not in any manner excuse the respondents from the exercise of reasonable care in examination of asylum vouchers. In addition to this the land commissioner in Dec. 1889 in his report to the governor which is in evidence says, (p. 89) "under the existing system of furnishing supplies the appropriation funds are too frequently used used in keeping with that conception of charity which declares that it "hideth a multitude of sins." Items for luxuries, privileges and conveniences that are alone enjoyed by the officials and their friends are too often cloaked in a claim "for board and clothing, fuel and lights," or some one of the other necessary funds appropriated for maintenance of the institution."

It is contended by the respondents that the business in their respective offices has so increased that it is impossible to give attention to many of the details of business that come before them and that they are therefore excusable. It is true there is a large amount of business in each of the offices named. This is a large and growing state and business in all departments is constantly increasing. In the office of the land commissioner, however, there are ten clerks and one deputy which with the principal make twelve persons. In the office of the secretary of state one deputy and two clerks, four persons in all. In the attorney general's office, one deputy and stenographer. If these officers need additional assistance if they will present their claim to the legislature through the governor no doubt the desired increase would be granted. These facts must be known to the respondents and as no such application was made it must be because it was not considered necessary. The business of the state, however, must be conducted in a reasonably prudent and careful manner, otherwise the result would be chaos. Suppose a merchant or business man should urge the want of time to look after his business and therefore neglect it, the result would not be uncertain. No defense of this kind can be entertained.

5. Are these acts grounds for impeachment? Sec. 5 article 5 of the constitution provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office." It may be well to inquire first what are the duties of public officers? Each one before entering upon his duties is required to take an oath that he will "faithfully and impartially perform the duties of his office according to law and the best of his ability." An officer is bound to exercise ordinary care—such care as an ordinarily prudent man would exercise in the management of his own affairs.

The respondents are to quite an extent trustees. They let contracts and certify claims each year to the amount of nearly $1,000,000. Now shall this work be performed faithfully to the best of the ability of each as he has sworn to do or shall it be neglected and no examination made? There is considerable conflict in the authorities as to what constitutes an impeachable offense. Under the common law the grounds of impeachment are "high crime and misdemeanors." In a number of cases under this law it has been held that the cause of accusation must be a crime punishable under the criminal law. In England impeachment has been to some extent considered as a mode of trial to punish crime—although a judgment of guilty was no bar to an indictment and conviction for the same offense. In this country, while some of the cases hold that to constitute an impeachable offense, it must be such as would be punished under the criminal law. Yet, in the majority of cases it is held that this requirement is unnecessary, and we are constrained to adopt the latter view. Judge Lawrence in 6 Am. Law Reg., 649, in discussing meaning of the word, says: "The word misdemeanor has a common law, a parliamentary and a popular sense. In a parliamentary sense as applied to officers, it means maladministration or misconduct not necessarily indictable." "Demeanor is conduct," and misdemeanor is misconduct in the business of his office. It must be in matters of importance and be of a character to show a wilful disregard of duty.

Are They Impeachable.

Now, do the acts above recited constitute misconduct in office? We are not without authorities in this state on that point. Thus in Minkler vs. State, 14 Neb., 181, a county surveyor who acted on the honest belief that he had a right to remove section corners erected by the government to conform with the field notes was found guilty of maladministration of his office and removed. In State vs. Oleson, 15 Neb., 247, the relator was removed from the office of sheriff for official misdemeanors and the judgment was affirmed. It is true the principal question in this court was the jurisdiction of the county commissioners to try the cause but the character of the offense was also to some extent involved. In State vs. Meeker, 19 Neb., 444, the respondent was removed from office by the county board of Saline county for certain alleged violations of the law and while an appeal was pending in this court compelled him to deliver over the books of the office to the person appointed in his stead. In these cases there was no testimony on the part of this court to hold that these judgments of removal were valid. Among the grounds mentioned in the statute for removal from office are habitual or wilful neglect of duty. Comp. St. Chap. 18, Art. 2, Sec. 1. An examination of the constitutional provisions of a number of the western states will show that misdemeanor is cause for impeachment. Thus,

Section 1, Art. 7, of the Wisconsin constitution provides for impeaching "all civil officers of this state for corrupt conduct in office or for criminal misdemeanors."

Sec. 6, Art. 6 of the constitution of Indiana declares that "all state officers shall for crime, incapacity or negligence be liable to be removed from office either by impeachment * * or by a joint resolution of the general assembly." Section 30 of the constitution of Illinois provides that "The general assembly may for cause entered on the journals upon due notice and opportunity for defense remove any judge upon concurrence of three-fourths of all the members of each house. All other officers in this article mentioned shall be removed from office on prosecution and final conviction for misdemeanor in office."

