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:

"At the request of the City Solicitor of Norwalk, we are asking your opinion of the legality of an ordinance passed by the council of that city, involving the question of the legal right of a municipality to compromise a lawsuit.

"We are enclosing the letter from Rex F. Bracy, City Solicitor, a copy of the ordinance, a copy of the proposal made to the city by the Ohio Electric Power Company and a brief prepared by Mr. Bracy and assistant counsel who was retained by the city in the lawsuit in question."

You do not confine your inquiry solely to the question of the power and authority of the city to make the proposed compromise and settlement but Mr. H. D. Defenbacher, Deputy Supervisor of the Bureau, has advised that this is the only question on which my opinion is desired. I will, therefore, without considering the feasibility of making the settlement, confine my opinion to the consideration of the power and authority of the City of Norwalk to make the proposed compromise and settlement.

The facts submitted show that the City of Norwalk has been engaged in this litigation for a number of years. A quo warranto proceeding was first started in the Court of Appeals of Huron County against the Ohio Electric Power Company and it was adjudged and decreed by that court that the company be ousted from the further use and occupancy of the streets and all public places in the City of Norwalk for the erection and maintenance of electrical light equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting, and from exercising any franchise rights.

This decree of ouster was affirmed by the Supreme Court on June 12, 1929, and on June 27, 1931, suit was filed in the District Court of the United States for the Northern District of Ohio, Western Division, by The Equitable Trust Company of New York, as Trustee for the owners of bonds of the said Ohio Electric Power Company, against the City of Norwalk. Said court granted a perpetual restraining order against the City of Norwalk enjoining it from in any manner interfering with or interrupting the full exercise of any and all franchise rights of said Ohio Electric Power Company and from taking any steps to cause the enforcement of said decree of ouster of said Court of Appeals of Huron County.

The Equitable Trust Company of New York was succeeded as Trustee by the Chase National Bank of the City of New York. The decision of the District Court was appealed to the Court of Appeals of the Sixth Circuit District and on the appeal judgment of the District Court was reversed and the restraining order dissolved without the court passing on the merits of the case.

On March 5, 1934, the Supreme Court of the United States on certiorari reversed the judgment of the Circuit Court of Appeals as to the dissolution of the restraining order but declined to pass on the merits of the controversy and remanded the case for rehearing on the merits to the Circuit Court of Appeals, where the case is now pending.

The Ohio Electric Power Company submitted an offer of compromise and settlement which provides in substance that it shall sell to the City of Norwalk all of the property of said company located in said city, except certain enumerated personal property, upon the payment of Twenty Thousand Dollars ($20,000.00) and that the company will pay its court costs and the court costs assessed against the City of Norwalk, not to exceed the sum of One Thousand Dollars ($1,000.00). The copy of the Ordinance entitled "Authorizing settlement of litigation with Chase National Bank of the City of New York, as Mortgagee-Trustee for holders

of bonds of Ohio Electric Power Company, by purchasing for City of Norwalk, Ohio, all property of said Ohio Electric Power Company and its claimed franchise rights within bounds of said city, except a substation, high tension transmission line and inventory of certain chattels, and authorizing the appropriation and payment by said city of $20,000.00 therefor," outlines in detail the conditions of the settlement.

It cannot be questioned but that there is a substantial controversy between the City of Norwalk and the Ohio Electric Power Company in view of the litigation which has already taken place and which is still pending. The only question is—Has the City of Norwalk the power and authority to compromise and settle its differences with the Ohio Electric Power Company by purchasing the property of the company located in said city?

A municipality has constitutional and statutory authority to acquire, construct, own, lease, and operate any public utility. Sec. 4 of Art. XVIII of the Ohio Constitution and Sec. 3990, G. C., reads as follows:

> "The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, but in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein. If the council and owner or owners of such gas or electric works are unable to agree upon the compensation to be paid therefor, the council may file in the probate court of the county where such gas works or electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings of appropriation shall be had as is provided for the appropriation of private property by a municipal corporation. A municipal contract existing between any village and such person, company of persons or corporation for the public or street lighting shall be considered as an element of value in fixing the compensation to be paid for such gas works or electric works."

By Section 3615, General Code, it is provided that: "Each municipal corporation shall be a body politic and corporate, which shall have perpetual succession, may use a common seal, (and) sue and be sued * * *." The principle of law that the power of compromise is incidental to the power to sue and be sued is well stated in 19 Ruling Case Law at page 775 as follows:

> "The power of a municipal corporation to settle or compromise claims is well established. The general power to compromise doubtful and disputed claims is necessarily incident to the power to sue and the liability to be sued. If a claim against a municipal corporation cannot be adjusted by way of compromise, neither could a claim in its favor. If this doctrine were applied generally to all claims, the result would be that in all disputed cases a municipal corporation must perforce engage in a litigation, the expense of which would be certain, but the result doubtful. A municipal corporation would be under the necessity of insisting at all hazards upon a judicial determination of all its controverted rights, and would be bound to pursue or resist all doubtful claims until

> final adjudication by the court of last resort. With respect to claims against a municipal corporation the right to compromise claims is not limited to such claims as the court of last resort decides to have been well founded, but if at the time of the settlement there was a reasonable doubt or dispute as to the liability of the municipality, so that the settlement was not a mere gratuity, it will not be set aside because the court is of the opinion that if the case had been fought out to the end the municipality would have been entitled to a verdict as a matter of law. * * *."

