OPINION

TAXABILITY OF HOBOKEN PIERS

THE FACTS

On March 28, 1918, Congress passed an Act (40 Stat. 459) authorizing the President of the United States to acquire the title to the docks and terminal facilities owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company in the City of Hoboken if he deemed it necessary for the national security and defense. He was empowered to purchase or "take over for the United States the immediate possession and title thereof," making just compensation therefor.

By proclamation dated June 28, 1918, President Wilson declared that acquisition of title was "necessary for the National security and defense" and took title to the property.

In his proclamation of December 3, 1918, the President ordered total compensation in the amount of $7,146,583.00 for the expropriated property. Of this amount, $2,314,877.00 was paid to Hamburg-American L. T. & N. Co., a New Jersey corporation, which held title to Piers 4, 5 and 6. After deduction of certain mortgage charges, $4,784,205.00 was paid to the Alien Property Custodian on behalf of North German Lloyd, a German corporation, in respect of its 999 year lease of Piers 1, 2 and 3, and $1.00 was paid to North German Lloyd Dock Company,

a New Jersey corporation, for its reversionary interest in Piers 1, 2 and 3.

During World War I, all piers were used for the shipment of troops and war material.

Piers 5 and 6 were destroyed by fire on August 24, 1921.

In 1921 possession and control of the piers passed to the United States Shipping Board and remained under its control until 1933. The Board entered into individual leases with commercial interests and derived considerable revenue from the operation, a net profitfor these years of $3,004,423.83 (HR 10536).

The Shipping Board leased the entire property in 1933 to North Atlantic Terminal Co. under an arrangement which made the lessee responsible for the operation of the piers and the Board responsible for the maintenance of the property.

Pursuant to Section 202 of the Merchant Marine Act of 1936, the piers were transferred to the Maritime Commission which has continued the practice of its predecessor of leasing the pier property for use by commercial interests.

Many times since the end of World War I has the City attempted to impress upon the Federal Government the enormity of the financial burden placed upon the City, but all efforts to have the United States return the property to the tax rolls

have met with failure. While most of these efforts were of a political nature, yet there are some which could be construed as having a legal effect upon the problem and may be properly considered in the necessarily brief factual background of the case.

Although Section 17 of the Merchant Marine Act of 1920 prohibited the sale of the piers, nevertheless on April 19, 1930, the President approved an Act of Congress authorizing the Shipping Board to sell the piers at public sale. Pursuant to this Act, the Shipping Board advertised the piers for sale, but only one bid in the amount of $4,282,000.00 was received. On July 30, 1930, the City passed a resolution requesting the Shipping Board to reject the offer and re-advertise for bids on the ground that the bid was inadequate and would tend to generally depress river-front valuations. The Shipping Board rejected the bid and no further attempts were made to sell the piers.

By an amendment of August, 1937 to the Merchant Marine Act of 1936, the Maritime Commission was authorized to operate or lease any piers under its control "in accordance with good business methods", the proceeds thereof to be expended by the Commission for its authorized functions.

By Chapter 557 of the Laws of 1938 (Public No. 689) the Congress authorized the Maritime Commission to sell or lease the piers to the City but, of course, this authorization was never acted upon.

The Armstrong Bill (State of New Jersey Senate No. 148) introduced March 17, 1949, and subsequently enacted into law, provided in part as follows:

> "1. When real estate exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, and assessed as real estate."

THE QUESTION

The fundamental question involved herein is an attempt to return the property to the tax rolls of the city with the concomitant easing of the burden on all the taxpayers of the city. The question must, in turn, be subdivided into the following two subdivisions:

I. Can title to the property be demonstrated to be in persons other than the United States?

II. Can the property be validly taxed when title thereto is in the United States?

United States v. Mayor and Council of City of Hoboken, 29 F (2d) 932 (1928).

Before attempting to answer the foregoing two questions it is necessary to consider the most important litigation entered into by the city.

This case, decided August 10, 1928 in the United States District Court, D, New Jersey, is of considerable importance and must be examined dosely not only from the point of view of what the case decided best but also because of certain suggestions made by Judge Clark in his opinion.

In order to properly consider the effect of the case, it is necessary to resort to the available briefs of counsel and pleadings since the report does not disclose

sufficient facts and some which it reveals are erroneous as will later appear in greater detail.

Subsequent to the seizure of the piers by the President on June 28, 1918, the city assessed the piers for the year 1920. The U. S., of course, did not pay the taxes. Pursuant to resolution of the Mayor and Council adopted November 1, 1927, the city put the piers up for sale for non-payment of taxes. The United States obtained a temporary restraining order against any such action by the city and brought this action to obtain a permanent restraining order.

In setting forth his version of the facts in the case, Judge Clark complained that he had not received "any connected history of these properties"(p. 934). In supplementing the given facts with his own research he came to the conclusion that Piers 1, 2 & 3 (North German Lloyd) had been constructed in front of Hudson Square and that the city was in the chain of title. Both conclusions are erroneous as shown by the attached chart. However, upon the assumption he recommended that the city investigate the title to see whether a right of re-entry might be found for breach of covenant against erecting piers in front of a public square. Of course as we have shown in our title search, this restrictive covenant applies only to the 150 ft. strip north of Pier 1 and therefore the Judge's suggestion in this regard is valueless from the

city's point of view.

As to the Judge's similar suggestion as to Piers 4, 5 & 6 (Hamburg-American) our investigation disclosed a similar state of facts and therefore the suggestion in this regard is also valueless.

The facts set forth in the report show that at the close of World War I, the War Department leased Piers 1,2& 3 to independent shippers reserving to itself the occasional use of Pier 3 for the return of war dead. Nothing is shown as to the use of Pier 4. Piers 5 & 6 had been destroyed by fire.

The main points set forth in the city's brief may be succinctly stated as follows:

A. The U. S. did not acquire legal title to the properties.

Here the city contended that the Act of Congress authorizing the President to take the properties "if he shall deem it necessary for the National Security and Defense" was unconstitutional since the Act gave the President, rather than the courts, the sole power to fix compensation for the properties giving no opportunity to the owners to be heard. The city also pleaded as a fact that the New Jersey legislature had not consented to the taking.

B. The U. S. did not use the properties for any proper governmental or public purpose after November 1918.

In his decision Judge Clark first raised serious questions as to his jurisdiction over the case, stating that the U. S. had an adequate remedy before the New Jersey administrative bodies and courts. However in the interests of both the U. S. and the city, he elected to exercise jurisdiction insofar as the tax from 1920 was involved.

He then decided that the property, if owned by the U. S., was exempt from tax relying primarily on the case of VanBrocklin v. Tennessee 117 U. S. 151

He also decided that under local law the tax was imposed on October 1, 1919 and that the entire question had to be considered as of that date.

Next he rejected the city's claim that the piers were not owned by the U. S. on October 1, 1919, holding that the Fifth Amendment to the U. S. Constitution had not been violated and that the question was res adjudicata. This latter argument is of particular interest since both pier owners attempted to recover against the U. S. in the U. S. Court of Claims on the ground of improper presidential seizure of the piers. The seizure was upheld in North German Lloyd v. U. S. 61 Ct. Cl. 138, cert. den. 270 U. S. 645 and in Hamburg American v. U. S. 59 Ct. Cl. 461, 48 S. Ct. 470.

