Your attention is directed to the case of *Larney* vs. *City of Cleveland,* 34 O. S. 599, the first paragraph of the syllabus of which reads:

> "1. Where a greater punishment may be inflicted on a conviction for a second or subsequent violation of a criminal law, than for the first, the fact that the offense charged is a second or subsequent offense must be averred in the indictment or information, in order to justify the increased punishment."

That such is the rule in Ohio is too well settled to require the citation of further authority.

Answering your question specifically, it is my opinion that inasmuch as a greater punishment may be inflicted on a conviction for a second or subsequent violation of Section 12619, General Code, than for the first, in order to justify the increased punishment, the fact that the offense charged is a second or subsequent offense must be averred in the indictment. In other words, in order for the court to impose a sentence for a second or subsequent offense, it is as necessary for the state to allege and prove a first or former conviction as it is to allege and prove each and every material allegation in such indictment.

However, in connection with the above, it is deemed proper to point out that the Board of Clemency is without power or authority to review, determine the legality of or modify a sentence duly imposed by the trial court. That is to say, in so far as the legality of the sentence imposed by the trial court is concerned, any question as to the jurisdiction or authority of the trial court to impose such sentence can only be raised in error proceedings in the proper tribunal, or by other proper action brought in a court of competent jurisdiction in a proper case. Unless a sentence be set aside or modified by a court of competent jurisdiction it is a finality and must be given full force and effect by all ministerial boards and officers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

908.

BOARD OF EDUCATION—CONTRACTS FOR BUILDING AND REPAIRING SCHOOL HOUSES—"URGENT NECESSITY" DISCUSSED.

SYLLABUS:

1. *In the absence of bad faith, fraud or collusion, whether circumstances which prompt a board of education to declare the existence of a case of urgent necessity as contemplated by Section 7623, General Code, have been brought about by the carelessness or inadvertence of the board is not material so far as the legal existence of the case of urgent necessity is concerned.*

2. *Whether or not a case of urgent necessity exists so that a board of education may be enabled to build, alter or repair a school house or make other improvements without complying with the provisions of Section 7623, General Code, as to competitive bidding is dependent upon the determination and declaration of the board*

itself and can not be questioned for any reason other than fraud, collusion, absence of good faith or abuse of discretion.

COLUMBUS, OHIO, August 24, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your communication, as follows:

"We respectfully request your written opinion upon the following matters:

Question 1: Can a board of education legally purchase a portable building, that is to cost more than $1,000.00, without advertising, providing they purchase it on the lease plan, the initial payment on which is less than $1,000.00?

Question 2: If a board of education neglects school room facilities until July, can they legally plead that as an excuse, to declare an 'urgent necessity' to exist?

In this connection, we are enclosing letter received from State Examiner B. B. Vance, giving details in the purchase of portable buildings, giving rise to the above questions."

It appears from the letter of your examiner, which you enclose, that the two questions set out in your inquiry have been asked of you by him and were prompted by matters disclosed upon his examination of the accounts of the Salem Rural School District in Hamilton County. He states:

"On July 6, 1926, Salem board found they were badly in need of two room portable building. Board advised clerk to get in touch with Circle A. Products agent. On July 9, agent came to clerk's residence, he and clerk drove to president of board's house and signed up contract for purchase of building. Clerk admits this: Said agent did not have the time to come to board meeting. Minutes show this purchase July 17, eight days after purchase had been made. Building was purchased at a cost of $2,970.00. Here are my objections:

1. In that the building cost over $1,000 board should have advertised for bids on same. Circle A. Products agent claims in that he sold it on lease plan and the first payment was only $297.00 it did not have to be advertised.

2. I claimed the purchase should have been made in open meeting by 'yea' and 'nay' vote of board and not by president and clerk at 10 o'clock at night and contract witnessed by president's wife. Agent claims this was done in order to get building shipped in time for erection before school begins in September.

3. Clerk certified to funds when there were not sufficient funds and no appropriation made for same. This district was consolidated with Anderson Twp. S. D. on Jan. 1, 1927, and their accounts showed a balance of $14.33 with outstanding debts of approximately $3,000.00, including a bond issue of $1,100.00.

4. By comparison, this building cost about $500 or $600 more than other two room portables which I have checked on. I claim if it had been legally advertised, Section 7623, this might have been saved. Agent claims this is a much better building than ones which I have checked. That may be but they will have to show me."

He then states the two questions which you have submitted to me for answer. It further appears that the transaction which your examiner speaks of as a sale and purchase of a school building was the hiring or leasing of a portable school building from the Circle A. Products Company. The contract between the board and the Circle A. Products Company is in writing and is in the form of a lease.

