owners while said waters remain in their natural state of accretion, erosion and avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills or otherwise beyond the natural shore line of said waters not expressly authorized by the General Assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby."

This section, at least, raises a very serious question as to the authority of a county to construct any improvements within the waters of Lake Erie, which, in view of my conclusions hereinabove set forth, it is unnecessary to discuss as applied to the facts in your case.

In specific answer to your letter, you are therefore advised that bonds of the county for such an improvement can in no event be issued covering a period of more than five years, and that in my opinion the building of concrete piers for the protection of the property described in your letter cannot be undertaken by the county under the guise of necessary drainage or prevention of overflow to land.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2711.

SANITARY ENGINEERING SERVICES—CONTRACT FOR COMPENSATION OF SANITARY ENGINEERS—OPINION NO. 2426 FURTHER CONSIDERED.

SYLLABUS:

Contract under consideration in Opinion No. 2426, dated August 6, 1928, further considered and construed in the light of additional facts submitted.

COLUMBUS, OHIO, October 13, 1928.

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

GENTLEMEN:—This will acknowledge your recent communication, as follows:

"Under date of August 6, 1928, you rendered Opinion No. 2426 to this department, construing the terms of the contract made between the Sanitary Engineer and Assistant Sanitary Engineer and the Board of County Commissioners of Portage County. In this opinion you stated that these contracts provided for the compensation of the engineers only on the basis of the actual cost of the improvement or an estimate thereof. We are enclosing herewith letters written to this department and to our examiner, also statements of the county commissioners as to the intent of the parties to the contract with reference to this compensation.

Will you please advise this department whether in the light of the arguments presented in these letters, the county commissioners would be warranted in basing the compensation of the assistant sanitary engineer upon the total cost of the improvement, including interest on notes and bonds?"

I shall not attempt to quote the letters accompanying your communication, for I deem it sufficient to quote the summary of the contentions of the engineering company, as set forth in their letter of August 24, 1928, which summary is as follows:

"In conclusion, therefore, we maintain that the intention of the original contract was clearly understood on the part of the commissioners and the engineer, and that the percentages set forth therein were to apply on the total cost of the improvement, exclusive only of enginering and inspction, for the following reasons:

(a) That the expressions 'Estimated Cost' of the improvement and 'Actual Cost' of the improvement customarily mean the engineer's estimate of the total cost of the improvement prior to construction, and the total actual expenses for the improvement after the construction, respectively, and that the board of county commissioners were familiar with such interpretations because they apply alike to road work, sewer work, water work, and other county improvements.

(b) That at the time of presentation of the final bills which were duly approved by the present board of county commissioners, there was a definite statement made of what constituted the total cost, such statement including all of the items entering into the actual cost of the improving, including interest, lands, legal expenses, etc., and that these final bills showed very clearly on the face of them that the engineering percentages were taken on the total cost including all of these miscellaneous items excepting engineering and inspection, and that the present board of county commissioners in approving these bills for payment, were under no misapprehension as to the engineering charges. Further that two of the present board of county commissioners were members of the board that entered into the contract for engineering services and the fact of their approval should indicate their intention as the representatives of the county at the time the contract was made.

(c) That the phraseology of the engineering contract itself, wherein it specifically states that the engineering and inspection shall be deducted from the actual cost in computing the engineer's percentage, indicates of itself that more than the contractors cost was intended to be included in these percentages or this paragraph would have been unnecessary.

(d) That the contracts in Portage County are identical in phraseology with the contracts in Summit County where for a number of years the engineer's percentages have been computed on the basis of total cost including all the miscellaneous items of interest, printing, legal expenses, lands, etc., and excluding the cost of engineering and inspection, and that this same point was reviewed by the county prosecutor's office of said county and the intention of the contract definitely determined to be in accordance with the provisions outlined previously."