Judge Clark also rejected the city's claim that the N. J. Legislature had not consented to the seizure by referring to a "general consent" statute (P.L. 1907 p. 43).

As to the argument that the piers were not used for a "public purpose", the Judge established as a fact that on October 1, 1919, the U. S. was using the piers for the return of war dead, an obviously "public purpose".

The city laid great stress on the case of Fort Leavenworth Ry. Co. v. Lowe, 114 U.S. 525 and in particular the language of the court which treated of the cession of jurisdiction by the State to the U. S.

> "Such cession is really as much for the benefit of the state as it is for the benefit of the United States. It is necessarily temporary; to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale."

The court rejected this language as applying to the Hoboken situation stating that the fallacy of the city's view was that the point for decision in that case was only as to the power of a state to make a cession of its jurisdiction to the U. S.

The court pointed out that the city could still raise the constitutional question of the government's right

to engage in the shipping business although indicating the probability that such an undertaking might fall within the "general welfare" clause of the Constitution.

In closing, the court raised the question as to the legality of taxing the leases to the private steamship lines.

I.

The attached exhibit is a graphic exposition of the chain of title of the lands lying beneath Piers 1 through 6 inclusive. The analysis clearly demonstrates that upon seizure of the piers by the President, title thereto was clearly vested in Hamburg American and North German Lloyd.

All deeds and covenants in connection therewith were carefully examined and no grounds for re-entry by the State of New Jersey or the City could be ascertained.

After World War I, the President's seizure of these properties was attacked by both Hamburg American and North German Lloyd in actions instituted against the United States in the U. S. Court of Claims. (North German Lloyd v. U. S., 61 Ct. Cl. 138, certiorari denied 270 U. S. 645; Hamburg American Line Terminal and Navigation Company v. U. S. 59 Ct. Cl. 461, certiorari denied 277 U. S. 138. The City's right to attach seizure of the piers by Presidential proclamation was foreclosed when the U. S. District Court for New Jersey held these cases to be res adjudicata against the City. U. S. v. Mayor and Council of the City of Hoboken, supra. Since no appeal was taken from this decision it would seem that the City would be precluded from raising the issue in any subsequent litigation. An added deterrent as to piers 4, 5 and 6 is found in the fact that on April 15, 1919, the Hamburg American deeded these piers to the United States.

II.

Having determined that the fee to the pier property is entirely in the United States, the question of the City's right to impose a real estate tax thereon must be decided.

The doctrine of the federal government's immunity from taxation by the States (in the absence of Congressional consent thereto) springs from the opinion of Chief Justice Marshall in the case of M'Culloch v. Maryland, 4 Wheat. (U.S.) 316 (1819), wherein he set forth that oft-quoted aphorism that "the power to tax involves the power to destroy" and refused to permit the State of Maryland to impose a tax upon a branch of The Bank of the United States, a federally incorporated bank.

Additional strength was given to the doctrine in the case of Dobbins v. Commissioners, 16 Pet. 435, (1842 U.S.) where the question arose as to whether or not a Pennsylvania county tax could be assessed upon a United States revenue officer and it was held that the states were restrained by limitations "as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments and persons, which the United States may use and employ as necessary and proper means to execute their sovereign powers. The means necessary and proper to carry into effect

the powers in the Constitution are in Congress." (p. 447).

As will be seen later in the detailed treatment of some recent decisions of the United States Supreme Court, this doctrine has remained alive and vibrant to the present day despite certain modifications which will also be discussed. Rather than cite the many cases setting forth the above principle, reference may be made to Julius Henry Cohen's extensive treatment of the subject in his article "Federal Taxation of State Activities and State Taxation of Federal Activities", 34 Yale Law Journal 807 (1925). There he cites the case of Polloch v. Farmers' Loan & Trust Co., 157 U. S. 429, (1895), for the proposition that agencies selected by the one sovereignty are free from taxation even though they are privately owned or controlled and their operations inure to private profit (except of course where the sovereignty consents to the taxation of its agency).

Though Mr. Cohen concedes that every public activity is entitled to be self-supporting, and indeed profitable, nevertheless the profits might be so large, and the apparent public need so small, as to justify a finding that the activity was undertaken not for the public end at all but purely for revenue purposes. "Certainly entry by a public body upon an activity purely or primarily for gain has not yet received the stamp of approval as performance of a sovereign function." This latter

argument seems to receive something of a set back in Mr. Justice Rutledge's concurring opinion in New York v. U. S., 326 U. S. 572 (1945) where he advanced a purely economic argument for permitting taxation by the United States of the right of the State of New York to engage in the business of selling its mineral water. Although this case will be more fully treated, it might be well to examine his language on this subject at this point: (page 584)

> "Too much is, or may be, at stake for the nation to permit relieving the states of their duty to support it, financially as otherwise, when they take over increasingly the things men have been accustomed to carry on as private, and therefore taxable, enterprise. Competitive considerations unite with the necessity for securing the federal revenue, in a time when the federal burden grows heavier proportionately than that of the states, to forbid that they be free to undermine rather than obligated to sustain the nation's financial requirements."

The survival of the doctrine of immunity of the Federal Government from State taxation finds its modern expression in a case, relevant in both fact and law, decided by the highest court of the State of New Jersey. In ABR Corporation v. City of Newark, 131 N.J.L.1944, the New Jersey Supreme Court had before it for review the validity of an assessment for the years 1942 and 1943 to one Bratter as owner of premises in Newark known as the old Post Office and Courthouse site. There the United States conveyed the premises in January of 1941 to Bratter, the payment therefor to be made in thirteen (13) annual installments, deed to be delivered in 1951. Bratter entered into possession of the premises in February, 1941. When Bratter failed to pay the tax the City advertised the premises in fee for sale. The U. S. obtained an injunction against

the sale of any of its right in the premises by consent. The case came before the Supreme Court on a writ of certiorari.

The court opened its opinion by saying "we do not think it is open to question that real property owned by the government is exempt from taxation by the state". The City claimed that Bratter became vested of certain equitable rights in the property and that because of his position he enjoyed all the advantages enjoyed by other owners and that his equitable interest was taxable. The court pointed out that it did not appear that the City proceeded on this theory that the assessment was made because it was levied against Bratter as owner and for the full value of the land. The court continued, saying "Certainly Bratter had no equitable estate in the property which would justify any such assessment to be taxable. His equitable title must be vested and perfected by full performance of the contract. Nor do we think that he had any taxable interest in the property." (Citing Lincoln County v. Pacific Spruce Corp., 26 Fed. 2nd, 435), "* * * As long as the government retains the legal title as security for the payment of any part of the purchase money, or to secure the performance of any other conditions of the grant or sale, the land is not subject to taxation by the states."

The court recognized the hardships worked on municipalities because of the loss of ratables, but stated that this was a matter for Congress to remedy.