After reciting the names and descriptions of the parties to the instrument, and the business in which the corporation is engaged as the manufacturer and builder of certain designs of buildings or structures for public school and general educational purposes, the form of lease then proceeds:

> "WHEREAS, said LESSEE is desirous of leasing one of such buildings or structures for the above purposes and for use within the school district represented by said LESSEE; and
>
> WHEREAS, said LESSEE, BOARD OF EDUCATION, has determined that the leasing of such school house or building is a matter of urgent necessity for the uses of said school district and has, pursuant to the provisions of Section 7623 of the General Code of Ohio, dispensed with advertising for public bids for said school house or building structure; and
>
> WHEREAS, the term of said lease extends beyond the fiscal year of the school district represented by said LESSEE, as defined by Section 260-1 of the General Code of Ohio; and
>
> WHEREAS, the treasurer, the chief fiscal officer of said LESSEE, has herewith certified, pursuant to the provisions of Section 5660 of the General Code of Ohio, that the money required to meet such contract of lease on the part of said LESSEE, throughout the fiscal year in which such contract of lease is made, is lawfully appropriated, authorized or directed for the purposes as herein contained, and is in the treasury of said LESSEE or in process of collection to the credit of the proper fund free from any previous and outstanding certification, and that such certificate has been duly filed with said LESSEE, BOARD OF EDUCATION, aforesaid.
>
> NOW, THEREFORE, in consideration of the rents and covenants herein reserved and contained on the part of the LESSEE to be paid, performed and observed, the LESSOR does hereby DEMISE, LET AND LEASE unto the said LESSEE the following building or structure to be placed upon the premises acquired by the said LESSEE in Section _____, Township _____, County of _____, State of Ohio, and which building or structure is further described as follows:"

The proper officer of the school district, to wit, the treasurer thereof, then executes on behalf of the school district a certificate of which the following is a copy:

> "CERTIFICATE OF TREASURER
>
> I, the Treasurer of the LESSEE, BOARD OF EDUCATION of the _____ School District, _____ County, Ohio, being the chief fiscal officer of said Board, herewith certify, pursuant to the provisions of Section 5660 of the General Code of Ohio, that the money required to meet the foregoing contract of lease on the part of said LESSEE, throughout the fiscal year in which such contract of lease is made, is lawfully appropriated, authorized or directed for the purposes as above contained, and is in the treasury of said LESSEE, or in the process of collection to the credit of the proper fund, free from any previous outstanding certification."

In addition to the recitals above set out, the contract provides that the Circle A. Products Company is the lessor and the Salem Rural Board of Education the lessee, and provides that the said lessee shall have and hold the said building for a term of ten months, at a monthly rental of $297.00, and contains the usual covenants found in leases as to the use of the premises and the commission of waste thereon, covenants with reference to the prompt payment of the rentals when due and the right of the lessor to reenter and repossess said premises upon default or failure to keep and perform any of the covenants and conditions of the lease on the part of the lessee, the usual covenants against assignment or sub-letting of the premises without the consent of the lessor, and provides:

> "That the lessee will surrender and deliver up said building at the end of said term in as good order and condition as the same now is or may be put by the said lessor, usual use and natural wear and tear excepted, the lessee to have the privilege of purchasing said building at any time during said term for the amount of $2,970.00 and in case of such purchase all rents to cease from the date thereof and the amounts paid thereon to apply on the purchase price of said building."

While I do not have before me a copy of the resolution of the board of education of July 17, 1926, I assume that the recitals in the resolution are similar to those in the contract executed by the officers of the board of education and refer to and ratify the making of the contract which I have described and which was the actual contract entered into.

Your examiner speaks of the transaction as a sale. It will be noted that the contract itself describes the transaction as the entering into of a lease. It speaks of the parties in each instance as the lessee and the lessor and does not in any place mention a sale except that it provides for a sale by way of an option granted to the lessee, and provides that the lessee will surrender the building to the lessor at the expiration of the term unless it desires to take advantage of its right to purchase the same. So far as appears at this time the transaction is merely a leasing of property, and not a sale. What was in the minds of the parties at the time of entering into this lease is mere speculation. Although it may have been intended that upon the expiration of the term of the lease the option to purchase would be exercised, the transaction, so far as the present time is concerned, is a lease and not a sale.