With respect to the contract in question, the former opinion of this department, to which you refer, stated:

"Said proposal in paragraph C thereof provides for a personal supervision of the engineering in the making of record surveys and maps of any improvement built and the preparation of estimated assessments therefor for which services he is to receive 'one-fourth of one (¼%) per centum of the cost of the improvement.'

Subject to the limitation provided for by Section 6602-14, General Code, that the compensation of the sanitary engineer shall not in any one year exceed the amount of compensation received during the current year by the county auditor of the county in which the improvement is being constructed, the board of county commissioners is authorized to make a contract with the sanitary engineer for such improvement on such terms as it may deem best; and the question here presented with respect to the contract of the county sanitary engineer, based on the proposal referred to in your communication, is simply one of construction with respect to the intention of the parties.

Without any extended discussion of the provisions of said proposal in the separate paragraphs thereof noted, I am clearly of the opinion that the terms 'cost of improvement' and 'estimated cost of the improvement,' as used in such proposal with reference to the basis on which the percentage compensation of the sanitary engineer is to be figured, refer to the actual cost of the improvement or the estimate thereof, as the case may be, exclusive of the particular matters mentioned in Section 6602-7, General Code, to-wit: the cost of engineering, necessary publications, inspection and interest on certificates of indebtedness or on bonds issued for the improvement.

The other proposal referred to in your communication is one by the Wynber Engineering Company to furnish to Portage County, for the purpose of said improvement, all engineers, assistant engineers, rodmen, field assistants, instruments and field and office supplies, that may be required to complete the engineering work in connection with said improvement. As compensation for services in this connection, said engineering company is to receive certain percentages on the 'estimated cost of the improvement' or 'cost of the improvement,' provided for by separate paragraphs in said proposal.

Although the percentages upon which the compensation of the Wynber Engineering Company is figured for the services to be rendered by it are considerably higher than those upon which the compensation of the sanitary engineer is figured, the basis upon which such percentages are to be figured is the same as that above noted with respect to the compensation of the sanitary engineer, to-wit, the actual cost of the improvement or the estimate thereof, as the case may be."

"My conclusion, therefore, is that in both cases referred to in your first question the compensation is to be figured on the actual cost of the improvement rather than upon the 'cost of any improvement,' as defined by Sections 6602-7 and 6602-23, General Code. The provisions of said section have their application with respect to the amount for which the county commissioners are authorized to levy assessments, as well as to the amount of the bonds issued by the board of county commissioners in anticipation of the collection of such assessments and the amount, if any, that the county is to pay towards the cost and expense of said improvements. The provisions of said Sections 6602-7 and 6602-23, General Code, have no necessary connection with the contract or contracts entered into by the board of county commissioners for engineering services in connection with said improvement, and, as above noted, it appears that so far as the contracts here in question are concerned, the intention of the parties was to limit the compensation for engineering services to the actual cost of the improvement, rather than to the cost of the improvement as defined by the sections of the General Code, above referred to."

From this quotation it is clear that in my opinion the contract is one which calls for construction, and upon the facts before me at that time I reached the conclusion that it was the intention of the parties to limit the compensation for engineering services to the actual cost of the improvement and not to include the items referred to in Sections 6602-7 and 6602-23 of the General Code. With this in view it becomes necessary to reconsider the question of the interpretation of this contract, taking into consideration the additional facts submitted. Accompanying one of the letters is a signed statement by the present board of county commissioners of Portage County, which is as follows:

> "In accordance with your request regarding our interpretation of your contract with Portage County for engineering services, we wish to state, herewith, that we understand the intent of this contract to mean that the engineering percentages provided therein shall, in the final analysis, be taken to apply to the total cost of any improvement exclusive only of engineering and inspection charges on said improvement.
>
> The total cost of any improvement, as we understand it, shall include the contract cost, lands, rights of way, legal expenses, advertising, interest on notes, engineering and inspection charges, and in fact all the items of cost as defined under the county sewer district law. It is with this understanding in mind that we have approved your engineering bills for services rendered in connection with the Portage County Improvements."