Another case involving similar facts came for decision before the Circuit Court of Appeals, First Circuit, in 1938, in the case of City of Springfield v. United States, 99 Fed.(2d), cert. den. 301 U. S. 650. In this case, the United States had acquired from time to time since 1887 the property in question for a post-office site, and as such it was used until 1933. It would seem that the government made efforts to sell this property, and failing to do so, leased it at a ground rental for five years to a private corporation for use as a bus terminal. The lease being in effect, the City of Springfield assessed the property and threatened to sell it for nonpayment of taxes and the United States brought an action to have the property stricken from the assessment rolls.

At the time of the assessment there was a Massachusetts statute which exempted property of the United States from taxation which was "constitutionally held and used by it for essential governmental functions".

Thereafter on September 29, 1937, the United States entered into a contract for the sale of premises whereby the purchaser was to pay the balance of the purchase price in five annual installments, possession to be given immediately to the purchaser, but the deed not to be delivered until the completion of the contract.

The court succinctly stated the question before it as being the following:

"Whether the use of property of the United

> States by a lessee for private purposes pending a sale by the United States, such property having been previously acquired and used for a post-office site, but since 1933 abandoned by the United States for that purpose, is, since January 1, 1937 exempt from local taxation."

The court recognized that the property had been duly acquired and that the government had the right to dispose of it when it was "no longer needed", and that while the government was seeking the purchaser, the leasing of such property conditioned on 30 days' notice to terminate such lease in case a purchaser was found could not have the effect of subjecting such property to taxation by the municipality under Massachusetts statute.

The court also held that it was "doubtful whether a state can render property of the United States taxable, though it is not strictly essential for governmental purposes", citing Lee v. Osceola, etc., 268 U. S. 643, 645. It further held that "since Congress has full power to determine the terms and manner of disposal of Federal property, the free exercise of this power cannot be interfered with or otherwise embarrassed by state taxation, or the imposition of tax liens upon such property".

Here for the first time appears a possible break in the armor of the federal government's complete immunity from taxation of real property held by it and there is proposed the

only remaining theory under which the City may hope to levy its tax against the United States. The question may be simply phrased as follows: Where the United States has acquired real property for a valid governmental purpose and thereafter devotes the property to a non-governmental purpose, may the property be taxed by a state or municipality?

No case could be found wherein this precise question has been answered, except the Springfield case where a doubtful negative has been offered by way of dicta. Since no precise answer can be found, it is only by examining the pertinent federal, and particularly, Supreme Court, decisions that an opinion may be formed.

In Van Brocklin v. Tennessee, 117 U. S. 151 (1886) the facts were these: Tennessee imposed a tax on land, title to which had been taken by the United States for non-payment of taxes. The court held this tax unconstitutional, holding: (page 179).

> "To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for state taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States."

In Coe v. Errol, 116 U. S. 517, at page 524, the Court in discussing the taxing power of a State held:

> "We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in use of the government of the United States."

In Lee v. Osceola, 268 U. S. 643 (1924) an Arkansas Improvement District improved certain "lake lands or sunk lands" and before completing the improvements learned that the United States owned certain of these lands. In reciting the facts, the Court then says: "It was recognized, however, that it (the United States) was not liable to assessment" and therefore did not assess the land. However, when the lands were sold to the plaintiff, the lands were reassessed. The Court held its assessment invalid on the ground that liability for future assessments for improvements made while the United States was the owner would create a serious encumbrance on the lands and would effect an indirect tax where no direct tax could have been imposed.

The government of the State of Minnesota undoubtedly had the foregoing cases in mind when facts similar to those in the Springfield case arose, for in S. R. A. v. Minnesota, 327 U. S. 558 (1946), a different taxing scheme was evolved - one which is similar in theory to that envisioned by the Armstrong Bill. Here the United States had acquired land as a sitefor a

post-office in the State of Minnesota in 1867. In 1939 the building was vacated and the property sold to S.R.A. Inc. under an executory contract of sale providing for annual installment payments and a delivery of a quitclaim deed by the United States upon all payments having been made. In the event of the failure of any of said payments the United States had the right of repossession.

In 1940, while the executory contract was in effect, the State of Minnesota assessed a tax on the realty "subject to fee title remaining in the United States". S.R.A. objected to the tax on the grounds that the realty was exempt because the title to all of the premises was in the United States.

Minnesota's Supreme Court affirmed a judgment which held the realty liable for the tax and declared a lien "upon such parcel of land as against the estate, right, title, interest, claim, or lien, of whatever nature, in law or equity, of every person, company, or corporation, subject however, to the prior rights, liens and interests of the United States of America."

The United States Supreme Court held as follows:

> "The supremacy of the Federal Government in our Union forbids the acknowledgment of the power of any state to tax property of the United States against its will. Under an implied constitutional immunity, United States property must be exempt from state control in tax, as in other matters." M'Cullough v. Maryland, 4 Wheat. 316; 425; Van Brocklin v. Tennessee, 117 U. S. 151; United States v. Allegheny County, 322 U. S. 174.

In this case the contract contained no clause which particularly set forth that sovereignty was to be retained in the United States and the court treated the case as though the government had relinquished legislative power over the property. Under this assumption, the question to be decided was whether or not there had been a transfer of the property by the contract of sale, and for this purpose, where the United States is a party to a contract, the governing rules of law must finally be declared by the Supreme Court of the United States. The court held the contract to contain no characteristics which would mark it as differentiating between a normal executory contract for the sale of land with partial payments, and held that the contract transferred to the purchaser the equity in the land. The United States retained only a legal title as security. "In substance it is in the position of a mortgagee," and that consequently, when S.R.A. entered into possession of the property it became subject to the territorial jurisdiction of Minnesota.

The court was careful to point out that "The immunity from state taxation of property to which the United States holds legal title, remains" since Minnesota carefully left unassessed whatever interest the United States may hold. The court further pointed out that a tax sale would not divest the fee title of the United States, noting that under Minnesota law it would appear that the equitable interest alone could be sold leaving the fee of the United States in its possession of priority over any interests transferred by the tax sale.

It is of interest to note that the court felt that the state was entitled to assess the property at its full value making no deduction for the interest of the United States, stating that the interest of the United States was for security purposes only and not beneficial in nature.

Another case involving facts similar to the Springfield and S.R.A. cases arose in United States v. Weisenbloom, 168 Fed. 2d, 698, (June 7, 1948), where the Court of Appeals of the Second Circuit had before it the question of whether or not New York State rent control laws applied to the United States as a lessor of surplus land owned by it in the City of New York and leased for commercial purposes.

There the United States leased land acquired for a post office to the defendant as a gasoline station, with the right to remove the tenant after notice of 30 days. The United States sued to recover possession solely in order to relet them at a better price.

In its opinion the court doubted whether the state had the power to regulate disposition of the property owned by the United States, saying that a state may not regulate the national government in the discharge of its "governmental" functions, citing Mayo v. U. S., 319 U.S. 441; SRA. Inc. v. Minnesota, 327 U. S. 558.

The court pointed out that the land had been acquired for use as a post office site and that although the property may be considered as "surplus", "The need of the government to do something with it flows from the acquisition of it for use as a post office site", indicating that the rental of the property might be merely temporary disposal of it pending its sale or devotion to some purpose more clearly "governmental" in character.

