"SEC. 190. *Compensating tax.* — All persons residing or doing business in the Philippines, who purchase or receive from without the Philiplipines any commodities, goods, wares, or merchandise, excepting those subject to specific taxes under Title IV of this Code, shall pay on the total value thereof at the time they are received by such persons, including freight, postage, insurance, commission and all similar charges, a compensating tax equivalent to the percentage taxes imposed under this Title on original transactions effected by merchants, importers, or manufacturers, such tax to be paid before the withdrawal or removal of said commodities, goods, wares, or merchandise from the customhouse or the post office: *Provided, however,* That merchants, importers and manufacturers, who are subject to tax under Sections one hundred eighty-four, one hundred eighty-five, one hundred eighty-six, or one hundred eighty-nine of this Title, shall not be required to pay the tax herein imposed where such commodities, goods, wares, or merchandise purchased or received by them from without the Philippines are to be sold, resold, bartered, or exchanged or are to be used in the manufacture or preparation of articles for sale, barter, or exchange and are to form part thereof: *And provided, further,* That the tax imposed in this section shall not apply to articles to be used by the importer himself in the manufacture or preparation of articles subject to specific tax or those for consignment abroad and are to form part thereof or to articles to be used by the importer himself as a passenger and/or cargo vessel, whether coastwise or ocean-going, including engines and spare parts of said vessel. If any article withdrawn from the customhouse or the post office without the payment of the compensating tax is subsequently used by the importer for other purposes, corresponding entry should be made in the books of accounts, if any are kept, or a written notice thereof sent to the Commissioner of Internal Revenue and payment of the corresponding compensating tax made within ten days from the date of such entry or notice. If the tax is not paid within such period, the amount of the tax shall be increased by twenty-five *per centum,* the increment to form part of the tax."

SEC. 2 This Act shall take effect upon its approval.

Approved, June 17, 1961.

OPINIONS OF THE SECRETARY OF JUSTICE

On the Meaning of the Term "Capital" under the Retail Trade Nationalization Law.

OPINION NO. 105, S. 1961

Opinion is requested on the proper interpretation of the term "capital" as it is used in section 4(a) of Republic Act No. 1180, otherwise known as the Retail Trade Nationalization Act, which provides as follows:

"SEC. 4. As used in this Act, the term 'retail business' shall mean any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption, but shall not include —

"(a) a manufacturer, processor or worker selling to the general public the products manufactured, processed or produced by him if his capital does not exceed ₱5,000.00 x x x".

It appears that the Department of Commerce has ruled that "capital includes all resources, whether goods or money, machinery, equipment and rentable articles covered in lease contracts, if any, and if their value exceeds ₱5,000.00, the license for a processing or manufacturing business may not be issued pursuant to Section 4(a) of Republic Act No. 1180".

Bouvier's Law Dictionary defines "capital" as the sum of money which a merchant, banker or trader adventures in any undertaking, or which he contributes to the common stock of a partnership (Vol. 1, p. 419). In commerce, as applied to individuals, the term "capital" refers to those objects whether consisting of money or other property, which a merchant, trader, or other person adventures in an undertaking." In its broadest sense, the word "capital" signifies "actual assets, whether in money or property, owned by an individual or a corporation; it is the fund upon which a corporation transacts business, which is liable to its creditors, and in case of insolvency passes to a receiver." (6 Words and Phrases, p. 61-64.)

In the light of the above definitions, which convey the ordinary accepted meaning of the term capital and which, in the absence of a statutory definition, is presumably the interpretation intended by the legislature, it is our opinion that rented equipment or other property used in the business which is covered by bona-fide lease contracts, should not be considered as part of the capital for purposes of Section 4(a) of Republic Act No. 1180, since they do not form a part of the proprietor's investment ventured into the business and will never answer to creditors for the debts incurred by the undertaking. It will be noted also that in nationalizing the retail trade, Republic Act No.

1180 invariably makes reference to ownership of *capital* in the retail business, and since there may conceivably be equipment used in the business which are normally leased, such rented equipment, it is believed, should not be reckoned in determining the capital of a retail business, except of course in cases where it plainly appears that the execution of the lease contracts was resorted to as a means to circumvent the provisions of the nationalization law.

The query is answered accordingly.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Scope of the Anti-Graft and Corrupt Practices Law.

OPINION NO. 106, S. 1961

Opinion is requested on whether the proposed contract between ACCFA and Erlanger and Galinger, Inc. for the servicing of an accounting machine owned by the former would fall within the purview of the Anti-Graft and Corrupt Practices Act, considering that the ACCFA Administration is a major stockholder of Gregorio Araneta, Inc. which in turn is a major stockholder of Erlanger and Galinger, Inc.

