the appointment. Of course, if the facts are that his existing commission bears a date earlier than that of the justice to whom you refer as having been elected in 1931, he would be entitled to make the appointment of a township trustee to fill the vacancy in such office.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3353.

APPROVAL, PAPERS AND PROCEEDINGS RELATING TO THE CONVERSION OF THE WESTERN HILL SAVINGS AND LOAN COMPANY INTO THE FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CINCINNATI, OHIO.

COLUMBUS, OHIO, October 26, 1934.

HON. HARRY L. EVERTS, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I have examined the papers recently submitted by you in connection with the conversion of The Western Hills Savings and Loan Company into the First Federal Savings and Loan Association of Cincinnati, and find the papers submitted and the proceedings of said association as disclosed thereby to be regular and in conformity with the provisions of section 9660-2 of the General Code of Ohio.

The papers are returned herewith to be filed by you as a part of the permanent records of your department.

The law provides that when the requirements of section 9660-2 have been complied with by the association you shall within ten days thereafter cause one copy of the Federal Savings and Loan Association charter with your approval endorsed thereon to be filed with the Secretary of State and transmit to the Secretary the sum of $5.00 paid by the association.

I have drawn a form of approval for your signature endorsed on the copies of the charter. I have heretofore quoted to you the law as to the effect on the status of the old association of the filing with the Secretary of State of a copy of the charter and will therefore not repeat the same.

Respectfully
JOHN W. BRICKER,
Attorney General.

3354.

CERTIFICATE—TEACHER MUST POSSESS CERTIFICATE AT THE TIME CONTRACT OF EMPLOYMENT MADE—NEW CERTIFICATE MAY BE OBTAINED THEREAFTER.

SYLLABUS:

1. *Under the terms of Sections 7830, 7831 and 7832, General Code, a contract between a board of education and a teacher in the public schools cannot lawfully be entered into unless the teacher is possessed of a proper and legal*

certificate to teach the grades and subjects he is employed to teach, at the time the contract of employment is made. The subsequent procurement of a certificate will not enable the teacher to recover from the board of education for services rendered as contemplated by such a contract or for damages for breach thereof.

2. *Where a teacher is properly certificated at the time his contract of employment is made, it is not necessary that the certificate cover the full term of employment. It is sufficient if the certificate is renewed or a new certificate procured, so that the teacher is properly certificated at all times when services are rendered in pursuance of the said contract.*

3. *Where a teacher is properly certificated at the time he is employed to teach in the public schools, and the certificate expires during the term of the contract, and a new one is not procured, his employment legally terminates, but continues in accordance with the terms of the contract if the old certificate is renewed or a new one procured to cover the remaining portion of the term of the contract.*

COLUMBUS, OHIO, October 26, 1934.

HON. WAYNE L. ELKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "I respectfully request your opinion concerning the validity of school boards' action in hiring teachers when their certificates expire before the time mentioned in the contracts ends. The facts are as follows:
>
> In 1933, the South Point-Delta Village Board of Education employed three teachers for a term of three years. One teacher only had a temporary certificate. The second teacher was a beginner, and only had a one year certificate, and the third teacher had a three year certificate which expired in 1934."

It is provided in Sections 7830, 7831 and 7832, General Code, that no person "shall be employed or enter into the performance of his duties as teacher" in any elementary school, high school or as a special teacher of certain enumerated branches of study, who has not obtained a proper certificate from a duly qualified certificating authority, to teach the subjects and grades which he is employed to teach.

Under the provisions of this law as it was originally enacted March 18, 1863 (61 O. L., 34; S. & S., 701, Sec. 7; S. & C., 1361), it was held by the Supreme Court of Ohio in 1871, in the case of *School District No. 2 Oxford Twp.* vs. *Dilman,* 22 O. S., 194, that a contract for employment in the public schools made with a teacher before he obtains the requisite certificate, is not invalid, providing he obtains a proper certificate before entering upon the duties of his employment. The pertinent provision of the law at the time of the decision of the Dilman case, reads as follows:

> "No person shall be employed as a teacher in any primary common school, unless he shall have first obtained * * * a certificate of good moral character, and that he or she is qualified to teach orthography, reading, writing, arithmetic, geography, English grammar, and possesses

an adequate knowledge of the theory and practice of teaching; and in case such person intends to teach in any common school of higher grade, he or she shall first obtain a certificate of the requisite qualifications in addition to the branches aforesaid."

The provision of law just quoted was later codified as Section 4074, Revised Statutes, and before any material change was made therein there was decided in 1896, by the Circuit Court of Licking County, the case of *Youmans et al.,* vs. *Board of Education,* 13 O. C. C., 207. Following the doctrine of the Dilman case it was there held:

"A teacher may be appointed by the board of education who, at the time has no certificate, if he obtains one before the commencement of the schools."

