STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1945-1946

and usual travel, with reasonable expenses incurred in the conveyance of such prisoner" (Chapter 79. §166 (29)) may be included in the costs to be paid by the prisoner.

Section 44 of Chapter 136 provides:

> "Whoever is convicted in any court or by a trial justice, of a crime which is punishable by a fine only, without imprisonment, and is liable to imprisonment in a county jail for the non-payment of said fine, may be sentenced to pay said fine and the costs of prosecution, and in default of payment thereof to be imprisoned in accordance with law; but the payment of said fine and costs at any time before the expiration of the imprisonment shall be a full performance of the sentence."

I am of the opinion that "costs of prosecution" would include all costs incurred, including those payable to the officers to convey the prisoner to jail in accordance with the judgment and sentence of the court.

This interpretation also finds support in Section 46 which authorizes the liberation of the prisoner after he had served 30 days upon giving his note "for the amount due to the treasurer of the same county." The amount due to the county would include the cost of the commitment and conveyance to jail, as that would have to be paid by the county to the officer.

ABRAHAM BREITBARD
Deputy Attorney General

May 21, 1945

Honorable Earl L. Russell, Justice, Superior Court

I have examined my notes on the subject about which I wrote you the other day. I was satisfied that in the case that I had under consideration the respondent was convicted of three larcenies, as that offense is defined in Section 3 of Chapter 119, the form of indictment there used being that found in "Directions and Forms in Criminal Procedure" by Whitehouse & Hill, on page 74, which charges the breaking and entering and larceny, but which omits that the breaking and entering was with the intent to commit a felony or the intent to steal the goods and chattels of a third person. I think the allegation of the intent to steal takes it into the offense of either common-law or statutory burglary, and that is the distinguishing feature in *Commonwealth v. Hope.* In that case, you will notice, the last paragraph on page 3 of the opinion speaks of the combined charge of housebreaking and larceny, and, going further on in the opinion, it is said that, while the respondent there might have been convicted of either larceny or housebreaking, when he was found guilty as charged in the indictment, the larceny was merged in the greater offense of house-breaking. Also in that case the form of pleading, that is to say, where the intent to commit a felony is charged and then in addition that he actually did consummate the felony, is justified by the fact that proof that he actually committed the offense tends to prove beyond any doubt that his intent was to commit the offense and consequently supports the finding of burglary or house-breaking.

If you will look on page 71 of Whitehouse & Hill you will find that in their form of indictment for burglary at common law they too not only set forth the intent but the actual consummation of the attempt.

In the forms that follow and which are the statutory crimes, they merely set out the intent to commit a felony, and of course that would sufficiently charge the offense, as burglary is the breaking and entering a dwelling-house or the other buildings described in the statute, with intent to commit a felony therein.

It would seem to me that, if the indictments in the case before you merely charge the breaking and entering and the actual commission of the larceny, following the form at the bottom of page 74, the crime charged is merely an aggravated or compound larceny. I think that is clear from the case of *State v. Savage*, 32 Maine 583, which was the case I found in my notes. My impression is that in Massachusetts house-breaking either was a separate offense or was another name for statutory burglary, because, as I recall it in their statute, the acts are set out which constitute the offense and then the punishment is fixed, without referring to it as burglary; but, however that may be, as I said before, I think that in *Commonwealth v. Hope* they held that the indictment there charged burglary in the forms which were in common use at that time.

ABRAHAM BREITBARD
Deputy Attorney General

May 24, 1945

To Harrison C. Greenleaf, Commissioner of Institutional Service

You request a ruling as to the right of arrest of a paroled prisoner from the State Prison who has committed a breach of the conditions of his parole, when his arrest cannot be accomplished until after the time when his sentence would normally have expired, had he observed the conditions of his parole.

The facts in the case under consideration, as you state them, are that the subject was received at the State Prison on January 20, 1942, to serve a sentence of two to four years for larceny. He was paroled August 27, 1943. He would have been entitled to a discharge, if he had fully observed the conditions of his parole, on April 21, 1945. In December of 1944 he was convicted in a federal court for the crime of larceny and sentenced to a year and a day in the federal penitentiary at Danbury, Conn. A parole violator's warrant was issued and filed with the proper authority of the penitentiary at Danbury. He is now serving his sentence at the penitentiary and has not as yet been released; and the question is whether upon his release he may be arrested and brought back to the State Prison to serve out the unexpired term of his sentence.

Under Chapter 136, Section 19, a prisoner who has been paroled is deemed, while on parole, to be still serving the sentence imposed upon him and entitled to good-time deductions the same as if he were confined in prison.