However, the court refused to decide whether the use of the property was "governmental" in character because of the fact that it could decide the question by holding that the statute in question did not intend to include properties owned by the United States and consequently held the property not subject to state regulation under the particular statute in question.

In this connection the court uses the following pertinent language:

> "But we need not now decide whether, or to what extent, this use of the property was 'governmental' in character or whether the distinction between 'governmental' and other functions is to be maintained for purposes of determining the validity of state regulation of activities of the United States."

Of course, while the foregoing language is pertinent to our problem, yet it must be borne in mind that the problem before the court was not whether the state could tax the fee in the United States but whether it's regulatory laws applicable to commercial property were valid as against the United States. It must also be noted that the Mayo case which the court cites, refers only to

whether a state's regulatory laws as to the inspection of fertilizer applied to a United States agency.

The same court decided six months later the case of U. S. v. Woodworth, 170 Fed. 2d, 1019 (December 1, 1948). There the United States sought to quiet title to certain real estate against which the City of Rochester had levied taxes. The United States had acquired the land by condemnation. Unfortunately, the opinion nowhere discloses the use to which the property was put. However, it should be noted that, in holding for the United States, the court used the following general language unmodified by reference to governmental or non-governmental functions: (page 1020)

> "Land owned by the federal government is not, without its consent, manifested by a Congressional enactment, subject to state taxation, regardless of whether jurisdiction over the land has been ceded to the federal government." (citing the Van Brocklin case, supra)

However, in Jefferson County v. U. S., 164 Fed. 2d, 184 (Nov. 7, 1947), the Circuit Court of Appeals for the Fifth Circuit had before it a case involving attempted taxation by a County in Florida against lands owned by the United States in fee simple absolute. The County alleged that the funds for the purchase of the lands had been supplied to the United States by the Florida Rural Rehabilitation Corp. In

its opinion the court did not anywhere disclose the character of the corporation or its functions but held the lands exempt from tax on the simple ground that the fee was held by the United States. The following significant language on the point of "governmental" purpose appears at page 186:

> "The lands were bought by, and in the name of the United States. They were owned by the United States in fee simple absolute, and the fact that by law they were devoted to certain purposes would have no effect whatever to deprive it of its sovereign exemptions."

A further indication that the courts might feel that the purpose for which the United States uses its property is not subject to review is found in the case of U. S. v. 243.22 Acres of Land, 129 Fed. 2d, 678 (1942), decided by the Circuit Court of Appeals, Second Circuit. This was a condemnation case involving lands required by the Secretary of War and stated by him to be necessary for military purposes. The Town of Babylon resisted on the ground that the land was taken, not for a public use, but for the private use of the Republic Aviation Corporation and that the corporation had received a lease from the United States for five years with an option to buy at the expiration of the lease. The court answered this point with the terse statement, (Page 683):

> "The decision of the Secretary of War is not open to judicial inquiry."

Thus far the cases considered have all been those wherein a state sought to exercise its authority over the United States. The following case treats the converse of this proposition and is pertinent on the question of a governmental function. In New York v. U. S. 326 U.S. 572 (1945) the United States sued to recover taxes assessed against New York on a sale of mineral waters taken from Saratoga Springs. The State claimed immunity on the ground that it was engaged in the exercise of a "usual, traditional and essential governmental function".

The opinion was written by Frankfurter (Rutledge joining). It was held that the case could be quickly disposed of and cited South Carolina v. U.S., 199 U.S. 437 for the proposition that when states sought to control the liquor traffic by going into the liquor business, they were denied immunity from federal taxes thereon. However, the court expanded its position because of the importance to New York and the 45 other states who joined in the case.

Beginning with the case of M'Culloch v. Maryland, 4 Wheat. (U.S.) 316, the court quoted Marshall's opinion that the "power to tax involves the power to destroy", but qualified that statement as being made at a time "when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute". Justice Frankfurther also further minimized the implications of the M'Culloch doctrine by quoting the dissenting opinion of Mr. Justice Bradley in Collector vs. Day (Buffington v. Day) 11 Wall (U.S.) 113-128 wherein he pointed

out the invalidity of the notion of reciprocal intergovernmental immunity. He points out that taxation by the state against U. S. instrumentalities is "a very different thing". He does not explain the difference, but it is to be gathered from the context of his language that the court would look more favorably upon a tax imposed by the United States against a state than it would upon a tax imposed by a state against the United States.

In treating the South Carolina case, supra, the court points to the distinction between "taxation of the historically recognized governmental functions of a state, and business engaged in by a state of a kind which theretofore had been pursued by private enterprise", and on the basis of the distinction apparently gives weight to the South Carolina decision in denying immunity from federal tax to South Carolina on its monopolization of the sale of liquors.

He further pointed to the case of Ohio v. Helvering, 292 U. S. 360, where the court stated at page 369:

> "* * *. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function . . . . When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.

He distinctly rejected the doctrine that only those activities engaged in by states in 1787 were governmental functions and therefore immune from federal taxation and stated

that the Supreme Court had:

> "* * * edged away from reliance on a sharp distinction between the 'governmental' and the 'trading' activities of a State, by denying immunity from federal taxation to a State when it 'is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State'." Helvering v. Powers, 293 U.S. 214, at page 227.

However, Mr. Justice Frankfurter is not satisfied with the criterion established in this case since the distinction between activities "normally" conducted by private enterprise and "usual" governmental functions of the state is too shifting a basis. He seems to prefer to let each case stand on its individual facts and if any general statement of his view is possible, he would appear inclined to tax any activity of a state which is customarily engaged in by private citizens where Congress has not specifically granted tax immunity to the state.

Of particular interest to an understanding of inequity such as the Hoboken case, is the following quotation from his opinion:

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

Mr. Justice Rutledge in his concurring opinion used the following language disclosing the trend away from the doctrine of intergovernmental immunity:

> "* * * * The shift from immunity to taxability has gone too far, and with too much reason to sustain it, as respects both state functionaries and state functions, for backtracking to doctrines founded in philosophies of sovereignty more current and perhaps more realistic in an earlier day. * * *"

As a further reason for upholding the tax upon the state, he advances the economic notion (as noted heretofore) that the states should not be able to undermine the federal taxing powers at a time when the nation's financial requirements have grown "heavier proportionately than that of the states".

In the concurring opinion of Mr. Chief Justice Stone (Justices Reed, Murphy and Burton joining) he again lends support to the decision in South Carolina v. U. S., although citing as untenable the distinction between "governmental" and "proprietary" interests on which this case rested to some extent.

In defining a "nondiscriminatory tax" as referring to a tax laid on a like subject matter without regard to the personality of the taxpayer, he points out that there may be nondiscriminatory taxes which, when laid on a state, would nevertheless impair the state's sovereignty as much as a similar tax imposed upon the federal government. However, he expressly states that a "general nondiscriminatory real estate tax (apportioned)" laid upon a state's capitol, its schools or parks would not be upheld.

Mr. Chief Justice Stone somewhat limits the fore-

going by holding that the subject matter of the tax was of a nature which has been traditionally within the taxing power of the United States from its beginning.

