Specifically answering your questions I am of the opinion:

1. That Section 4270, General Code, as amended by the 87th General Assembly, requires the mayor of a municipality, whether a city or a village, to pay all fees collected by him in ordinance cases and due him as such mayor, or to a marshal, chief of police or other officer of the municipality, into the treasury of the municipality on the first Monday of each month.

2. Where the council of a village had, previous to the effective date of House Bill No. 99, passed by the 87th General Assembly, provided by ordinance that the mayor and marshal might retain as a part of their compensation the fees collected in ordinance cases, such council may enact legislation providing further means of compensation for such mayor and marshal to take the place of the compensation by way of fees which was caused to fail by reason of the amendment of Section 4270, General Code, as passed by the 87th General Assembly, and the benefit of such legislation may inure to the benefit of a mayor and marshal then in office for the remaining portion of their terms.

3. Legislation providing for compensation for village mayors and marshals may lawfully take the form of providing a fixed fee for the trial of each case involving the violation of an ordinance, the said fee to be in no wise dependent on the outcome of the trial or the collection of the costs thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1646.

CEMETERIES—INTEREST BEARING BONDS OR STOCKS—SECTION 4169, GENERAL CODE, CONSTRUED.

SYLLABUS:

The term, "interest bearing bonds or stocks", as used in Section 4169, General Code, relating to the investment of the permanent funds of public graveyards or burial grounds located in cities, does not include certificates of deposit issued by building and loan associations authorized to do business in Ohio.

COLUMBUS, OHIO, February 1, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion as follows:

> "Section 4169, G. C., relates to the investment of certain cemetery funds and reads:
>
> 'The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed

by its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property.'

QUESTION: May the permanent fund of a cemetery be invested in building and loan company certificates of deposit?"

Your question resolves itself into a determination of whether or not building and loan certificates of deposit are "safe interest-bearing bonds or notes" as the expression is used in Section 4169, General Code, quoted in your letter.

Provision is made by Section 4160, of the General Code, et seq., for the management, control and regulation of public graveyards and burial grounds located in cities. These sections provide in substance that the title to and right of possession of public graveyards and burial grounds located in a city and set apart and dedicated as public graveyards and burial grounds, and grounds used as such, but not dedicated, except such cemeteries as are owned or under the control of religious or benevolent societies, or an incorporated company or association, are vested in the city in which they are located. The entire management, control and regulation of such cemeteries are vested in the Director of Public Service of the city, subject to the ordinances of the city.

The city may accept and maintain a permanent fund for the care of lots in such cemeteries, the said fund to be administered as provided in Section 4169, General Code. This fund may be invested by council in interest-bearing debts of the city, that is in bonds, notes or certificates of indebtedness of the city if there are any such outstanding obligations. If not, these funds must be invested in any "safe interest-bearing stocks or bonds."

A building and loan association or savings association is defined by Section 9643, General Code, as

"A corporation for the purpose of raising money to be loaned to its members, and others,"

Said Section 9643, General Code, further provides that such

"Associations may be organized and conducted under the general laws of Ohio relating to corporations, except as otherwise provided in this chapter;"

The chapter referred to is Chapter I, Division IV, Building and Loan Associations, Section 9643, et seq., General Code.

There are a number of provisions in said chapter relating to building and loan associations that are different from corresponding provisions of the general corporation laws of the state. Among these is a provision that before the articles of incorporation of a proposed building and loan association may be recorded by the Secretary of State the articles must first be submitted to the Superintendent of

Building and Loan Associations who after conducting an investigation as to the existence of certain facts, which the statute requires as a prerequisite to the incorporation of such institution, may either certify to the existence of these facts or withhold his certification, as in his judgment the situation warrants. If the certificate be made showing that the association is entitled to the right to incorporate, the Secretary of State shall record the articles of incorporation.

The authorized capital stock of such an association shall in no case be less than $300,000. An association which proposes to locate in a city having a population of more than 5,000 must have a capital stock of not less than $500,000. Only 5% of the capital stock need necessarily be subscribed or paid in to authorize the association to complete its organization and begin business. The names and addresses of its officers and not less than two copies of its constitution and by-laws must be filed with the Superintendent of Building and Loan Associations for his approval. In no case, shall such corporation transact any business whatever, except such as is incidental and necessary to its preliminary organization, until it has been authorized by the Superintendent of Building and Loan Associations so to do.

When organized, such associations are empowered to issue stock to subscribers therefor, who by subscribing for such stock become members of the association, and to receive deposits from members, either as stock deposits or otherwise, and from persons other than members.