In the school code of 1904, Section 4074, Revised Statutes, was amended (97 O. L., 334—372). As so amended, it read:

"From and after the first day of September, 1904, three kinds of teachers' certificates only shall be issued by county boards of school examiners. * * From and after the first day of September, 1905, no person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village, township, or special school district who has not obtained from a board of school examiners having competent jurisdiction a certificate of good moral character and that he or she is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, including civil government, physiology including narcotics, literature, and that he or she no person shall be employed or enter upon the performance of his possesses an adequate knowledge of the theory and practice of teaching; and no person shall be employed or enter upon the performance of his duties as a teacher in any recognized high school supported wholly or in part by the state in any village, township, or special school district, or act as a superintendent of schools in such district, who has not obtained from a board of examiners having competent jurisdiction a certificate of good moral character and that he or she is qualified to teach literature, general history, algebra, physics, physiology including narcotics, and, in addition thereto, four branches elected from the following branches of study: Latin, German, rhetoric, civil government, geometry, physical geography, botany, and chemistry; and that he or she possesses an adequate knowledge of the theory and practice of teaching; * * * "

Upon the codification of 1910, the provisions of Section 4074, Revised Statutes, with some modification not material to the present inquiry, became Sections 7830, 7831 and 7832, General Code. The change of the wording of the statute, which formerly provided that "no person shall be employed" as a teacher without a proper certificate, to read: "No person shall be employed or enter upon the performance of his duties" as a teacher, who has not obtained a proper certificate, upon its amendment in 1904, is presumably at least, of some significance.

It is a well known principle of statutory construction as stated by Judge Donahue, in the case of *Lytle et al.,* vs. *Buldinger, et al.,* 84 O. S., 1, that:

> "The presumption is, that every amendment of a statute is made to effect some purpose."

Presumably, the intention of the legislature in its amendment of the law, was to prohibit the making of a contract with a teacher who did not have a proper certificate as well as the actual teaching by a teacher who did not have a proper certificate. It was stated by the Supreme Court in the Dilman case, supra, that in view of the statute then in force, "the mischief intended to be guarded against was the teaching of a school by an incompetent person, not the making of a contract by an incompetent person." By the amendment of the statute as noted above, the apparent intention of the legislature was to further safeguard the teaching by an incompetent person, by prohibiting the making of a contract with a person as a teacher in the public schools who did not at the time of being employed or entering into the contract, possess a proper certificate to teach. Similarly, the Supreme Court of Idaho, in the case of School District No. 15, in *Fremont County* vs. *Wood,* 32 Idaho, 434, 185 Pac., 300, held:

> "Laws 1911, Chap. 159, Sec. 58, Subdivision (a) as amended by Laws 1913, Chap. 115, Sec. 9, forbidding contract to employ teacher to be signed until teacher exhibits a certificate to the board, was to guard against the employment of teachers not holding certificates."

The effect of the amendment of 1904, and the proper legal construction of the language of the statute as so amended, seems never to have been passed upon by the courts of Ohio so far as reported decisions show. In a recent case decided January 24, 1934, by the Court of Appeals of Green County, and as yet unreported (*Anderson* vs. *Wolf, et al*), it was held that a purported contract made with a person to teach in the public schools who was not at the time of making the contract, properly certificated was unenforcible and that no recovery could be had thereon. In that case, which was a taxpayer's suit to recover $390.00 which had been paid to Mrs. Joseph Kinzer by the School Board of Xenia Township Rural School District in Greene County, it appeared that Mrs. Kinzer's husband, who at the time of the payment was deceased, had taught in the schools of the said district; he had no certificate to teach at the time, having failed to pass the examination. About four years afterward the board of examiners issued a certificate in his name. The certificate was designated—"Delayed "Teachers Elementary Certificate." This "Delayed Certificate" was filed as provided by law, and the county superintendent of schools so certified to the Clerk of the Xenia Township Rural Board of Education, whereupon a warrant was issued by the said clerk for the payment of $390.00 to the widow of Mr. Kinzer for his services as teacher. The contention was made that inasmuch as a certificate was on file as provided by Section 7786, General Code, the payment was legal. The court after noting the provisions of Section 7830, General Code, to the effect that "no teacher shall be employed or enter upon the performance of his duties as teacher in any elementary school" unless properly certificated, and quoting the provisions of Section 7786, General Code, to the effect that no clerk of a board of education shall draw an order for the payment of a teacher for his services until there is filed with him a written statement of the superin-

tendent of schools that the teacher has filed with him a legal teachers' certificate or a copy thereof, entitling him to teach the subjects and grades taught, said:

> "This section adds nothing to nor takes nothing from the provisions of Section 7830 G. C., supra.
>
> "If Mr. Kinzer had brought himself within the provisions of the above Section 7830 G. C., but had not complied with Section 7786 G. C., his payment of salary would be delayed pending such compliance.
>
> "Applying this principle to the instant case if we were able to find the provisions of 7830 G. C. complied with, we would accept the delayed filing of the certificate with the Clerk of the Board of Education as the last step requisite under the law to authorize payment of the salary. Neither of these sections standing alone are sufficient to authorize withdrawing money from the treasury of the school district.
>
> "Employment, performance and filing delayed certificate after a period of four years still admits of the question as to whether or not the employment was legal. The plain mandatory provisions of said Section 7830 G. C. seem to definitely determine the question. This section says:
>
> "'No person shall be employed or enter upon the performance of his duties as teacher who has not obtained a certificate, * * '
>
> "No other authority than the Board of Examiners can determine the qualifications to teach and issue the requisite certificate. Until the individual has such certificate, he or she must be looked upon as incompetent. The courts are always open through mandatory orders to guard against any abuse of discretion upon the part of the examining board.
>
> "It has been judicially determined that laws must be uniform in their operation. It sometimes happens that injustice is done in isolated instances, but to avoid anticipated or threatened evils the law must be given its uniform operation. This is upon the theory of good to the greatest number.
>
> "It is not within the power of the courts in an action of this character to determine the question of the fitness of the teacher.
>
> "The legislature has gone far in its enactments to insure strict observance of the provisions of Section 7830 G. C. prohibiting employment or entering into the performance of duties as teacher before the issuing of the legal certificate."

There is considerable conflict of authority on this question in other states. While the cases turn on the construction of the particular statutes in force in the jurisdictions where the cases arise, the authorities are so widely at variance even where precisely similar statutes are involved, that it is difficult to reconcile them. In line with the doctrine in *Anderson* vs. *Wolf, supra,* are cases in Michigan and New York. In the case of *O'Connor* vs. *Francis,* 59 N. Y. S., 28, it is held:

> "Under the consolidated school law authorizing trustees to employ such school teachers as are qualified under the act and Section 38 requiring the teacher to have certain certificates, a contract of employment was void where the teacher did not have a proper certificate, though he secured one before the term of his employment began."

In *McCloskey* vs. *School District No.* 5, 134 Mich., 35, 96 N. W., it was held:

"Under Compiled Laws, 1897, Section 4812, providing that school officers shall not contract with anyone to teach who has not a certificate in force, a contract of employment made with one not having at the time a qualifying certificate is not binding, though the person employed obtains a certificate before the time submitted for the teaching to commence."

On the other hand, in Kentucky and several other states, the opposite view is taken even where the statute apparently makes a certificate necessary before employment can be consummated. These cases take the view expressed by the Supreme Court of Ohio, in the Dilman case, supra, which involved the construction of the Ohio statute prior to its amendment, and which then provided that, "no person shall be employed as a teacher unless he has obtained a proper certificate." This conflict of authority is noted in *Corpus Juris, Vol.* 56, Title, *"Schools and School Districts,"* Section 267, where it is stated:

"Where the teacher does not possess the requisite license or certificate at the time the contract for services is entered into, the fact that he subsequently obtains it is, according to some authorities, of no avail, unless a new contract, express or implied, is thereafter entered into between the parties; according to other authorities it has been held sufficient that the teacher shall have obtained a certificate before he enters on the term of his employment, or before the time for the commencement of his duties. It has, however, been held that the performance of his duty by the teacher with the knowledge and consent of the board of school directors after receipt of his certificate of qualification is the equivalent to the making of a new contract upon the terms of the one they had previously attempted to enter into, and if payments have been made on salary before he has a certificate, they will operate as an estoppel of the board to deny the employment."

The doctrine of implied contract and the theory of estoppel to the extent stated in the text of Corpus Juris quoted above, does not, in my opinion, prevail in this state with respect to contracts with teachers in the public schools, inasmuch as Section 4752, General Code, expressly provides that the employment of teachers and superintendents of schools must be made by resolution of the board of education, and a yea and nay vote is required. It has been held that the provisions of this statute are mandatory and must be strictly construed. *Board of Education* vs. *Best,* 52 O. S., 138; *Board of Education* vs. *Brown,* 81 O. S., 520.

In North Dakota, where there was in force a statute pertaining to the employment of teachers, the wording of which is very similar to that of Sections 7830, 7831 and 7832 of the General Code of Ohio, it was held:

"A contract duly executed between the proper officers of a school district and another person, by the terms of which said person is employed as a teacher in a public school in said district, is void where such person, at the time of making the contract holds no certificate of authority to teach in the county where the district is located.

