

MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSION

A. D. 1836.

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1836.

SIXTEENTH LEGISLATURE.

No. 26.

HOUSE.

OPINION of the Justices of the S. J. Court on the question, "If the Legislature shall abolish the punishment of death, *will the crime of murder become, by the Constitution, aailable offence?*"

To the Honorable, the Legislature of the State of Maine:

The undersigned, Justices of the Supreme Judicial Court, have taken into consideration the question propounded by the Legislature, whether, if they should abolish the punishment of death, the crime of murder would become, by the Constiution, aailable offence.

By the tenth section of the first article of the Constitution, it is provided, that all persons before conviction, shall beailable, except for capital offences, where the proof is evident, or the presumption great. The answer to the question proposed, will depend upon the true construction of the term capital, used in this section. In its ordinary sig-

nification, when applied to other objects, it has the sense of chief or principal. In reference to crimes, it indicates those of the deepest character, by the commission of which the life of the offender is forfeited. That is understood to be a capital offence, for which the law provides capital punishment. We are not aware that capital punishment, as understood by Jurists, or in the common acception of the term, has ever had any other meaning, than the taking of human life, in the regular administration of Justice, by the appointment of law, for the commission of crimes, for which this infliction is prescribed. It is this which gives to the perpetration of such crimes, and to the trial, by which they are judicially ascertained, the denomination of capital.

By the fifth section of the Act of February, 1823, in addition to an Act establishing the Supreme Judicial Court, provision is made for the trial of all indictments, which may be found for any capital offence, before at least two of the Justices. And by the sixth section of the Act of March, 1826, in addition to an Act regulating Judicial proceedings, one Judge, at any regular term of the Court, is authorized to cause any person, indicted for any capital offence, to be arraigned; and if upon such arraignment he shall voluntarily plead guilty, to render judgment, and to pronounce upon him the sentence of the law. In these enactments, no explanation is given by the legislature of what constitutes a capi-

tal offence; but the term is used as having a definite, distinct, and well ascertained meaning. Nor has any doubt, as to the duties thereby imposed, been at any time entertained by the judicial department. Hence all offences, except such as incur a forfeiture of life, have, in virtue of the statute first cited, been deemed to be within the jurisdiction of the Court, when holden by one Judge, subject to the revision of the whole Court, as in other cases, when exception is taken to his opinion, upon any question of law.

A consideration of the reasons, upon which the exception in that section of the Constitution may have been founded, it is apprehended, may be regarded as in accordance with the construction, before intimated. The object of bail, in criminal cases before conviction, is, to secure the appearance of the party charged, before the competent tribunal for trial. If the charge be for an offence, punishable with death, and the proof is evident or the presumption great, this object can be effected by nothing short of close and safe custody. To allow bail therefore in such cases, is to afford to the accused facilities for eluding public justice, of which they could not fail to avail themselves.

For the foregoing reasons, the undersigned would respectfully answer to the question propounded, that if the legislature should abolish the punishment of death, the crime of murder, which is now a cap-

ital offence, would cease to be such; and being no longer capital, it would in their opinion before conviction, become a bailable offence by the Constitution.

**NATHAN WESTON,
ALBION K. PARRIS,
NICHOLAS EMERY.**

FEBRUARY 6, 1836.

STATE OF MAINE.

**HOUSE OF REPRESENTATIVES, }
February 9, 1836. }**

ORDERED, That 500 copies of the foregoing Opinion be printed for the use of the members.

[Extract from the Journal.]

ATTEST: JAMES L. CHILD, Clerk.