3158.

1. GAMBLING CLUB, PUBLIC COMMERCIAL—MAINTENANCE IS NUISANCE—OPERATION, CRIME IN OHIO—REGARDED AS SUCH BY COMMON LAW.

2. STATUS, PARTICULAR COMMERCIAL GAMBLING CLUB, JUSTICIABLE ISSUE, MUST BE ADJUDICATED BY COURT OF EQUITY—HEAR EVIDENCE, AS TO OPERATION, EFFECT ON PROPERTY RIGHTS OF PUBLIC AND WHETHER ORDINARY LEGAL REMEDIES, i. e., ARREST AND CONVICTION OF OPERATORS OR OTHERWISE MAY BE INVOKED.

3. PROSECUTING ATTORNEY, SECTION 2916 G. C., AUTHORIZED TO PROSECUTE AN ACTION ON BEHALF OF STATE, IF PUBLIC NUISANCE FOUND TO EXIST IN ANY COUNTY—ATTORNEY GENERAL NOT REQUIRED TO INSTITUTE SUCH ACTION—NO STATUTE TO EMPOWER ATTORNEY GENERAL TO AUTHORIZE OR PROHIBIT SUCH ACTION.

SYLLABUS:

1. *The maintenance of a public commercial gambling club is a nuisance not only by reason of the fact that its operation is a crime in Ohio but was regarded as such by common law.*

2. *Whether a particular commercial gambling club constitutes such a public nuisance as a court of equity will enjoin, is a justiciable issue which must be adjudicated by a court of equity upon a hearing of the evidence concerning its operation, the effect of such operation on the property rights of the public and whether it may be remedied by ordinary legal remedies; such as by means of the arrest and conviction of the operators thereof or otherwise.*

3. *If a public nuisance is found to exist in any county of the state, the prosecuting attorney therefor is authorized by Section* 2916, *General Code, to prosecute an action on behalf of the state for its abatement. No authorization or direction by the Attorney General to institute such action is required, nor is there any statute empowering the Attorney General either to authorize or prohibit the prosecution of such action.*

Columbus, Ohio, December 21, 1940.

Hon. Frank T. Cullitan, Prosecuting Attorney,
Cleveland, Ohio.

Dear Sir:

I am in receipt of your request for my opinion in which you inquire:

First, whether a gambling club is a common or public nuisance as a matter of law.

Second, whether the prosecuting attorney of his own volition may prosecute an action for the abatement of a gambling club as a common or public nuisance, or whether he must first obtain the express authorization of the Attorney General.

In the case of Rosehill Cemetery Company v. Chicago, 352 Ill., II, the court defines the term "nuisance" as follows:

> "A nuisance is something that is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable."

And in Amlung v. Lang, 8 O. L. R., 286, 22 O. D., 61:

> "A nuisance is anything which causes hurt, inconvenience or annoyance to the lands, tenants or hereditaments of another or the reasonable enjoyment of the same."

See also State, ex rel. Pansing, v. Lightner, 32 O. N. P. (N. S.), 376.

However, we must bear in mind the proposition which is well stated in Higgins v. Decorah Produce Company, 214 Ia., 276, that "not every instrumentality producing more or less disturbance to the owners of property and residents in the community can be abated as a nuisance." The hurt, inconvenience or annoyance must be a fixed thing in order to constitute a nuisance. Robinson v. Greenville, 42 O. S., 65. A single act is never and an occasional act is scarcely ever a legal nuisance. Pennsylanvia Company v. Sun Company, 290 Pa., 404.

Nuisances are classified by some authorities as follows:

1. Nuisances per se; those which from their very nature constitute a nuisance or which have been so denounced by the common law or statutes.

2. Nuisances per accidens; those which are in their nature not nui-

sances but may become so by reason of the locality, surroundings, or manner in which they are conducted or managed.

3. Those acts which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds.

20 R. C. L., 383, Section 6.

Langel v. Bushnell, 197 Ill., 20.

McPherson v. Woodward First Presbyterian Church, 120 Okla., 40.

They may be of two kinds, dependent upon those whom they affect, viz., public or common nuisances and private nuisances. A nuisance is a private one when a person so uses his property as to damage another person or disturb him in the quiet enjoyment of his own property; it is a public one where a whole community or neighborhood is annoyed or inconvienced by the offensive acts. Cardington v. Fredericks, 46 O. S., 442; Minnich v. Lutz, 18 O. N. P. (N. S.), 601.