Mr. Justice Douglas in his dissenting opinion (Mr. Justice Black concurring) doubts whether the South Carolina case reaches the right result, although admitting that, if the case is to be followed, the tax in the instant case must be upheld. He feels that a state's project, regardless of whether or not it is conducted for profit or in the nature of private enterprise, is legitimate governmental activity (approving Mr. Justice White's dissenting opinion in the South Carolina case).

He criticizes the majority opinion if it means (as he evidently thought it meant) "that a federal real estate tax of general application (apportioned) would be valid if applied to a power dam owned by a state". He further contends that "the fact that local government may enter the domain of private enterprise and operate a project for profit does not put it in the class of private business enterprise for tax purposes". He charges the majority of the court with stating in effect that the sale of mineral water by the state is admittedly a function of government but that the tax is so slight as to be no burden, overlooking the fact that the power to tax lightly is the power to tax severely.

The framework of his dissent is the traditional immunity of the states upon entering the Union and he refers to the Constitution as a "Compact between sovereigns."

As a general observation of this case, it would seem that we have an example of an extreme departure from the doctrine of intergovernmental tax immunity - at least as far as the States' freedom of taxation by the United States is concerned. From a reading of this case, it would seem probable that if the shoe were on the other foot and the federal government were seeking to levy a real estate tax upon Hoboken piers which had been seized by the State of New Jersey, the Supreme Court would uphold the assessment of such a tax. However, the majority opinions are pregnant with the possibility that the extension of taxability applies only to activities and instrumentalities of the state and possibly not those of the federal government - largely because of the economic conditions which require additional sources and increased amounts of revenues for the support of the federal government.

While the decision of the Supreme Court in S.R.A. v. MINNESOTA indicates a relaxation of the federal government's immunity from state taxation, yet this very relaxation lends further strength to the United States resisting the imposition of a tax upon the fee when a tax may be properly levied upon

the equitable ownership of the fee.

It seems doubtful that a court would look with favor upon any doctrine of abandonment of governmental function when the property is being used for commercial purposes. It could well be held that the holding of property in and of itself is a governmental function and that a court could not inquire into the purposes for which it was used as long as Congress had approved the purpose for which it had originally been taken. Again, there is no guarantee that a court would view the leasing as "non-governmental" since the encouragement of a strong merchant marine and the availability of port facilities in the event of war could be looked upon as functions within the proper sphere of the federal government.

Any holding that the United States had no power to lease its property would be a decision of tremendous detriment to the federal government as now functioning since it would constitute a precedent of such universal application as to place a serious burden upon its operations and it is to be feared that this sentiment might well motivate a court to adhere to its long-standing and repeatedly pronounced general principle of immunity.

Perhaps an excerpt from the argument of Daniel Webster in M'Culloch v. Maryland, supra, at page 323, might be applied with equal force to the pier situation. In arguing

that Congress constitutionally possesses the power to incorporate a bank, he said:

> "When all branches of the government have thus been acting on the existence of this power for nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest."

CONCLUSIONS

1. Neither the City of Hoboken nor the State of New Jersey has any right of re-entry or title to property fronting on River Street between Newark and Fourth Streets heretofore designated as Piers 1, 2, 3, 4, 5 and 6.

2. The City of Hoboken does not have a reasonable chance of successfully imposing a real estate tax upon the fee to the above mentioned property inasmuch as title thereto lies in the government of the United States and is exempt from such tax.

SULLIVAN, DONOVAN & HEENEHAN

NEWARK

FIRST

SECOND

THIRD

FOURTH

HUDSON SQUARE

RIVER ST.

off to Tract

B C D E F G H I J K L M N O P Q R S T U V W X Y Z AA BB CC DD EE FF FF² GG GG² HH II

H.W. LINE LOSS MAP

EXTERIOR LINE FOR SOLID FILLING

EXTERIOR LINE FOR PIERS

PIER 6

PIER 5

PIER 4

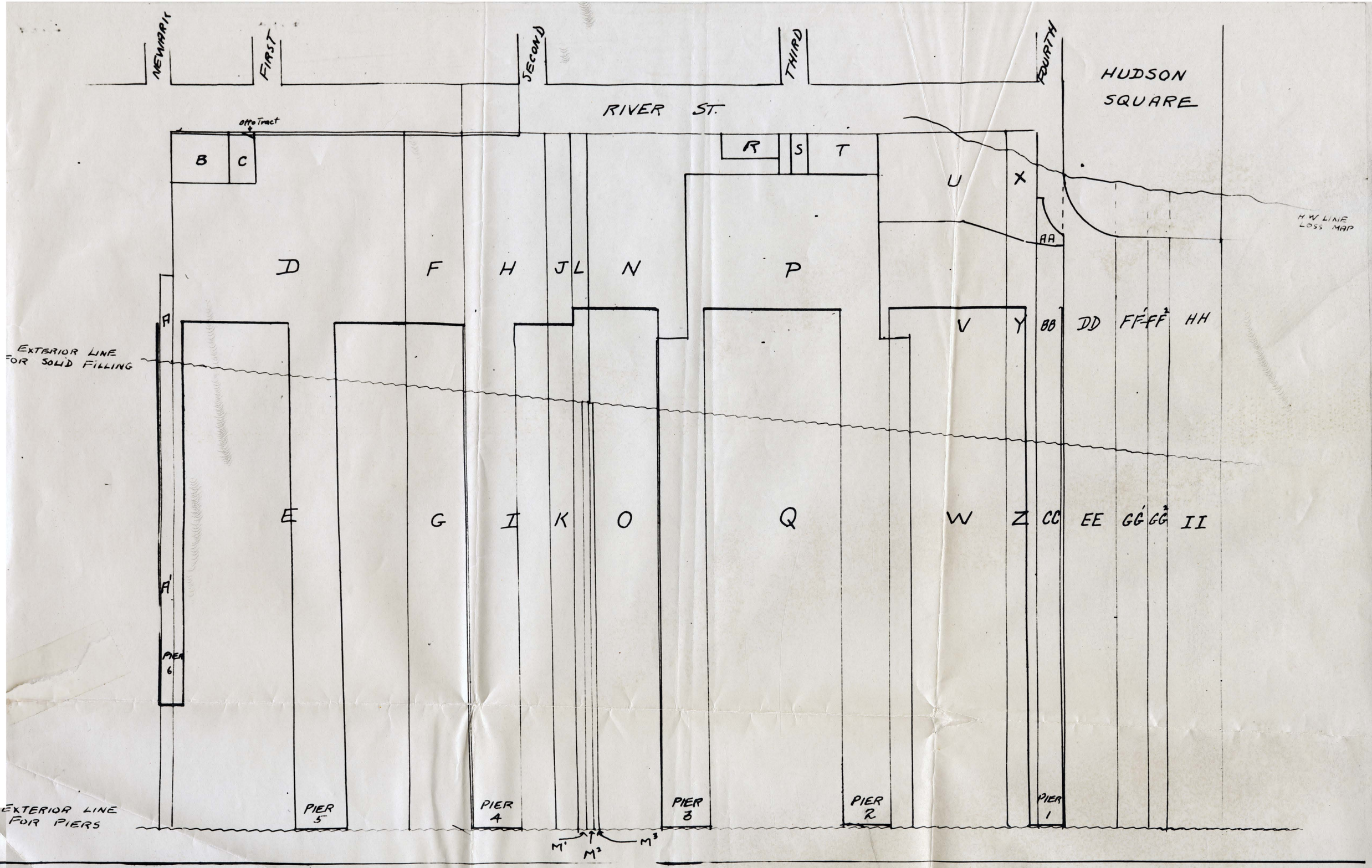
PIER 3

PIER 2

PIER 1

M¹ M² M³

Tract lands	1/7/1787	D-437 (Bergen Co.) Cornelius Haring, as Agent of Forfeited Estates (NJ) to John Stevens
	5/6/1839	A4-287 (Bergen Co.) Edwin A. Stevens et al, to Hoboken Land & Imp. Co.
L	5/11/72	245/40 State of New Jersey (Riparian Commissioners) to Hoboken Land & Improvement Co.
N to W	12/2/69	210/696 " "
X Y Z	6/20/65	H05/324 " "