It is further set forth in one of the letters that two of the board of county commissioners who signed the above statement were also members of the board at the time the contract was executed and this indicates that at least a majority of the board executing the contract did so with the understanding that at least the major portion of the items mentioned as being included in the cost of construction in the sections of the Code hereinabove referred to, were to be treated as a portion of the cost for the purpose of computing the compensation earned under the contract. In this connection, however, I note that the statement signed by the county commissioners originally contained the words "and bonds" after the words "interest on notes," and these words were lined out in ink so that, at least in this respect, there is a different construction placed upon the contract by the parties thereto and such construction constitutes a departure from the items of cost enumerated in the section of the Code, to which reference has been made.

As stated in Page on Contracts, at page 3487:

> "The primary object of construction in contract law is to discover the intention of the parties as it existed at the time that the contract was made."

A determination of this question is necessarily one of fact, which must be determined in case any controversy exists. Of course the words employed are primarily the basis for deducing the intention of the parties, but where an ambiguity exists, resort must be had to other evidence in order to ascertain the true intent. In this instance the words "actual cost" and "estimated cost" are, as I have heretofore stated, not so definite and certain as to be not subject to construction. That is to say, these words might or might not include various items, such as those set forth in the sections of the Code referred to, according to the intention of the parties to the contract. Resort must be had accordingly to certain well established rules with respect to the construction of written contracts. As stated in Page on Contracts, at page 3511:

> "If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight, even though the contract is in writing, and, ordinarily, is controlling, at least if such practical construction has lasted for a long period of time. If the contract can fairly be regarded as ambiguous the practical construction which is placed thereon by the parties will control, although without such practical construction another construction might have seemed more natural. The practical construction placed upon the contract by the parties is, at least, of great weight, although it is not always conclusive. The fact that the practical construction is placed upon the contract by the acts of the parties thereto a considerable period of time after the contract was made, does not prevent such practical construction from being given full effect."

Examination should, therefore, be made to determine just what practical construction, if any, has been placed on the contract in question by the parties thereto. It is urged in one of the letters accompanying your communication that final bills were heretofore presented to the county commissioners in which all of the items which entered into the cost of the improvement, such as construction cost, lands, rights of way, interest on notes and bonds, legal expenses, printing and miscellaneous items, were specifically set forth and that these bills were approved by the board. It is claimed that this is a practical construction given by parties to the contract and reflects upon the proper interpretation to be placed thereon. This is the assertion made in paragraph (b) of the summary of the letter heretofore quoted. If this be the fact, I believe it is entitled to some weight in the determination of the question here involved. It is to be observed, however, that there is at least one particular in which the present board of county commissioners has not agreed to the position taken by the engineering company, that is, with respect to the item of interest on bonds which they had stricken out of the statement heretofore quoted. As to all the other items, the present board apparently has adopted the construction urged by the engineering company, both by the approval of the final bills and by their statements which they have subsequently made.

In paragraph (c) of the summary, heretofore quoted, it is urged that the phraseology of the engineering contract itself is such as to urge the adoption of the construction of the contract sought by the engineering company. With reference to this contention, my attention is directed to the fact that in the last phrase of the contract for engineering, it is provided that engineering and inspection charges shall be excluded from actual cost before computing the engineer's percentage. It is argued that this reference is unnecessary unless the contract in question were using the words "actual cost" with reference to the definition of the cost of the improvement, as found in the sections of the Code referred to. These sections enumerate among the other items the item of engineering and consequently the company now urges that the exclusion of this item by the contract itself would have been unnecessary unless the statutory definition of cost of improvement were in view. I am inclined to the opinion that there is some force in this argument and that the clause in question is indicative, in a measure at least, of the intention to include items other than the actual construction cost. There is, however, a rule of construction which militates against the claim of the company in this instance. As stated in Page on Contracts, at page 3548:

> "If the interest of the public is affected by a contract, it should be construed so as to protect such interest."