First taking up the objections of your examiner stated by him as numbers 1, 2, 3 and 4, his first objection is covered by the questions you have submitted, and will be discussed after disposing of the other objections. As to his second objection, it appears that the agent for the Circle A. Products Company came to the clerk's residence on the evening of July 9th and he and the clerk then went to the home of the president of the board and signed the contract for the purchase of the building.

It is a well settled principle of law that boards of education must, in the performance of their public duties, act as a board. The acts of individual members acting alone are not binding on the board, and contracts made on behalf of the board by individual members have no force and effect. It is said by the Supreme Court of Ohio in the case of *Thomas McCortle* vs. *Bethel Bates, et al.*, 29 O. S. 419:

> "The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board, except

when together in session. They then act as a body or unit. * * * The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided for by the statute."

It is equally well settled that while the action of individual members of a board of education with respect to matters coming within the jurisdiction of the board, and which should be done by the board as a whole, is void and of no effect, such member's action may be ratified by the board and thus become effective as though regularly done by the board in the first place. It appears from the statement of your examiner that while the agent of the company and the clerk and president of the board of education acted on July 9th independently of the board itself, their acts apparently were ratified by the board on July 17th. The examiner states "the minutes show this purchase July 17, eight days after purchase had been made."

The action of the clerk and the president of the board, in executing the contract on July 9th, having been regularly ratified by the board on July 17th, if such be the case, this second objection of the examiner is untenable.

It appears from his third objection that the clerk of the board made a false certification as to the funds in the treasury to meet the obligation incurred by the lease. Section 5660, General Code, provides in part as follows:

"No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation * * * . No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district * * * unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation * * * .

In the case of contracts running beyond the termination of the fiscal year in which they are made for salaries of educational employees of boards of education or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made, the certification of the auditor or chief fiscal officer as to money in the treasury or in process of collection, above required as a condition precedent to the making of such contract or lease shall be deemed sufficient if such certification cover the money required to meet such contract or lease throughout the fiscal year in which such contract or lease be made. * * * "

Section 5661, General Code, provides that contracts entered into contrary to the provisions of Section 5660, General Code, which I have quoted above, shall be null and void, and further provides a penalty for the auditor or clerk who makes a false certification. It does not appear that such false certification has the effect of making the contract null and void, but simply makes the fiscal officer making such false certification subject to a penalty.

In the case at hand, the treasurer of the board of education did certify that the money required to meet the contract of lease on the part of the board of

education throughout the remaining portion of the fiscal year of 1926 was lawfully appropriated and was in the treasury or in the process of collection to the credit of the proper fund, free from any previous outstanding certification, thus satisfying the requirements of Section 5660, supra.

The examiner has set out the financial condition of the treasury of this school district on January 1, 1927, but does not state what that condition was at the time of the certification made by the treasurer. Whether or not the treasurer has actually made a false certification in this case depends on the state of the treasury at the time he made the certification, but whether false or not it makes no difference as to the legality of the contract if the certification was actually made as appears to have been done in this case. This effectually disposes of your examiner's third objection.

As to his fourth objection to the effect that the board paid more for the use of this building than it was worth, or than would have been necessary had they looked elsewhere, can make no difference as to the legality of the contract which they actually did enter into. This is a matter purely within the discretion and judgment of the board itself, and for such errors of judgment, if any, the board members are answerable only to their constituents.

Coming now to the question of when, and under what circumstances a board of education may enter into such contract as has been entered into in this case without advertising for bids, it is pertinent to examine the statutes with reference to the manner in which boards of education may provide school facilities for their district. The question is what, if any, are the circumstances under which a board of education may dispense with advertising for public bids when they desire to acquire a school building.

Section 7623, General Code, reads in part as follows:

> "When the board of education determines to build, repair, enlarge or furnish a schoolhouse, or schoolhouses or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, three thousand dollars, and in other districts one thousand dollars, except in *cases of urgent necessity,* or for the security, and protection of school property, it must proceed as follows: * * * " (Italics the writer's.)

Then follows the manner of advertising, receiving and accepting bids and the awarding of contracts to the lowest responsible bidder.

In the case at hand the board dispensed with competitive bidding and let the contract after declaring that it was acting in a case of urgent necessity. The question then is whether or not there existed at the time a case of urgent necessity. If so, the board was authorized to dispense with complying with the provisions of law with reference to competitive bidding and the contract is, so far as that is concerned, legal. If there did not exist at the time of making this contract a case of urgent necessity, the board had no authority to dispense with competitive bidding and the contract is therefore illegal.