Entire Tract Uplands 1/7/1787 D-437 (Bergen Co.) Cornelius Haring, as Agent of Forfeited Estates (NJ) to John Stevens

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4/24/73 260/590 Fred. Kunge, Tr. to German Transatlantic Steam Navig. Co.

1/23/78 320/156 German T.S.N. Co to Adolph Schmidt and Emil Goldschmidt

3/0/87 365/172 Schmidt & Goldschmidt, & to Hamburg American Packet Co.

B 12/8/88 475/1 Hamburg Amerikanische Packet Fahrt Aktien Gesellschaft to William Utz

C 5/23/92 558/529 HAPJAG to John Steneck

FG 5/23/85 405/340 State of New Jersey (R.C.) to Hoboken Land & Imp Co.

H1 Grant by Special Act of N.J. Legislature (approved 3/31/1804) to Camden & Amboy R.R. & Transp. Co

12/1/04 121/017 Hoboken Land & Imp Co. to T. Stephens, Ex., to Camden & Amboy R.R. & Transp Co

U 4/15/99 721/551 State of New Jersey (R.C.) to Hoboken Land & Imp. Co

LM¹M² 5/11/72 245/40 " " " " " " " "

JKM¹M² 10/1/69 204/148 Hoboken Land & Imp Co. to Camden & Amboy R.R. & Trans. Co.

HIJKMM¹M² 4/17/99 721/543 United N.J. R.R. & Canal Co. to Hoboken Land & Imp Co.

FGHIJK M¹M²M³ 4/20/99 721/558 Hoboken Land & Imp Co to H.A.P.J.A.G.

M²M¹ 9/28/1900 767/598 HAPJAG to North German Lloyd

AA BB CC DE FG HIJKM' 793/229 HAPJAG to Hamburg American Line Trans. & Nav. Co.

Off Tract 3/6/82 365/175 Hoboken Land & Imp Co to Hamburg American Packet Co

L 5/11/72 245/40 State of New Jersey (Riparian Commissioners) to Hoboken Land & Improvement Co.

N to W 12/21/69 210/696 " " " " " " " "

X Y Z 5/23/85 405/340 " " " " " " " "

LNO 4/23/72 237/701 Hoboken Land & Imp Co to North German Lloyd

d. to 11/1/73 265/118 confirmation deed

PQ 1/26/70 207/633 Hoboken Land & Imp Co. to Oelrichs Co.

10/10/70 217/616 Oelrichs Co. to North German Lloyd

R 11/15/1900 760/527 Rudolph Rabe, Ex. to North German Lloyd

S 4/12/98 699/142 Hoboken Land & Imp Co. to North German Lloyd

T 4/12/98 699/143 " " " " " " " "

UVWXYZ 6/30/88 463/77 " " " " " " Campbell & Co.

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7/2/99 778/390 Campbell & Co. to North German Lloyd

AA 3/7/1902 800, 378 Campbell & Co to North German Lloyd Dock Co.

LM²N³N OPQR STWYZ 1/10/1901 769/598 North German Lloyd to North German Lloyd Dock Co

DD-EE-FF FF²GG-CC HH-II 8/29/89 490/550 State of New Jersey (R.C.) to City of Hoboken

DD-EE 8/29/1900 769/257 " " " " " " to Hoboken Land & Imp Co

3/1/1901 775/404 Hoboken Land & Imp. Co. to North German Lloyd

1909 City of Hoboken to North German Lloyd 784/156

999 year lease

AA'GG' FF²GG² 11/10/1905 1027/167 State of New Jersey (R.C.) to Hoboken Land & Imp