Sec. 197 of the constitution of North Dakota provides for impeachment for "misconduct, malfeasance, crime or misdemeanor or habitual drunkenness or gross incompetency." Sec. 4, Art. 16 of the constitution of South Dakota is the same. Sec. 28, Art. 2 of the constitution of Kansas provides for impeachment for any misdemeanor in office. Sec. 20, Art. 3 of the constitution of Iowa provides for "impeachment for any misdemeanor or malfeasance in office." The constitution of Colorado specifies "high crimes and misdemeanor or malfeasance in office." Sec. 479. Other states provide for substantially the same causes. The provision in the constitution of this state is broader than that of any of the states named except Kansas. Under our constitution any gross misconduct is cause for impeachment. It would be a violation of the oath of office and of the officer's duty. In that respect our constitution is much broader than the common law term "high crimes and misdemeanors." But even at common law the offense need not necessarily be a crime punishable by the criminal law.

Alexander Hamilton in No. 65 of the Federalist says: "The subjects of this jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political as they relate chiefly to injuries done immediately to the society itself." Hamilton's views are generally adopted in this country. In the early part of the century impeachment was the ordinary mode of removing objectionable officers. Thus in Massachusetts and some other states county officers and even justices of the peace were impeached. In many if not all of the states at the present time the statutes provide for a simple direct proceeding in an action in the nature of impeachment against certain officers who are guilty of misconduct in office; and impeachment is but one of the remedies for that purpose, and in this state if applied to a state officer is the sole remedy.

The causes however which would cause the removal of a county officer on the ground of misconduct in office would seem to be sufficient against a state officer. The claim that there was no wilful disregard of law in the penitentiary cell house is clearly shown to be unfounded. The respondents' duty to the state was in the first instance to appoint a capable, efficient superintendent who would protect the rights of the state. Second: See that the state received fair treatment as other contractors in the employment of convicts and purchase of materials and to exercise a general supervision over the work. Third: To permit no money to be drawn except on original vouchers of the persons primarily entitled to the money or their assignees. In all these respects there was a failure to discharge their duty. The claim that they knew nothing about Dorgan is entitled to no weight whatever. They did know that he represented the party who could and probably would profit by his being superintendent. Indeed the argument they were able to hire him cheaper than a disinterested party is an admission of his unfitness, as it shows that he was drawing full pay for his services from Mosher at the same time. In addition to these facts each allowance of an estimate without a voucher was a violation of a duty by the respondents by which they wrongfully and wilfully permitted Dorgan to draw money from the treasury.

Usage No Defense.

Some attempt was made to prove usage as a defense to some or all of these charges but the authorities are uniform that usage cannot be proved to contradict the expressed terms of a contract where it would result in violating some positive result of statute. Rogers' Expert Test., 271-272 and cases cited. It is very clear that proof of usage cannot be considered, otherwise we might be asked to sanction the usage at asylum switch. Considerable stress is laid upon the good faith of the respondents in committing these acts. This question was before this court in Cobby vs. Burke, 11 Neb., 161-162, in an action for taking illegal fees. It is said: "The penalty imposed by this act may be incurred by exacting fees which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the taking is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable and with irresistible force to the case of an officer selected for his capacity and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide, provided for him with unusual attention, clearness and precision. On any other principle a conviction would seldom take place even in cases of the most flagrant abuse; for pretexts would never be wanted." It may be said that the people having elected these men to fill should be respected and they should not be ousted for the offenses charged. In every vote I have given in this court I have favored carrying out as far as possible the will of the people as expressed through the ballot box but the same constitution which provides for the election of officers and for a discharge of the duties of the officers, also provides for declaring the office vacant in case of serious, wilful misconduct. In other words, where the officer fails to faithfully perform the trust committed to his hands. The doctrine has been applied from time immemorial. Thus, if a trustee in equity misbehaves in any way to the detriment of the estate he may be removed. Ex parte Reynolds, 5 Ves., 707. So, if he refuse or neglect to execute the trust it is cause for removal.

In re Mech. Bank 2 Barb, 446. De Puyster v Clonding 8 Page 295. Perry on trusts No. 419 and cases cited. This rule has been applied by this court against inferior officers in a number of instances. Thus in Brock vs. Hopkins, 5 Neb. 231 it was held that a clerk of the district court was liable for damages occasioned by his negligently and carelessly taking insufficient security. While if he exercised a reasonable degree of care in the performance of his duty he was not liable. In Fox vs. Meachim 6 Neb. 531 it was held that where a justice of the peace violates the law and abuses his authority to the injury and danger of another, he and his sureties are liable on his bond for such damages. I know of no reason why the same rule which would hold a county officer liable for damages or guilty of an offense for which he might be removed, should not be applied to the state officers. The charge in both cases is substantially the same, viz misconduct in office.

