upon to perform an act more thoroughly warranted by law, or more in accordance with equity and good conscience.

C. P. WOLCOTT,
Attorney General.

F. M. Wright, Auditor of State.

RELATIVE TO THE UNCONSTITUTIONALITY OF TAX LAW.

Attorney General's Office,
Columbus, February 4, 1859.

MY DEAR SIR:—I have from day to day deferred answering your letter of the 18th ult., in the hope that on each succeeding one I might be able to advise you of some definite action taken upon the subject therein mentioned.

Even now, however, I cannot say that any satisfactory conclusion has been reached, but nevertheless I felt impelled to write and at least acquit myself of the seeming discourtesy implied by the long delay in answering your letter.

Since my return from New York engagements in the Supreme Court and official duties which could not be postponed or avoided, have so entirely engrossed my attention, that I have not been able to give the subject that close examination which would justify me in committing myself to any opinion as to the compatibility of he tax in question with the federal constitution.

Such general consideration, however, as I could, at intervals devote to this topic, inclines one very strongly to the conclusion that the tax is unconstitutional, and therefore, while I am not, for the reason stated, prepared to plant myself finally on that ground, I am prepared to say that this State ought, in my judgment, to question by such form of proceeding as is best adapted to that end, the validity of an impost which bears so heavily and directly upon the property of a large class of her citizens.

As well to secure beyond all peradventure the authority

to sue in the name of the State, as to give to the demonstration itself the most imposing form, I will cause the subject to be brought, in some suitable mode, to the notice of the legisalture, and will advise the adoption of resolutions directing the attorney general to institute, on behalf of the State, the proceedings necessary to obtain the determination of that question.

Nothing less urgent than the hard necessity which then drove me onward without pause could have obliged me to forego the pleasure of seeing Wm. Meredith and yourself on my way home, but it still remains for me to hope that the kind fates have that gratification yet in reserve for me.

Very truly yours,

C. P. WOLCOTT.

Theodore Cuyler, Esq., Councellor, etc., Philadelphia.

FORMER JEOPARDY.

Attorney General's Office,
Columbus, March 4, 1859.

DEAR SIR:—I have considered as thoroughly as other present engagements would permit the matters submitted in your letter of the 25th ult.

From this letter it appears that Foreman had once been tried on an indictment charging him with the murder in the first degree of Josephine Allen, and was duly acquitted. Upon that trial "a girl raised by Foreman" was called as a witness, and from your statement I infer that her testimony contributed in some degree to her acquittal. Recent developments, however, afford ground for belief that Foreman was guilty of the crime charged, and that the "girl" so called as a witness upon the former trial commited perjury "at the instance of Foreman, and under the threat that he would kill her unless she swore as he wanted her." Foreman has been re-arrested, and upon this state of facts you inquire of me:

1. Whether he can be again tried on the same charge; and if not, then

2. Whether he can now be tried upon a charge of assault with intent to kill, the assault being in fact the mortal blow, laid in the former indictment as the means by which he did the murder therein charged against him.

Answering your first question, I have to say distinctly, no. I have now no time to give you the reasons at length for this conclusion, and therefore merely remark that the constitution of this State absolutely ordains that "no man shall be twice put in jeopardy for the same offence." This provision is without exception or qualification, and is, therefore, of universal appliaction. Whenever the accused has once actually been in jeopardy, within the proper meaning of this phrase, he is protected from a second prosecution for the same offence, and though there are cases in which courts have attempted to ingraft some exception founded on the implied waiver of the accused of his rights to insist upon the benefit of this provision, yet I apprehend that even in those cases it will be found that he was not really in jeopardy. It is not, however, necessary to pursue this distinction, for your question, while it assumes that Foreman was once in danger, yet states nothing from which it can be implied that he has ever waived his constitutional right. The bare fact that he procured the "girl raised by him" to swear falsely in his favor, does not, on your statement of the facts, seem to have been such a fraud on his part as necesarily to prevent his conviction, for, notwithstanding her perjury, the jury might, on the other evidence in the case, which you say wes "very strong," have renederd a verdict of guilty against him, and this subornation of perjury on his part would not therefore bring him within the rule suggested by Bishop to which you referred me, even if (which I must say I very much doubt) that suggestion has any solid foundation in the law.

The second question is one of much more difficulty and

while I entertain the greatest doubt whether the indictment can be sustained, yet, because the question is doubtful, I do not think that either you or myself ought to undertake its decision. I have, therefore, to advise you to prepare and submit to the grand jury an indictment for assault with intent to kill, sustaining it, of course, with the proper evidence, and if (as doubtless they will do under your advice) they return it a "true bill," prosecute it with the utmost skill and vigor. The responsibility of deciding will then rest where the law designed it should rest, with the court.