The pertinent provisions of the statutes with reference to deposits in building and loan associations are as follows:

> Sec. 9647. "Such corporation shall have all the powers set forth in the following sections of this chapter."
>
> Sec. 9648. "To receive money on deposits, and all persons, firms, corporations and courts, their agents, officers and appointees may make such deposits and stock deposits, but such corporation shall not pay interest thereon exceeding the legal rate. * * * "
>
> Sec. 9649. "To issue stock to members upon certificates or upon written subscription on such terms and conditions as the constitution, and by-laws provide, but no initiation or membership fee shall be charged and if the stock is sold at a premium all such premiums shall be placed in the reserve fund of the association. Each member may vote his stock to the extent and in the manner provided by the constitution and by-laws, but no member shall cumulate his votes."
>
> Sec. 9651. "To permit members to withdraw all or part of their stock deposits, at such times, and upon such terms, as the constitution and by-laws provide. Any member, however, who withdraws his entire stock deposits, or whose stock has matured, shall be entitled to receive all dues paid in and dividends declared thereon, less all fines or other assessments, and less the pro rata share of all losses, if any have occurred.
>
> Sec. 9652. "To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders."

It will be observed that the statutes speak of two kinds of deposits, stock deposits

and others. Stock deposits are those received from members to be credited to their subscriptions for stock. Other deposits may be accepted from members or non-members. In either case the withdrawal of the deposit is regulated by the constitution and by-laws and other regulations of the association. In no case, however, may such regulations permit the withdrawal of the said deposits by check or draft, nor may the association carry for any member or depositor any demand, commercial or checking account, but provision may be made permitting members or depositors to withdraw funds by means of non-negotiable orders.

A certificate of deposit is defined in Daniel on Negotiable Instruments, Sixth Edition, Vol. 2, Section 1698, as follows:

> "A certificate of deposit is a receipt of a bank or banker for a certain sum of money received upon deposit and it is generally framed in such a form as to constitute a promissory note payable to the depositor, or to the depositor or order, or, bearer."

The term "stocks" as universally used in the commercial world means the shares or units of the capital stock of a corporation, joint stock company, association or partnership usually represented by certificates, issued under seal of the company, association or partnership, if it has a seal, and authenticated by its proper officers, which are transferable by endorsement and notation thereof on the books of the company or association. These certificates represent the owner's interest in the management, profit and ultimate assets of the company and a right to partake, according to their proportionate ratio, of the surplus profits accruing from the use of the capital stock of the company.

As stated in Bouvier, "stock" is commonly used to mean shares of stock, citing *Lockwood* vs. *Weston,* 61 Conn. 211. In *Forbes* vs. *R. Co.* 2 Woods 331—Federal Cases 4926, it is stated that a share of stock is the right to participate in stockholder's meetings, and in the profits of the business, and to require that the corporate property shall not be diverted from the original purpose.

It is obvious that the mere fact, that a person is a depositor in a savings and loan association and that his deposit is evidenced by a certificate of deposit does not make him a shareholder in the corporation, and that the certificate of deposit would not be classed as "stock". Depositors in building and loan associations as such have no voice in the management of the association nor do they have a right to partake of the surplus profits of the company. In Thornton on Building and Loan Associations, Section 42, it is stated:

> "It has been decided that depositors are not shareholders in the association."

Endlich on Building and Loan Associations, Section 56, states:

> "There is, where it is permitted by law to exist, a class, known as 'depositors'—persons who, without fully entering the circle of the society's membership, and becoming liable to all its duties, and sharing in all its benefits, use its treasury as a savings bank, in which to deposit, from time to time, small sums of money, with the privilege of drawing them, at their pleasure, thereafter, under certain restrictions, and with the addition of interest at a certain moderate rate. These people are not properly members."

In an opinion of this department published in the Annual Report of the Attorney General for 1913, page 866, it was held:

> "A person making deposits in a building and loan company in the manner provided in their respective contracts can not be treated as a member or stockholder unless he subscribes for a definite number of shares of the capital stock of such corporation."

Although Section 9649, General Code, has been amended since the rendition of the foregoing opinion in 1913, it has not been so materially changed as to affect the question as to whether or not depositors in building and loan associations are members thereof or shareholders therein, and it is my opinion that, under the present law, depositors are not for that reason shareholders; nor are certificates of deposit in building and loan associations "stocks," as the term is used in Section 4169, General Code.

It remains to determine whether or not certificates of deposit issued by building and loan associations are safe interest-bearing "bonds" as the term is used in Section 4169, supra.

The term "bond" is defined by Bouvier as "An obligation in writing and under seal."

Webster defines "bond" as the term is used in financial circles as:

> "An instrument made by a government or corporation as an evidence of debt, usually for the purpose of borrowing money, hence, *loosely*, any interest-bearing certificate issued by a government or corporation, especially when a date is set for the payment of the principal."

Corpus Juris, Vol. IX, page 7, says of bonds:

> "In a technical sense a bond is an obligation in writing and under seal binding the obligor to pay the sum of money to the obligee, usually with a clause to the effect that on the performance of a certain condition the obligation shall be void * * * but in popular language any instrument in writing that legally binds a party to do a certain thing may be called a bond."