The word "necessity" in its primary sense, signifies a thing or act without which some other thing or act can not be done. As applied to the determination of the powers of the board of education it should be held to mean an incidental act or measure requisite to enable the board to carry out the main object of its existence. It need not necessarily be an absolute necessity, but if in the discretion of the board it be a practical necessity, the existence of the board's expression in determining the act or measure to be a necessity is sufficient and can not be questioned, in the absence of fraud, collusion or abuse of discretion.

It is said in the case of *Folk* vs. *State Capital Savings and Loan Association,* 214 Pa. 529:

> "When it comes to determining what is 'necessary' for the conduct of the business and transacting of the affairs for which a corporation has been chartered it must of course be understood that what is meant is a due and profitable prosecution of its lawful purposes; that the necessity contemplated is a relative one having reference to economy, convenience, efficiency and success; and some latitude is to be allowed to the discretion of the corporation itself in deciding what from time to time is or is not in that sense necessary."

Accordingly, if a board of education in its discretion, determines that more room is needed for the housing of the pupils of its district, that finding will be respected by the courts unless the evidence clearly shows that the actual facts were so contrary to the finding as to leave no room for difference of opinion.

The word "urgent" as defined by Webster, means pressing, plying with importunity; calling for immediate action; instantly important.

Thus, if it be determined that a necessity has arisen or exists, the question of time becomes important and if the necessity is pressing, if its calls for immediate attention it becomes an urgent necessity. Here again the question of immediate need or instant importance is relative and requires for its determination the exercise of discretion. What might appear an urgent necessity to one person might not appear so to others, hence the determination of whether or not the urgent necessity for more school facilities in a district calls for the exercise of the board's discretionary powers, there being no other authority vested with the power to determine in the first instance the question of whether or not a case of urgent necessity exists, and when that power is exercised it can not be questioned, in the absence of bad faith, fraud, collusion or abuse of discretion.

It is said in *Brannon, et al.* vs. *The Board of Education of the Tiro Consolidated School District of Crawford County, et al.,* 99 O. S. 369:

> "A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine.
>
> A court will not restrain a board of education from carrying into effect its determination of any question within its discretion, except for an abuse of discretion or for fraud or collusion on the part of such board in the exercise of its statutory authority."

The statute (Section 7623, General Code) contemplates merely the existence of the urgent necessity. It makes no mention of how the state of affairs which had been determined to be in a state of urgent necessity was brought about, hence when a board determines that the affairs of a district are in such a state that a case of urgent necessity exists and the actual facts do not clearly disprove such finding we can not go back of that determination and question the legal existence of the case of urgent necessity upon the ground it may have been brought about by carelessness or inadvertence unless such carelessness or inadvertence were shown to have been the result of bad faith or collusion participated in by the contractor. The board might have been guilty of the grossest carelessness, yet that fact would not make the requirements of the district any the less urgent when the time actually arrived that the district needed the school facilities. The board might carelessly defer

action on any measure until it called for immediate attention and thus deserve the sharpest criticism and be answerable to its constituents as meriting the severest censure and yet the situation would be none the less such as to merit the determination of the existence of a case of urgent necessity.

The board in this case, having in the exercise of its discretion determined that a case of urgent necessity existed and the facts submitted not showing an abuse of discretion or the presence of fraud or collusion or the absence of good faith, the decision of the board is final. When said board thereafter entered into a contract for the leasing of the portable building from the Circle A. Products Company by having properly ratified the action of their president and clerk in executing the contract, and the clerk having duly certified that the money required to meet the contract of lease was lawfully appropriated and in the treasury or in the process of collection to the credit of the proper fund, free from any previous outstanding certification, I am of the opinion that the contract is valid, and that the expenditures of the board in pursuance of the execution of the contract are legal.

Respectfully,
EDWARD C. TURNER,
Attorney General.

909.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND L. R. McMICHAEL, BUCYRUS, OHIO, FOR CONSTRUCTION OF FISH HATCHERY, NEAR BUCYRUS, OHIO, AT AN EXPENDITURE OF $23,875.71—SURETY BOND EXECUTED BY THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

COLUMBUS, OHIO, August 24, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, O.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, for the Department of Agriculture, Division of Fish and Game, and L. R. McMichael, of Bucyrus, Ohio. This contract covers the construction and completion of a Fish Hatchery located two miles east of Bucyrus between the Plymouth road and the Sandusky river in Crawford county, Ohio, and calls for an expenditure of twenty-three thousand eight hundred and seventy-five and 71-100 dollars ($23,875.71).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a contract bond upon which the Fidelity & Deposit Company of Maryland appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.