In 44 Corpus Juris, p. 1459, it is stated thus: "A municipal corporation may compromise pending actions brought by or against it. While the power to compromise is sometimes expressly conferred by statute, it is generally considered that the power arises out of the power to sue and to be sued." This is stated to be the law in Ohio in 7 O., Jur. Sec. 19, 1003, as follows:

> "Municipal corporations are included within the rule that the power to compromise and settle is inherent in all corporations as a corollary of their power to sue and to be sued. This power, on the part of municipal corporations, however, is limited, as a general rule, to rights of a proprietary nature, and does not ordinarily extend to matters pertaining to the governmental functions of the municipality."

The following Ohio authorities are cited in support of the above statement: *Cincinnati Union Depot and Terminal Co.* vs. *Cincinnati,* 105 O. S., 311; *Cleveland and Pittsburgh Rd. Co.* vs. *Cleveland,* 15 O. C. C. (N. S.), 193 (Affirmed by the Ohio Supreme Court without opinion in 87 O. S., 469). In the case of *Springfield* vs. *Walker,* 42 O. S., 543, the Supreme Court held, as is disclosed by the first branch of the syllabus:

> "Municipal corporations, that have any controversy as to disputed claims, the same as individuals with whom such controversy exists, are included in the word 'persons' as used in Revised Statutes, §5601; and as to such controversy, such a corporation may be a party to the arbitration therein provided for."

In many other jurisdictions courts have upheld the authority of a municipal corporation to compromise and settle claims. In *Agnew* vs. *Brall,* 124 Ill., 313, the court stated that: "A municipal corporation has the power, however, to settle doubtful and disputed claims against it or in its favor. This power results from the capacity and power of suing and being sued, and to prosecute and defend suits." The Supreme Court of Nebraska in the case of *Farnham* vs. *City of Lincoln,* 75 Neb., 502, held that a city had the inherent authority to settle and compromise suits and in the course of the opinion the court stated:

> "The power to compromise grows out of, and is incident to, the power to sue and be sued. The power to sue and be sued is conferred upon the city in express terms by its charter. This power would indeed be a snare, or its utility much impaired, if having entered upon litigation, the city could not make an accord as to controversant matters, but must pursue the controversy to its ultimate result in the court."

In the case of *Quinby* vs. *City of Cleveland,* 191 *Fed.,* 68, *Day, J.,* stated:

> "It is generally recognized that a municipal corporation, the same as an individual, unless otherwise expressly prohibited by statute, has the same power to adjust, arbitrate and settle disputed claims as any one else."

This principle is also supported by decisions of the courts in this state in the following cases: *Colby* vs. *Toledo,* 22 O. C. C., 732 (Affirmed without opinion in 6 O. S., 698); *Parks* vs. *Cleveland Ry. Co.,* 38 O. App., 315 (Affirmed by the Supreme Court in 124 O. S., 79); *Cleveland & Pittsburg Ry. Co.* vs. *Cleveland,* 33 O. C. C., 482; *Dillon on Municipal Corporations* (5th Ed.) Vol. 2, p. 1240; *McQuillin on Municipal Corporations* (2nd Ed.) Vol. 1, Sec. 384, p. 951.

For further authorities outside the state of Ohio see:
Oakman vs. *City of Eveleth,* 165 Minn., 100; *Town of Petersburgh* vs. *Mappin,* 14, Ill., 193; *Prout* vs. *Pittsfield Fire Dist.,* 154 Mass., 450; *O'Connell* vs. *Pac. Gas & Elect. Co.,* 19 Fed. (2nd), 460; *Grimes* vs. *Hamilton Co.,* 37 Iowa, 290, 47 Iowa, 66; *Abrams* vs. *City of Seattle,* 23 Pac. (2nd), 869; *Nat'l Bk. of Red Oak* vs. *City of Emmetsburg,* 157 Iowa, 555.

My immediate predecessor was called upon to pass upon the authority of the City of Dayton to settle and compromise claims asserted by occupying tenants on a tract of abandoned Miami and Erie Canal lands. Opinion reported in Opinions of the Attorney General in 1930, p. 543. The then Attorney General held:

> "* * * That said city as a municipal corporation has the legal power and authority to compromise and settle such claims by proper action of the city commission of said city, and to expend in good faith out of the public funds of said city such sums of money as may be necessary to effect the compromise and settlement of said claims."

In consideration of the foregoing authorities, it is my view that the conclusion reached in the 1930 opinion is correct and in specific answer to your inquiry it is my opinion that the City of Norwalk has the legal power and authority to compromise and settle the controversy between the city and the Ohio Electric Power Company and that the city by act of its council is authorized to accept the offer of the company. The copy of the ordinance submitted covers fully the details of the transaction and it is my view that this is a proper subject for legislative act of the city council and the offer of the company if accepted should be done by ordinance. The city council has found that it is to the best interests of the city to accept the offer of the company and purchase the property rather than prosecute the litigation to a final determination and incur further expense. The authority of a city to purchase the property of a public utility cannot be questioned as this authority is granted the city by the state constitution and by statute and in the absence of fraud or collusion, if the purchase price and other conditions can be agreed to, the purchase can be made without resorting to condemnation proceedings.

Respectfully
JOHN W. BRICKER,
Attorney General.