In the case of *Ide* vs. *Passumpsic River R. R. Co.* 32 Vt. 297, it was said:

> "We are not prepared to say that the word bond *ex vi termini* implies a contract under seal. The term is used in various significations in popular language as importing the substantive action expressed by the verb to bind. If one is bound he is in bonds or under bond. In that sense it implies nothing more than a binding contract in whatever form. And although in the phraseology of the law the term usually denotes a specialty, we do not think it necessarily implies that."

In a New York case, *Cass* vs. *Realty Securities Co.*, 132 N. Y. S. 1074, affirmed 206 N. Y. 649, a distinction was drawn between stocks and bonds in the following language:

> "The distinguishing feature of a bond is that it is an obligation to pay a fixed sum with stated interest. It may or may not be secured, but

> if it is, and the security proves to be insufficient, the indebtedness is not thereby wiped out. The distinguishing feature of stock is that it confers upon the holder a part ownership of the assets and rights to participate according to the amount of his stock in the surplus profits of the corporation and ultimately on its dissolution in the assets remaining after the payment of its debts."

At common law the term "bond" implied an obligation "under seal", but with us private seals have been abolished and all written contracts have been raised to the dignity of sealed instruments so that a seal is no longer necessary to a bond.

In a *Kentucky* case, *Schoomaker, et al.* vs. *Mitchell's, Admr.,* 144 Ky. 794, 139 S. W. 968, where a testatrix gave by will all her bank stock and bonds to her sister, it was held that the notes of the testatrix passed to the sister as bonds—"a bond being an obligatory instrument in writing whereby one binds himself to another to pay a specified sum or to a specified account."

In the case of *Benton* vs. *Benton,* 63 N. H. 289, it is held that:

> "The term 'bond' as used in a will bequeathing to the testator's widow all of his government and other bonds which he might possess at the time of his decease, does not include shares of stock in a bank."

There are many cases in Ohio holding that the relation between a bank and its depositors is that of debtor and creditor. *Bank* vs. *Brewing Co.,* 50 O. S. 154, *Blake* vs. *Bank,* 79 O. S. 200, *Niles* vs. *Olszak,* 87 O. S. 239.

In the case of *Bank* vs. *Brown,* 45 O. S. 39, it is said:

> "A certificate of deposit issued by a bank payable to a depositor or order upon the return of the certificate, is in effect a promissory note, and may be sued upon by a depositor if lost unendorsed, without tendering an indemnity against future liability."

In so far as the relation of debtor and creditor exists between a building and loan association and its depositors, and in the light of the definitions given by courts and text writers to the term "bond", to the effect that a bond is any obligation whereby the promisor is bound, it is my opinion that certificates of deposits of building and loan associations might in a broad sense, be said to be bonds, but that is not determinative of the question whether such certificates are "bonds" as that term is used by the statute authorizing the investment of public monies in bonds.

It is my opinion that the legislature used the term "bond" in Section 4169, supra, as that term is ordinarily used and understood; and since the term "bond" in its generally accepted sense, as used in the commercial world and elsewhere, does not include promissory notes or certificates of deposit, I am of the opinion that certificates of deposit were not intended to be included within the term "bond" as used in Section 4169, supra.

In the case of *Commissioners* vs. *State,* 78 O. S. 287, there was considered the question of whether or not county commissioners, who were authorized by statute to issue new bonds in exchange for outstanding bonds under certain circumstances, might exchange the new bonds for promissory notes or other evidences of indebtedness of the county. The court in holding that the authority to exchange the new bonds for outstanding bonds did not authorize the commissioners to exchange the new bonds for promissory notes said in its opinion:

"In its broad sense a bond comprises a negotiable promissory note under seal, but a promissory note is not a municipal bond within the meaning of those words as understood in the commercial world. A negotiable promissory note generally is made payable to a person or order and is for a comparative short period of time, while a bond generally made payable to bearer, has a long time to run and has negotiable interest coupons attached. It is easier to distinguish them than to point out the distinction."

I am therefore of the opinion that certificates of deposit issued by building and loan associations authorized to do business in Ohio are not such interest-bearing bonds or stocks as, by virtue of Section 4169, General Code, may be the subject of investment of the permanent funds of public graveyards or burial grounds located in cities.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1647.

APPROVAL, BONDS OF THE VILLAGE OF BEXLEY, FRANKLIN COUNTY—$48,000.00.

COLUMBUS, OHIO, February 1, 1928.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

1648.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN JEFFERSON COUNTY, OHIO.

COLUMBUS, OHIO, February 1, 1928.

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

1649.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF THOMAS MILLER, ASHLAND COUNTY, OHIO.

COLUMBUS, OHIO, February 1, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—Examination has been made of the Abstract of Title of the Thomas Miller tract, being a part of the southwest quarter and a part of the south-