By reason of the provisions of Section 11245, General Code, requiring an action to be prosecuted in the name of the real party in interest, it is self evident that you are not concerned with the right of a person to maintain an action to abate or enjoin a private nuisance. I will, therefore, limit my discussion to the question as to whether the operation of a gambling club is a *public* nuisance, and will give no consideration to the question as to whether its operation affects the private rights of neighboring property owners.

There is little doubt but that the legislature may declare many acts and things which may be, but not necessarily are, offensive to public health or comfort, but which become offensive, to be nuisances even though they have not been so recognized at common law, and may provide the method for their abatement. In your communication you have referred to many instances in Ohio. Section 6212-1, General Code, provides that a house in which lewdness, assignation or prostitution is conducted or permitted is a public nuisance and provides for its abatement. Section 13195, General Code, declares a place where beer or intoxicating liquors are sold illegally to be a nuisance and provides for its abatement. Section 12646, et seq., General Code, enumerate acts deemed injurious to public health, designate them as nuisances and provide for the abatement thereof. There are many more instances cited in your letter and additional instances in the Code but not cited by you; however, in my research through the statutory pro-

visions I have been unable to find any provision wherein the legislature has specifically declared the conducting of commercial gambling clubs to be "statutory nuisances."

In some of the instances cited in your letter the legislature has provided a specific method for the abatement of such nuisances. As to the abatement of such designated nuisances, it is quite possible that the courts will hold the statutory procedure for the abatement of the nuisance to be exclusive.

The mere fact that the General Assembly has not in haec verba stated that a specific course of conduct shall constitute a public nuisance does not prevent it from being such. If the course of conduct is unlawful and in violation of public rights, it constitutes a public nuisance. Toledo Disposal Company v. State, 89 O. S., 230. As stated in the headnotes of Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S., 317, 27 L. Ed., 739:

> "That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupancy uncomfortable to him.
>
> From such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomforts are continuous, courts of equity will interfere and restrain the nuisance."

Courts of equity have provided a remedy from a nuisance if it be a private one at the instance of the party or parties injured thereby, but if it be a public one, at the instance of the government, when a proper case is presented and a sufficient showing is made, a court of equity will compel its abatement by use of a mandatory injunction. 20 R. C. L., 482, Sec. 94; Columbus Packing Company v. Philbrick, 5 O. N. P. (N. S.), 449. However, as stated in 20 R. C. L., 475, Sec. 89, "before an injunction will issue to restrain acts constituting a public nuisance, it is necessary that the nuisance affect the civil or property rights or privileges of the public, or the public health; the criminality of the act itself will not be sufficient to give jurisdiction in chancery."

While it is generally held that a court of equity will not enjoin the commission of a crime, it is likewise established that equity will enjoin the commission of a public nuisance even though the act may or may not also be punishable as a crime, at the suit of a public official whose duty it is to enforce the laws within the particular portion of the territory injured by the public nuisance.

State v. Ellis, 201 Ala., 295.
Dean, v. State, 151 Ga., 371.
New Orleans v. Liberty Shop, 157 La., 26.
Lyric Theatre v. State, 98 Ark., 437.
Pompano Horse Club v. State, 93 Fla., 415.
People v. Danziger, 238 Mich., 39.
Hamilton v. Hamilton Gas Co., 8 O. N. P., 319.

In determining whether a public nuisance will be enjoined we must bear in mind that, since a public nuisance concerns the public generally, it is the duty of the government to abate or enjoin it. For this reason it is generally held by the courts that the public official need not show any injury to the property owned by the government, as distinguished from that owned by its citizens. If it be shown that there is continuing injury to the property rights of the citizens of the state by reason of the acts of the defendant, such is sufficient to maintain the action. Pomeroy's Equitable Remedies, Section 479. If the act be declared a nuisance by statute, and such declaration is not beyond the power of the legislature, it is not necessary to prove that the continued course of conduct amounts to a public nuisance. However, where the legislature has not by enactment declared a course of conduct to be a public nuisance to be abated whenever found to exist, it seems to be the settled rule of law that whether the continued course of conduct amounts to a public nuisance is a question to be decided by the courts and if so whether it can only be remedied by an injunction, which will lie only when no adequate remedy at law exists. As stated in 20 R. C. L., 474, Section 89:

> "Public nuisances are subject to criminal prosecution, and where this procedure is adequate, jurisdiction in equity fails, either because adequate remedy precludes jurisdiction in equity, or the subject matter is beyond the scope of equity jurisprudence."