Though I have thus fully answered your inquiries, it still remains for me to suggest that, on the facts as stated by you, Foreman has been guilty of "subornation of perjury," for which you ought to indict him, under the tenth section of the crimes act. If he shall be found guilty, I take it for granted that the court will inflict upon him the utmost penalty attached by the law to this crime, and then, though he may escape the gallows, you will be able to put him out of the way of doing mischief for at least a decade to come. Perhaps, before the end of that period he may summoned by the Great Avenger, before whom even constitutional guaranties are powerless to protect crime from just retribution.

Very respectfully yours,

C. P. WOLCOTT.

Wm. P. Richardson, Esq., Prosecuting Attorney, Woodsfield, Monroe County, Ohio.

FREE BANKING ACT.

Attorney General's Office,
Columbus, March 18, 1857.

SIR:—I have attentively cnsidered the question stated in your letter of the 25th ult., and in reply thereto have to say that in my opinion a company organized under the "act to authorize free banking" must, in addition to the other

conditions precedent imposed on it, deposit with the auditor of state the requisite securities for its circulation, in order to entitle itself to the certificate mentioned in the fifth section of the act.

The question is not without difficulty, but upon a view of the whole act I think that is the true construction.

Very respectfully yours,

C. P. WOLCOTT.

To the Governor.

P. S. Herewith I return the papers sent me with your note.

FUGITIVE FROM JUSTICE.

Attorney General's Office,
Columbus, April 6, 1857.

SIR:—In accordance with your request I have examined the requisition, with its accompanying papers, made by the governor for the extradition of John Mann as a fugitive from justice, and am of opinion that they are defective in the following essential particulars:

1. There is no authentication of the paper purporting to be the affidavit on which the requisition is predicated, either in respect to the genuineness of the signature of the supposed Justice of the Peace, or his official character.

2. There is no jurat to the assumed affidavit, nor does it otherwise sufficiently appear that Russell, whose name purports to be signed to the paper as affiant, actually signed it, or was sworn to the truth of it. The general recital in the caption that he "made oath" cannot supply the want of a jurat certifying that he subscribed the affidavit and verified its truth. Perjury could not be predicated on this paper, though all its averments be false.

3. The averments of this paper are altogether too vague and indefinite to constitute the foundation for criminal proceedings, or to warrant an arrest. No criminal act is positively charged against Mann, but only that the affiant

believes him to have been guilty of one; nor is the supposed crime set forth with the precision and certainty essential to a good indictment or affidavit. It is not enough to allege in general terms that one has been guilty of named offence, but the affidavit must show on its face the existence of every element necessary in the law to constitute the crime of which the accused is charged, and apply these elements to the particular facts of the given case. Here the paper merely avers that Mann was "accessory to the murder of George E. Miller" (*sic in orig.*), and cannot, therefore, be deemed as of any validity.

Upon the whole matter I am clearly of opinion that no proper case is made out for the issuing of your warrant of extradition.

Very respectfully yours,
C. P. WOLCOTT.

To the Governor.

RELATIVE TO CASE OF OHIO VS. FOREMAN.

Attorney General's Office,
Columbus, July 22, 1859.

DEAR SIR:—Prolonged absence from the State on official business has prevented an earlier reply to your letter concerning the case of Foreman.

The question which you submit to me, namely, Whether it will be better for you to start on the motion already made to strike out the special plea with which Foreman has met the indictment preferred against him, or withdrawing that motion to reply to that plea and rely on what you term the "first assault," is one upon which my advice given in this way, and without the opportunity of full interchange of views with you, can be of little or no benefit to you.

You are, however, entitled to my opinion, such as it may be, and I, therefore, proceed at once to state it. If you

choose the first alternative, then the case in its last analysis presents the single question whether Foreman, having once been tried and acquitted upon an indictment which charged him with the murder of Isaphene Allen, can, nevertheless, still be tried for an assault upon her with intent to kill, that assault being, in point of fact, the mortal blow charged in the former indictment, and having been shown against him upon the trial of that indictment. Upon principle it seems to me very clear that he may be so tried, though upon the authorities the question is one of great doubt. This question it will be desirable to avoid if it can be done without encountering another equally difficult. It may be avoided by adopting the other alternative, that is, by withdrawing the motion and replying to the plea, an assault made (as you state) upon the deceased prior to the mortal blow, but separate from it by an interval so distinct as to constitute it a different assault, and one which (as I infer from your statement) was not necessarily mortal; nor was it given in evidence upon the former trial. Now, if this state of fact could be clearly established, there would be no doubt as to the wisdom of choosing this alternative. It seems, however, that for the proof of this "first assault" you must rely upon a witness who was "undeniably" guilty of perjury "more than once on the former trial of this defendant." Now, there may be circumstances which, in spite of this acknowledged perjury, would authorize a jury to "rely implicitly" upon her present statement, though it seems to me to be treading on very dangerous ground to insist that any man shall be convicted upon the naked, unsupported evidence of a witness who has committed repeated perjury in respect to the very alleged facts which her testimony is now offered to establish. Certainly, this course, if adopted at all, ought not to be taken till all other alternatives shall have been exhausted Happily, however, there is now no necessity for electing finally and absolutely between the two courses you have suggested. If necessary, each may be