If this rule were the only one applicable in the present instance, then we should be compelled to follow my previous opinion and hold that the cost of the improvement

does not include the items now under consideration. This is so because the expenditure of public funds is involved and by so construing the language of the contract, the expenditure of public funds would be less. I do not feel, however, that this rule is so arbitrary as to override all other principles of construction.

I have not heretofore noticed the contentions made in paragraphs (a) and (b) of the summary heretofore quoted. In the first paragraph mentioned the claim is made that this construction of the contract is one established by custom and that the board of county commissioners was familiar with such custom because it applies alike to road work, sewer work, water work and other county improvements. While custom, when satisfactorily established, is given weight in the interpretation of contracts, I do not believe that it can be said that there is such a custom in this instance as provides a basis for the interpretation of this contract. In paragraph (d) reference is made to a similar contract in Summit County where for a number of years the engineer's percentages have been computed on the same basis as is contended for here. This is cited as showing what the true rule is in the construction of a similar contract. This argument is along the same line as that announced in paragraph (a), and, while it is entitled to some force, I do not believe it is of any controlling effect.

As I have before indicated, I am inclined to place considerable weight on the interpretation placed upon the contract by the county commissioners who were parties to its execution. That this is entitled to weight is evidenced by the following quotation in the case of *Cincinnati* vs. *Gas Light and Coke Company*, 53 O. S. 278, at page 287:

> "The reason of the rule of practical construction has its origin in the presumption that the parties to the contract, at and after the making thereof, knew what they meant by the words used and that their acts and conduct in the performance thereof, are consistent with their knowledge and understanding, and that therefore their acts and conduct show the sense in which the words were used and understood by them. In such cases acts sometimes speak louder than words. But the reason of the rule ceases, when the acts or conduct are not those of the parties who made the contract, and are not presumed to know in their own minds what was in fact meant by the words used. The acts and conduct of the parties following after the parties who made the contract, must in the nature of the case be only their own construction of the words used, and not an acting out of the understanding of the words by the parties who used them. The same is true of public officers. They may put their own construction upon the words used, but in so doing they are not acting out the mental understanding of the sense in which the words were used by those who made the contract or written instrument.
>
> In such cases the acts and conduct of the parties in the performance of the contract, are only their construction of the meaning of the words used; and their construction of words used by others, should not override the construction to be placed thereon by the courts. So that while the practical construction of the contract by the parties who made it, is entitled to great weight, in case of doubt, the construction placed thereon by those who follow is of much less weight."

Here at least two members of the board of county commissioners have stated unequivocally what their understanding of the contract was at the time of the execution and this is affirmed by their action in approving the bills already rendered, which bills set forth in detail the items in controversy. The only discrepancy which exists is the item of interest on bonds. Since the commissioners do not concede that this

item was within their contemplation at the time of the execution of the contract, I do not feel that I am warranted in saying that it may legitimately be included as a part of the basis upon which the engineer's percentage is computed. As to all other items, however, I believe that effect should be given to the interpretation placed upon the contract by all the parties thereto.

Accordingly, by way of specific answer to your inquiry, I am of the opinion that the county commissioners are warranted in basing the compensation of the assistant sanitary engineer upon the total cost of the improvement, including interest on notes, but excluding the item of interest on bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2712.

APPROVAL, BONDS OF BOWERSTON VILLAGE SCHOOL DISTRICT, HARRISON COUNTY, OHIO—$20,000.00.

COLUMBUS, OHIO, October 13, 1928.

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

2713.

APPROVAL, BONDS OF WILMOT VILLAGE SCHOOL DISTRICT, STARK COUNTY, OHIO—$37,850.00.

COLUMBUS, OHIO, October 13, 1928.

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

2714.

APPROVAL, BONDS OF NILES CITY SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—$18,571.43.

COLUMBUS, OHIO, October 15, 1928.

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