In Pompano Horse Club v. State of Florida, ex rel. Bryan, 93 Fla., 415, an action in injunction was brought to restrain or abate the operation of a place of business where gambling was practiced, to wit, betting on horse races. The court enjoined the maintenance of the nuisance. However, in that case the court calls attention to the fact that Section 5639 of the Revised Statutes of Florida declared that any place or building where games of chance were engaged in, in violation of law were public nuisances and directed their abatement.

In State of Alabama, ex rel. Bailes, v. Guardian Realty, 237 Ala., 201,

we find another case wherein a place where gaming was practiced was abated as a common or public nuisance. However, in that case Section 4281 of the Code of Alabama Laws specifically declared such type of place to be a public nuisance.

As is stated in 20 R. C. L., 405, Section 23:

> "The present tendency of courts and legislatures is to extend the law of nuisances to every sort of gaming, whether in the form of lotteries, policy, pool rooms or turf exchanges or even slot machines."

Common gambling houses were held to be nuisances at common law.

Mullen v. Mosely, 13 Idaho, 457.
James v. State, 4 Okla. Ct. Rep., 587.
Jones v. State, 38 Okla., 218.
Breathitt v. Respaso, 131 Ky., 807.
Scott v. Courtney, 7 Nev., 419.
Chase v. Revere House, 232 Mass., 88.

In many of such cases the court states that they are nuisances per se. James v. State, 4 Okla. Ct. Rep., 587; Ehrlick v. Commonwealth, 125 Ky., 742; Commonwealth v. Ciccone, 85 Pa. Superior Ct., 316.

However, as I have above pointed out, the mere fact that gambling houses are nuisances would not necessarily require a court to abate it as a "public nuisance;" its continuance might be enjoined at the suit of a private person upon a showing of substantial injury to his property or to the enjoyment thereof, yet a court would hardly enjoin its continuance or abate it unless there be a showing that its continued existence was injurious to the public or some portion thereof, which continued injury could best be alleviated by its abatement. That is, the acts or conditions are such as to be subversive of public order, decency, or morals, or constitute an obstruction of public rights. A nuisance is a public one if it affects the entire community, a neighborhood or any considerable number of persons. See In re Debs, 158 U. S., 564; Acme Fertilizer Company v. State, 34 III. App., 346; Dean v. State, 151 Ga., 371.

As stated by the court in Rowland v. State, ex rel. Martin, 129 Fla., 662:

> "Unless property is within that class which is designated and condemned by statute or the common law as a nuisance, the determination of the question as to whether or not it is a nuisance be-

comes a judicial one, and its final determination cannot be effectuated by an administrative office or board."

Like reason would lead to the conclusion that under similar circumstances the question as to whether the existence of the gambling club constituted a public nuisance is a judicial one which must be determined upon a proper presentation of the particular facts and circumstances to the court.

An answer to your second inquiry as to whether you as prosecuting attorney may maintain an action to abate a public nuisance located in the county of which you have been elected as such official requires an examination of the statutes with reference to the powers and duties of your office. It is elemental that a public official has such powers and such only as have been granted him by statute.

In Section 2916, General Code, it is provided that:

"The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits, and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the probate court, common pleas court and court of appeals. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. * * *"

The specific language of such section is that "except when otherwise provided by law he shall prosecute on behalf of the state all complaints, suits, and controversies in which the state is a party.

Section 2917, General Code, further provides:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Section 2913, General Code, provides in part:

> "On complaint, in writing, signed by one or more taxpayers, filed in the court of common pleas, containing distinct charges and specifications of wanton and wilful neglect of duty or gross misconduct in office by the prosecuting attorney, the court shall assign the complaint for hearing and cause reasonable notice thereof to be given to the prosecuting attorney and of the time fixed by the court for the hearing. * * * If it appears that the prosecuting attorney has wilfully and wantonly neglected to perform his duties or has been guilty of gross misconduct in office, the court shall remove him from office and declare the office vacant, but otherwise the complaint shall be dismissed, and the court shall render judgment against the losing party for costs."

From the language of such section it might be urged with some weight that if Sections 2916 and 2917, General Code, impose the duty on the prosecuting attorney to prosecuting the action to abate such nuisance, the performance of such duty is mandatory. However, we do not need to concern ourselves with such proposition for the reason that you are desirous of bringing the action if you have the power.

The difficulty in your mind no doubt arises from the provisions of Section 333, General Code, which reads:

> "The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. The attorney-general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state may be directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

and also Section 343, General Code, which reads:

> "When requested by them, the attorney-general shall advise the prosecuting attorneys of the several counties respecting their duties in all complaints, suits and controversies in which the state is, or may be a party."

You have undoubtedly noticed that Section 333, General Code, does not provide that the State of Ohio may not be represented by other than the Attorney General. The prohibition is against a state officer, board, head of a department or institution being represented by any other counsel. There

are other provisions of statute which provide for the cooperation of the prosecuting attorneys of counties in specified matters and proceedings within the counties, none of which refer to the abatement of public nuisances, not declared to be such by the General Assembly. For example, Section 6212-3, General Code, as well as several of the other sections cited in your inquiry, authorize either the prosecuting attorney or the Attorney General to prosecute actions for the abatement of the particular nuisances therein referred to. In such cases the court would probably hold that the action might be prosecuted by either of such officials, especially if the nuisance affected more than the residents of a particular county.

The language of Section 2916, General Code, is that "the prosecuting attorney shall have the power to * * * and except when otherwise provided by law shall prosecute on behalf of the state all * * * suits, and controversies in which the state is a party." Such language is not qualified by a limitation of obtaining the advice or consent of the Attorney General. Section 343, General Code, limits the right of the Attorney General in giving such advice to a prosecuting attorney to cases where the advice is requested by the prosecuting attorney. The language of such section does not specifically state that the prosecuting attorney shall represent the state in causes of action which arise in his county; however, it would seem logical that the county prosecuting attorney should not be required to represent the state unless the subject matter of the action directly affects the citizens of the county for which he has been elected a public official. Such appears to be the view taken by the courts. State, ex rel. Logan County Attorney, v. Kansas State Highway Commission, 133 Kan., 357; State, ex rel. Westhues, Prosecuting Attorney, v. Sullivan, 283 Mo., 546. In the last case above cited the court stated:

> "The rule is that such prosecuting officer cannot proceed in the name of the state, save and except the matters involved are matters arising within and pertaining to the jurisdiction of the prosecuting officer. In other words, they must be matters which concern the state in the limited territory over which such officer has control or in which he has power to act. His limit is the county for which he is elected."

I am unable to find any statutory provision which purports to grant to the Attorney General any authority to either direct or authorize a county prosecuting attorney either to bring or refrain from bringing an action to abate a public nuisance. The authority of the prosecuting attorney to main-

tain the action, if it exists, is contained in Section 2916, General Code. The language of such section authorizes the prosecuting attorney to bring the action in behalf of the state, if the cause of action exists in favor of the state; that is, if it is a public nuisance which can be eliminated only by its abatement.

Specifically answering your inquiries, it is my opinion that:

1. The maintenance of a public commercial gambling club is a nuisance not only by reason of the fact that its operation is a crime in Ohio but was regarded as such by common law.

2. Whether a particular commercial gambling club constitutes such a public nuisance as a court of equity will enjoin, is a justiciable issue which must be adjudicated by a court of equity upon a hearing of the evidence concerning its operation, the effect of such operation on the property rights of the public and whether it may be remedied by ordinary legal remedies; such as by means of the arrest and conviction of the operators thereof or otherwise.

3. If a public nuisance is found to exist in any county of the state, the prosecuting attorney therefor is authorized by Section 2916, General Code, to prosecute an action on behalf of the state for its abatement. No authorization or direction by the Attorney General to institute such action is required, nor is there any statute empowering the Attorney General either to authorize or prohibit the prosecution of such action.

Respectfully,

THOMAS J. HERBERT,
Attorney General.