"The subsequent procurement of such certificate will not enable such person to recover against the district damages for the breach of such contract."

Hosmer vs. *Sheldon School District* No. 2, 4 No. Dak., 97, 59 N. W., 1035.

The statute under consideration in the North Dakota case cited above, provided:

> "No person shall be employed as teacher or permitted to teach in any public school who is not when so employed or permitted to teach, the holder of a teacher's certificate valid in the county or district in which such school is situated."

A number of authorities pertaining to this subject will be found collated in 42 L. R. A., (N. S.) page 412, note.

After considerable search, I have found no case that holds that a contract made with a teacher is void where the teacher has, at the time of employment, a proper certificate to teach the grades and subjects which he is employed to teach, even though it expires before the term of employment ends. There are very few cases which deal with the subject, and they are not in entire accord. The general rule is stated in *Corpus Juris, Vol.* 56, *"Schools and School Districts"* Section 268, as follows:

> "It has been held that if a teacher's certificate expires while he is teaching, and a new one is not secured, his employment legally terminates, but continues if the old certificate is renewed; but, on the other hand, it has been held that, where the teacher has a certificate at the commencement of his employment, but it expires during the employment, and is not renewed, there is an employment for the full term of the contract. The repeal of a statute under which a certificate, good until revoked, is issued after a proper examination will not affect the validity of a contract based on such certificate."

Most of the cases cited in support of the above section are from jurisdictions where a certificate is not required as a condition of employment but only as a condition of teaching. Several Missouri cases are cited, however. In the case of *Hubbard* vs. *Smith,* 135 *Mo. App.,* 116 S. W., 477, it is held:

> "Under Annotated Statutes 1906, Secs. 9766-9796 requiring a teacher as a condition precedent to her employment to have a certificate to teach covering the entire term of her employment, it is sufficient if at the time of her employment she has a certificate covering a portion of the term and obtains another at its expiration covering the remaining portion of the term."

Again, in the case of *Abler* vs. *School District of St. Joseph,* 141 *Mo. App.,* 189, 124 S. W., 564, it is held:

> "Where a school teacher has a certificate as a licensed teacher at the time of employment, it is not required that it extend to the end of the term of employment; all that is required is that it be renewed at its expiration."

All that Sections 7830, 7831 and 7832, General Code, require is that a person with whom a contract to teach is made, should have a proper and legal certificate to teach at the time the contract is entered into and at the time the teacher enters upon the performance of his duties under the contract. It need not necessarily

be the same certificate, in my opinion, and that seems to be the holding of the Court of Appeals in Missouri, even where the statute provided that a certificate covering the entire term of employment was a condition precedent to employment.

The courts have never held, so far as I have found, that a contract made in contravention of a statute of this character is tainted with illegality in the sense that it is *malem in se*. At the most, such a contract is void, for the reason only that it is prohibited by law. There is a clear distinction between void contracts, such for instance, as contracts in contravention of the statute of frauds and illegal contracts. See Page on Contracts, Second Edition, Sections 54 and 1020; *State ex rel. Hunt* vs. *Fronizer, et al.*, 77 O. S., 7.

Boards of education are authorized and directed to employ teachers by contracting for their services, limited by the provision that the person so employed must be properly certificated, and if they are not so properly certificated, a contract for their services as teacher can not lawfully be entered into, but if they are certificated at the time of employment, a valid contract may be entered into, and such a contract is not rendered invalid by reason of the fact that the certificate then held by the teacher does not cover the entire period of the contract, and if the teacher secures another certificate for the period of the contract not covered by the former one the contract will stand and may be enforced according to its terms, by either party thereto.

I am therefore of the opinion that if the teachers about whom you inquire had valid and proper certificates to teach the subjects and grades which they were employed to teach at the time their contracts were entered into in 1933, such contracts were valid and binding contracts for the full term thereof even though the certificates in question did not cover the full period of their employment, providing they secure proper certificates so that at all times when they perform services under the contract they are properly and legally certificated.

Respectfully
JOHN W. BRICKER,
Attorney General.

3355.

MUNICIPALITY—AUTHORIZED TO COMPROMISE AND SETTLE CLAIMS FOR AND AGAINST IT.

SYLLABUS:

A municipal corporation is by statute made a body politic and corporate with the power to sue and be sued and as an incident to that power has the legal power and authority to compromise and settle bona fide claims in favor of or against the municipality.

COLUMBUS, OHIO, October 26, 1934.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion as to the power and authority of the City of Norwalk to compromise and settle certain litigation which has been pending in the courts for a number of years.

The litigation involves the property and franchise rights of the Ohio Electric Power Company in the City of Norwalk, the franchise of said company to operate in said city having theretofore expired.

Your inquiry reads: