907.

INDICTMENT—UNDER SECTION 12619, GENERAL CODE, A SECOND OR SUBSEQUENT OFFENSE MUST BE AVERRED IN THE INDICTMENT.

SYLLABUS:

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.*

COLUMBUS, OHIO, August 24, 1927.

Ohio Board of Clemency, Columbus, Ohio.

GENTEMEN:—This will acknowledge receipt of your letter of August 18, 1927, which reads:

> "Section 12619 provides that whoever steals a motor car, etc., 'shall be imprisoned in the penitentiary not less than one year nor more than twenty years, and for each subsequent offense not less than five years, nor more than thirty years.' This section was passed June 13, 1923, but as far as known, only one convict is now serving a sentence of five to thirty years for the second offense.
>
> Question: Must the fact that the indictment for stealing an automobile is for the second offense of that kind be stated in the indictment before the court can impose a sentence of five to thirty years, or may the court impose such a sentence if the fact of its being a second offense of that kind is brought to his attention during the trial or afterwards?"

Section 12619, General Code, provides:

> "Whoever steals any motor vehicle, or whoever purposely takes, drives or operates any motor vehicle without the consent of the owner thereof, or buys or conceals any motor vehicle that has been stolen, knowing it to have been stolen, or knowingly conceals a person who has stolen any motor vehicle, shall, for the first offense, be imprisoned in the penitentiary not less than one year nor more than twenty years, and for each subsequent offense not less than five years nor more than thirty years."

As stated in 16 Corpus Juris, at page 1342:

> "As a general rule, in prosecutions under statutes authorizing a more severe penalty to be imposed upon a conviction for a second or subsequent offense, the fact of a former conviction is regarded as a part of the description of the offense and therefore must be alleged in the indictment or information in order to authorize the infliction thereof, although in some jurisdictions the contrary rule prevails. The entire record of the former trial and conviction need not be set forth; it is only necessary that the facts required shall be alleged with sufficient clearness to enable the court to determine whether or not the statute applies."

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*