successively tried. You may first press your legal objections to the plea of Foreman, and if the court shall sustain you, as you seem to think it will, Foreman must, of course, answer over and plant his defence on some other ground. If, on the contrary, the court shall overrule your objections, then you can still supply the "first assault." My own opinion is, therefore, decidedly, that you should in the first instance, do precisely what you have done—insist upon the insufficiency of the plea. In my opinion, and for the reasons so clearly stated by you, that plea constitutes no bar to the indictment. Having thus answered your question you will, of course, pardon me for a single suggestion as to the mode in which the sufficiency of the plea should be challenged. From your letter I see you raise the question by a "motion to strike out the plea." This form of presenting the question, whether a plea constituted in law a bar to an indictment or declaration, is novel in my experience, but may, neveretheless, be entirely proper. As, however, all objections raised by your motion can just as well be presented by demurrer, and as that is the usual form of testing the legal sufficientcy of a plea, I venture to suggest to you whether it would not be advisable to withdraw your motion and interpose a demurrer, setting out the causes of demurrer, the objections embodied in your motion. Do not understand me as positively advising this, for you may have reasons of controlling might which do not suggest themselves to me, and which have determined you to present the questions by motion. Your letters to me have so decisively indicated your ability to cope with the case in all its aspects that I make the suggestion with great reluctance, and am even now only induced to do it by the consideration that quite possibly in the press of the very important other questions involved your attention has not been turned to this distinct point of mere practice. It would be quite annoying to have the judgment reversed because a valid objection to the plea had not been made in the appropriate method.

I should be pleased to learn the action of your court in the premises, and if I can render you any further aid in the matter shall, of course, be pleased to do so.

Very respectfully yours,

C. P. WOLCOTT.

Wm. P. Richardson, Esq., Prosecuting Attorney, Monroe County, Woodsfield, Ohio.

RESIGNATION OF OFFICER. APPOINTMENT TO FILL VACANCY.

Attorney General's Office,
Columbus, October 19, 1859.

DEAR SIR:—Your letter of the 17th instant, forwarded by express, reached me at a late hour last night.

While I cannot give you any official opinion as to the matters which you submit, there can be no impropriety in saying that some time since I had occasion to examine the question submitted by you, and was then clearly of opinion that (saving those cases when it is otherwise expressly enacted) where the incumbent of an office tenders his resignation thereof to take effect some future day, there can be no selection or appointment to fill the vacancy until the resignation shall have taken effect and the office shall be actually vacant. If this be the true rule, there was no vacancy in the office of prosecuting attorney of Putnam County at the late general election, and the votes cast for that office have no legal value. It is also very obvious that the attempted resignation of Budd is of no avail, for the event upon which it is to take effect is legally impossible. No successor can be appointed or elected until Budd shall actually vacate the office, or until the recurrence of the regular biennial period for the election of that officer.

Yours very respectfully,

C. P. WOLCOTT.

G. Pomeroy, Esq., Buckeye, Ohio.

CONTESTING ELECTION; UNDERTAKING.

Attorney General's Office,
Columbus, December 22, 1859.

SIR:—Official engagements of so pressing a nature as not to admit of delay have engrossed all my time and attention since the receipt of your letter of the 24th ult., and a reply thereto has been necessarily delayed until now.

Upon an examination of the question which you therein submit to me, I have arrived at the conclusion that the undertaking which has been filed in the office of the probate judge of Perry County (and approved by that functionary) with the view of contesting the validity of the votes cast at the recent election in that county on the question of removing the county seat, is not such an undertaking as the statute authorizing contests of this nature plainly requires.

The limitation of the liability of the makers of the undertaking is, in my opinion, clearly fatal to its sufficiency, and as no step can be taken in aid or furtherance of the intended contest until the prescribed undertaking and notice have both been duly filled, I am of opinion that in the Perry County case as it is now presented, you have no legal warrant for the appointment of a commissioner.

Time is not allowed me to state more than the simple result of my examination.

Very respectfully,
C. P. WOLCOTT.

To the Governor.

FUGITIVE FROM JUSTICE.

Attorney General's Office,
Columbus, February 1, 1860.

SIR:—I have the honor to acknowledge the receipt of your letter of the 14th instant, covering a requisition addressed to you by the Governor of Kentucky for the surren-