FF'GG' 11/10/1905 1022/243 Hoboken Land & Imp. Co. to North German Lloyd Dock

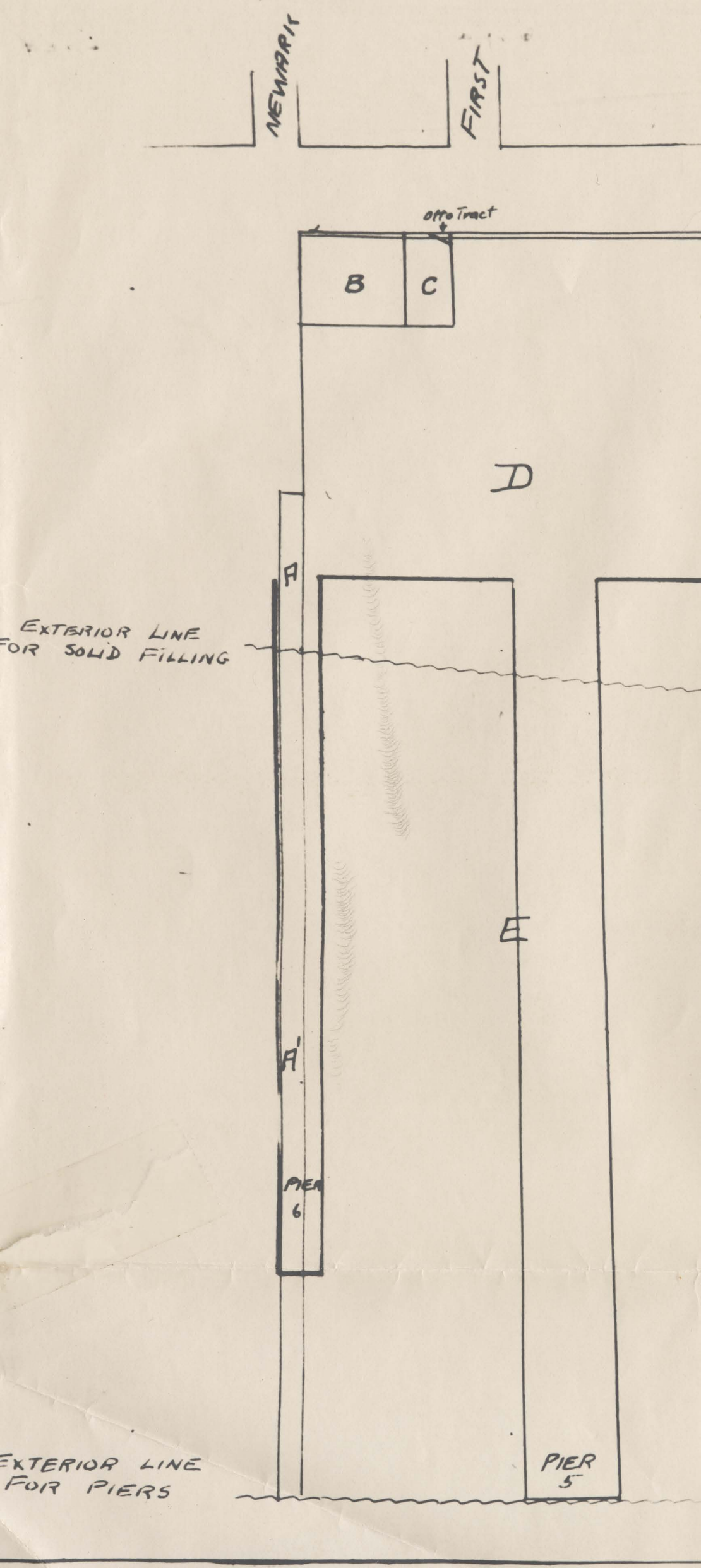
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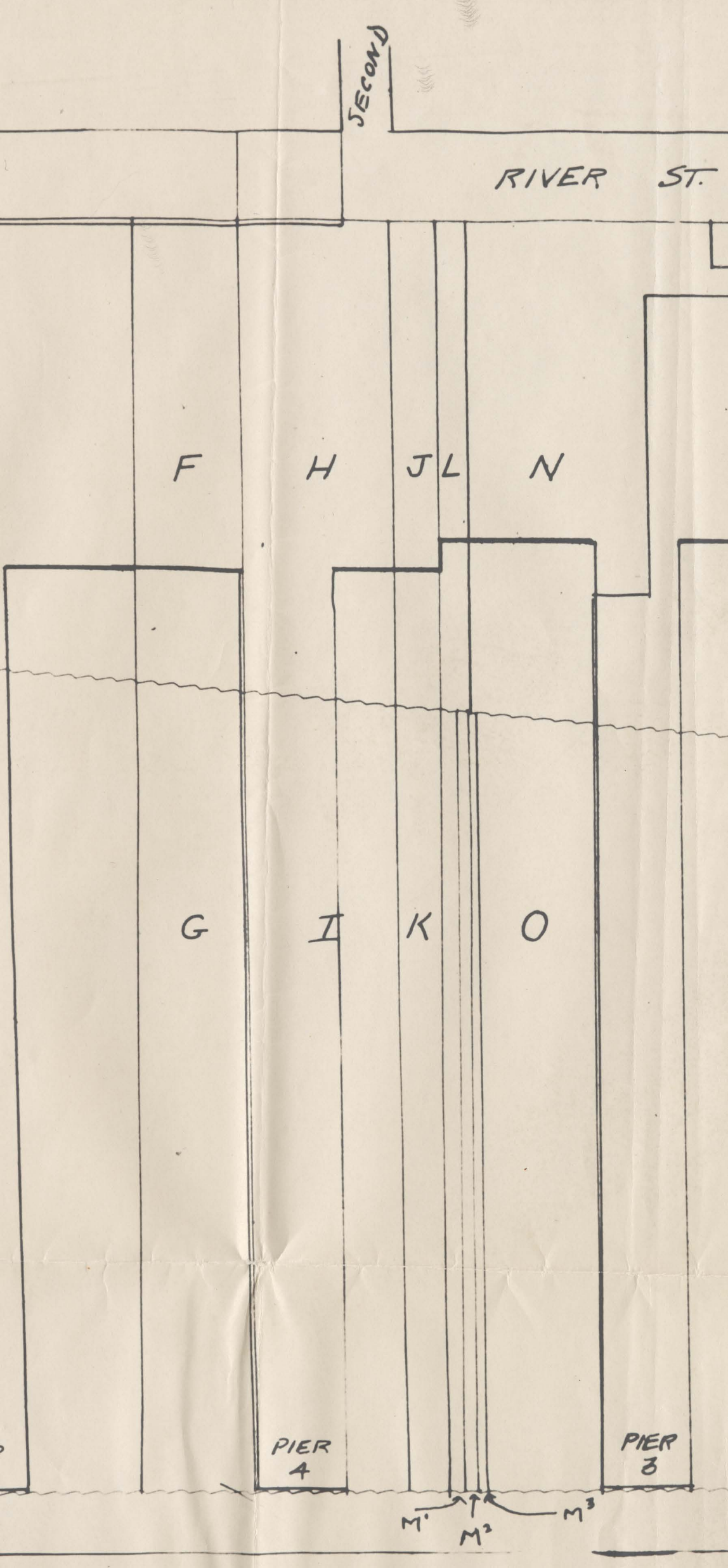
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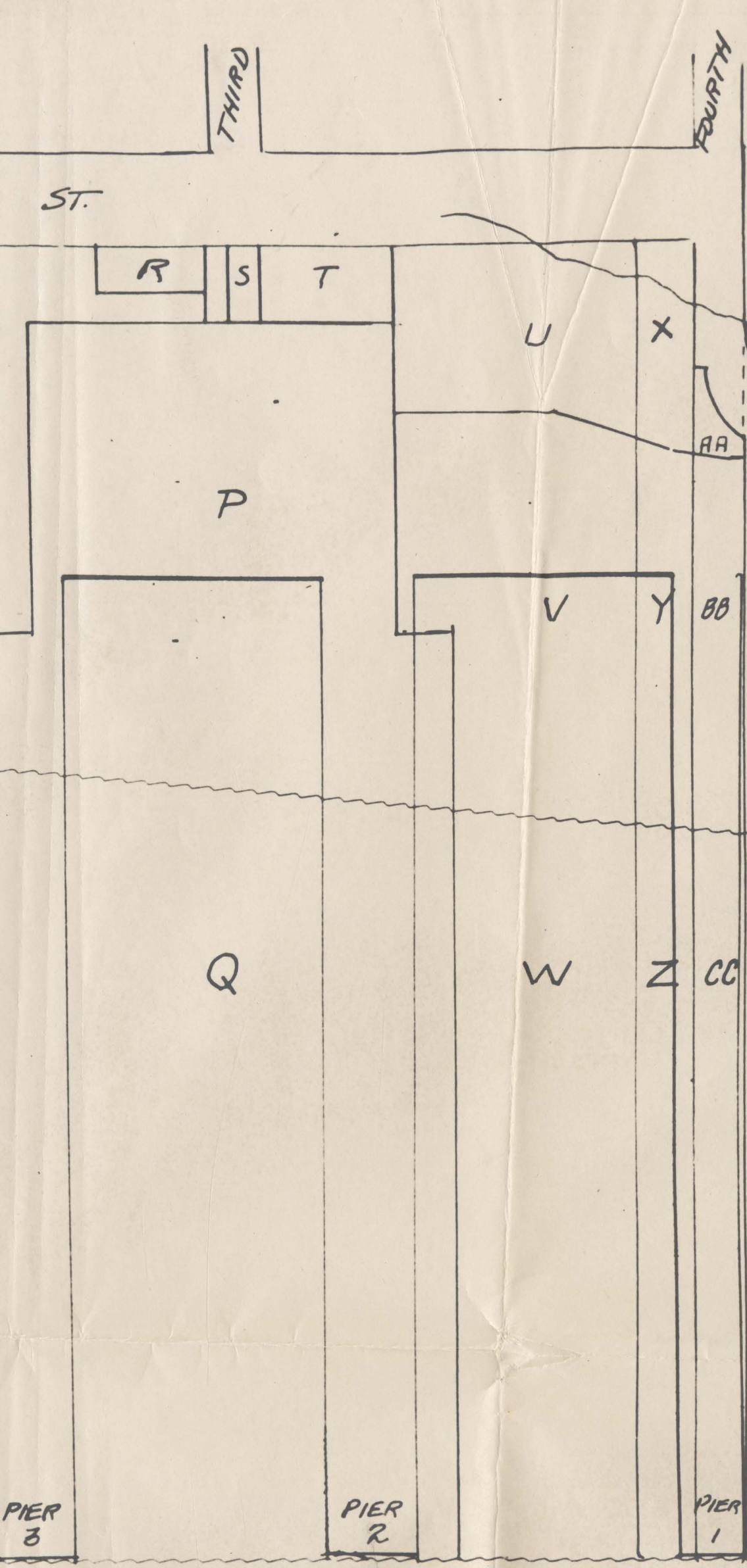
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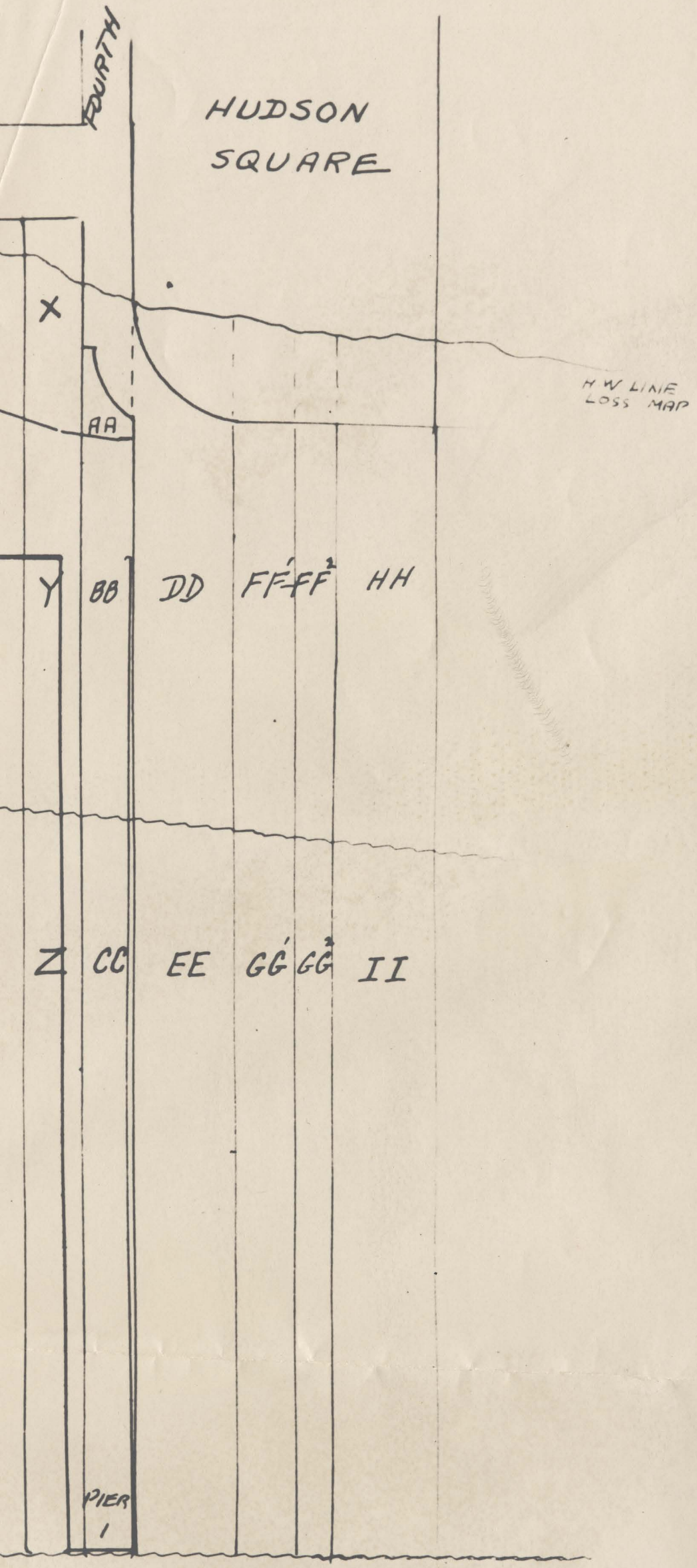
4/20/99 721/558 Hoboken Land & Imp. Co. to Hamburg Amerikanische Packet Fahrt Aktien Gesellschaft

