September 15, 1943

To the Attorney General
Re: Federal Housing Project at Boothbay Harbor with reference to the Possibility of Pollution through Percolating Waters

On September 14, 1943, Mr. Hale of the Health Department of the State and Mr. Ring, attorney for the Federal Housing office in Boston, called at this office for the purpose of discussing the situation at Boothbay Harbor. It seems that this housing project plans to dispose of the sewerage into a septic tank system, the overflow being filtered and then treated with a chlorination process. This project is on the adjoining property land owned by one Hodgdon, who owns a spring from which he and his family have obtained drinking water which has been sold to the citizens in Boothbay Harbor over a long period of time. Mr. Hodgdon has been very much concerned about the possibility of this spring water becoming contaminated by the effluent from the sewerage system to be installed on the land of the housing project.

Mr. Hale has . . expressed his opinion, based upon his engineering knowledge, that the system. . . would be sufficient to reasonably ensure the same against eventual contamination; but qualifies his opinion by stating that there is a possibility, in the event that the sewerage system should have a break in the pipes, or if the filter system should happen to be located over a crack or seam in the subsoil, which is of clay, that this might result in contamination, if the seam or underground crack in the clay bed should lead to channels supplying the spring. . .

The housing project has not been completed and the sewerage system is not in use; but Mr. Hodgdon has informed Mr. Hale and Mr. Ring that all his customers for water have already been lost because of their anticipatory fear of the spring water becoming contaminated.

There is no fear on the part of Mr. Hodgdon about surface water discharging from the sewerage system; his fear is entirely related to the possibility of pollution through subterranean courses.

Under the subject of "Percolating Waters", 67 C. J. 260, p. 842, the following language appears.

> "Generally speaking, a landowner may not so deal with his own land as to foul the water percolating through it, thereby polluting his neighbor's well; but he is not required at his peril to ascertain the course of subterranean waters before doing things on his land which in themselves are lawful, such as constructing a cesspool or burying nexious substances in the earth, his liability resting on other circumstances making the pollution the natural and probable consequence of his act, or the result of failure to take certain precautionary measures required by contract or statute; nor, regardless

> of circumstances, does his liability rest solely upon his knowledge of the pollution, but upon his negligence or disregard of the rights of others after he has discovered its existance. In some cases following the English common-law rule, a distinction is made between dealing with land in such a way that surface water sinking into the earth and percolating through it injures the water in a neighbor's well, subjecting the wrongdoer to liability, and a dealing with subterranean waters that percolate and injure the neighbor's well, in which case it is damnum absque injuria unless done maliciously, but where plaintiff has a right to have the subterranean water come to him in its accustomed course and purity, a right of action exists against a defendant responsible for its pollution."

In paragraph 260:

> "Whether or not injuries to wells, reservoirs, and springs, caused by the obstruction or diversion of underground waters, by an owner of lane over the waters obstructed or diverted, are actionable depends in the first instance on whether the waters flow in a defined and known channel, and, if they do not, on the nature and extent of defendant's right to use the waters under the law of the particular state where the question arises. If the injuries are caused by the obstruction or diversion of an underground stream flowing in a defined and known channel in excess of the reasonable use permitted a riparian owner, an action lies. If the waters obstructed or diverted are percolating, no actionable injury results in jurisdictions following the English common-law doctrine. . ."

In Maine, our law court has apparently followed the English doctrine with regard to subterranean waters. In 62 Me. 177, at 178, Chase v. Silverstone, Tindall, C.J., after discussing the known state and condition of water in surface channels and the well-settled rules governing riparian rights, says:

> "But in the case of a well sunk by a proprietor in his own land the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may be, that it is only yesterday's date that they first took the course and direction which enabled them to supply the well; again no proprietor knows what portion of water is taken from beneath his own soil;

> how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk and the water collecyed by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. . . If the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of his soil. . . The advantage on one side, and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle, whilst the owner of the adjoining land may be prevented from mining metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined."

The opinion concludes as follows:

> "We think this case, for the reasons given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within the principle which gives the owner of the soul all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soul, part water, that the person who owns the soil may dig therein, and apply all that is there found to his own purposes at his free well and pleasure; and that if, in the exercise of such right, he intercepts and drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of <u>damnum absque injuria</u>, which cannot become the ground of action."

In conclusion, it would seem to be very difficult for Mr. Hodgdon to show what the underground course or courses of his supply to the spring really are. Having in mind that the installation of a sewerage system on land in close juxtaposition to the land on which Mr. Hodgdon's spring is situated would naturally concern Hodgdon and anyone buying spring water from him, yet I do not see how the Attoeney General's department could take any action to prevent the Housing authorities from completing this construction and using the same, unless an opinion were obtained from the Health Department of the

State to the effect that the proposed system would not be adequate under the circumstances. Mr. Hodgdon would not have any civil remedy until such time as he could show contamination and that it was done with malice.

In Woodward v. Aborn, 35 Maine 271, this language appears:

> "An action of the case, charging that the defendant's act was done maliciously may be maintained by proof that it was done negligently. Malice, though alleged, need not be proved.
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> "For keeping a deleterious article so negligenrly as thereby to occasion damage to another, an action is maintainable, although from such keeping no damage would have accrued, except for the extraordinary, but not very uncommon, action of the elements."

John G. Marshall
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jgm/c

NOTE: See opinion of October 13, 1943, Mr. Cowan to Mr. Hale.