If a county officer is guilty no one will urge as a reason for condoning the offense that the accused was elected to the office and that the people would be deprived of his services by his removal; and I know of no good reason why the same rule should not be applied where the officer is elected by the entire state. It is said the respondents acted judicially in approving accounts, and therefore are not liable for their acts. The able attorneys for the respondents made no claim of this kind, and therefore it is evident they did not rely on it.

If in approving accounts they act judicially in order to protect them, there are three things which must occur. First, the claim must be one they are authorized to audit. Second, it must be presented in the form of a bill or voucher showing the debt and what it is for, otherwise the board would like a judge passing upon a matter not before him, such as a matter not put in issue, and third, the statute makes it their duty to investigate every claim. The protection accorded to a judge against a private action does not apply when he is on trial under specific charges of impeachment. Even a judge of this court could not plead protection against such charges. In such case his conduct and general manner of conducting his business may be inquired into and if he is found guilty of misconduct on any of the charges he may be declared guilty. But no judicial officer is protected when he exceeds his authority and these respondents very clearly in all that they are charged with acted either without authority of law or in excess of such authority. But in my view their duties are not judicial. In the proper sense they do not allow accounts. They merely investigate or should investigate the vouchers and the several items thereof to see that they conform to the contract. In other words, the duty of the board is to let contracts in a specified manner and when vouchers are presented under such contracts which upon examination are found to be correct they are to certify the same to the auditor. The certificate is not a final order from which an appeal would lie and is not a judicial act. It will not be seriously contended that an officer who negligently and improperly certifies a fraudulent account which it was his duty to investigate, or who unlawfully draws money from the treasury is protected from the consequences of his acts, and so far as I am aware no case so holds.

Had Given Bonds.

Proof was introduced on behalf of the respondents to show that Dorgan, Knapp and others had given bonds to the state. It is evident that none of these bonds will cover the actual loss to the state, and even if enforced would be an inadequate remedy. But the giving of the bond by an officer does not exempt him from the performance of his duty nor relieve those who superintend his acts from a faithful supervision of the same. The law imposes the duty of supervision "with a reasonable degree of care." The duty of an officer is stated by Judge Lake in Brock vs. Hopkins, supra, that he exercised a reasonable degree of care in the performance of his duty. It seems to me the respondents wholly failed in the performance of their duties in the cases specified in these charges, whereby the state, during the ten months that Dorgan was superintendent, lost a large sum of money, probably not less than $15,000 and $234 for re-setting the boilers, which was not a debt of the state, together with the sums drawn by Hopkins and Howe to go to Pittsburg and these respondents to go to St. Louis, in all $684. The over-payments for coal all in sixteen months exceed $12,000. An ordinarily prudent man would have required the vouchers to be in proper form, giving the numbers and weights of the several cars. There are telephones in all of the public buildings so that it would have taken but a moment to make the proper inquiries in regard to the coal and protect the interests of the state, but so far as the proof shows such inquiries were not made in a single instance.

A public officer, like any other servant should be faithful to his employer to see that in all matters under his control the master shall not be defrauded. In other words, he shall be faithful to his trust, not as an eye servant, but in the sight of God. This is in effect, the oath that each officer takes to faithfully perform his duty. Our public institutions should be conducted on business principles and without fear, favor or favoritism, and no money should be drawn from the treasury except in strict pursuance of law. If the court should approve or even condone the conduct of the respondents in these cases, the influence of the decision will be felt in every department of business in the state as tending to weaken the sense of faithfulness of public officers and employes, and in every way prove detrimental to the best interests of society. There are an abundance of men in the state who can, and if the opportunity is given by their selection to the office, filled by the respondents, will faithfully look after the interests of the state; and as the respondents have failed in that regard the charges are well taken and should be sustained. I therefore vote guilty as charged.

His Fears.

I fear the result of the decision, if adhered to, will open a door to the grossest frauds in the public institutions of the state. A number of witnesses for the state testified as if under constraint and there seems to be powerful influences affecting some of them aside from the immediate friends of the respondents, at work in their favor. The respondents, of course, are not responsible for their influences but it is my duty to mention them.

SAMUEL MAXWELL,
Chief Justice.