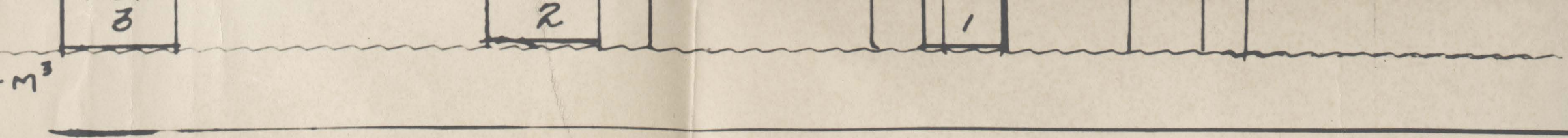
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NEWHARK
FIRST
Off to Tract
B
C
D
A
EXTERIOR LINE
FOR SOLID FILLING
E
A'
PIER
6
EXTERIOR LINE
FOR PIERS
PIER
5


SECOND
RIVER ST.
F
H
J
L
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K
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PIER 4
PIER 3
M1
M2
M3


THIRD
FOURTH
ST.
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CC
PIER 3
PIER 2
PIER 1


AQUARITH
HUDSON
SQUARE
X
AA
H W LINE
LOSS MAP
Y
BB
DD
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GG'
II
PIER
1



L 5/11/72 245/40 State of New Jersey. (Riparian Commissioners) to Hoboken Land & Improvement

N to W 12/21/69 210/696 " " " " " " " " " "

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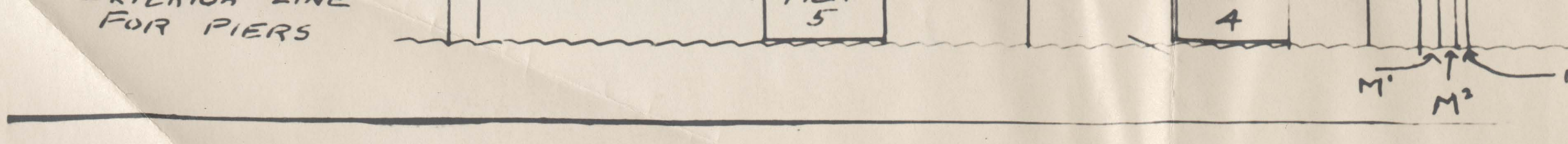
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