Since the Administrator, has to take part in the execution of the above contract and since said contract has to be submitted for approval to the ACCFA Board of Governors of which he is the Chairman, the inevitable conclusion is that execution thereof will bring him within the clutches of the Anti-Graft and Corrupt Practices Act. In particular, I have in mind paragraphs *h* and *i* of Section 3 of the aforesaid law which penalize a public officer for —

"(h) Directly or *indirectly* having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

"(i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group."

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Scope of the Power of the Justice of the Peace to Issue Interlocutory Orders in the Absence of the District Judge for the Province.

OPINION NO. 108, S. 1961

Opinion is requested as to whether or not the justice of the peace of the provincial capital of Occidental Mindoro, pending the appointment of the District Judge for the province, may: (1) divide the province of Occidental Mindoro into circuits in accordance with Section 117 of the Revised Election Code and to assign a justice of the peace for each circuit to hear and decide petitions of voters for inclusion in or exclusion from the electoral list; (2) designate the justice of the peace of any municipality within the province to act as justice of the peace of another municipality in case of temporary disability of the incumbent justice of the peace pursuant to Section 73 of the Judiciary Act; and (3) appoint or commission notaries public within the province. In this connection, the last paragraph of Section 88 of the Judiciary Act empowers justices of the peace of provincial capitals, in the absence of the District Judge, to exercise "like interlocutory jurisdiction as the Court of First Instance, which shall be held to include the hearing of all motions for the appointment of a receiver, for temporary injunctions, and for all other orders of the court which are not final in their character and do not involve a decision of the case on its merits, and the hearing of petitions for a writ of habeas corpus."

In Africa vs. Gronke, 34 Phil. 50, it has been held that "while the phrase, 'may exercise within the province like interlocutory jurisdiction as courts of first instance' and that jurisdiction shall be held to include 'the orders of the court which are not final in their character and do not involve a decision of the case on its merits,' are broad in their scope, they will be held to cover only such cases as are expressly mentioned in this section, or those strictly of the same character." It would seem, therefore, that the orders which a justice of the peace of a provincial capital is authorized to make in the absence of the District Judge are strictly interlocutory in their character from which the law permits no appeal and are related to civil and criminal cases within the jurisdiction of, and actually pending in, the Court of First Instance. They are orders which are urgent in their nature, a delay in procuring them resulting in loss of property or personal liberty, the intention of the law being simply to expedite matters of urgency where great loss to person or property would result from delay.

In the light of these observations, it is believed that Section 88 of the Judiciary Act, aforecited, is no authority for a Justice of the Peace to act in any of the three cases mentioned above.

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On the Rule of Incompatibility of Office.

OPINION NO. 109, S. 1961

Opinion is requested on the legality of the appointment to be extended by the Rice and Corn Board to one of its members who is the representative of the Millers and Warehousemen, or, for that matter, to any member who is representing the other private sectors mentioned in Section 5 of Republic Act No. 3018, otherwise known as an Act "Limiting the Right to Engage in the Rice and Corn Industry to Citizens of the Philippines and for Other Purposes", to head the position of Executive Director of that Office.

The Rice and Corn Board is composed of eleven members, five of whom are government officials, and the others are appointed by the President from the private sector to represent respectively the millers and warehousemen, planters or producers, retailers and wholesalers, consumers cooperatives, and labor (section 5, Republic Act No. 3018). It seems that the Executive Director is charged with the implementation or execution of the policies formulated by the Rice and Corn Board, and there is doubt as to whether the appointment of a board member who is a representative of the private sector to head the Executive Office, would "give rise to incompatibility of offices, one of which is policy-making, and the other is execution, under whose principle the law declares that the acceptance of one is the vacation of the other."

The question stems from the general principle that a public officer is prohibited from holding two incompatible offices at the same time. The incompatibility from which the law declares that the acceptance of one is the vacation of the other, depends on the circumstances of the individual case, and conflict of interest is generally the determining factor. (67 C.J.S. 1933; Zulueta vs. de la Costa, 66 Phil. 615; Enage vs. Martinez, 52 Phil. 896, People vs. Green, 58 N.Y. 295.) Aside from any specific constitutional or statutory prohibition, incompatibility depends on the character and relation of the offices, and not on the matter of physical inability to discharge the duties of both of them; "the question is whether one office is subordinate to the other, or the performance of one interferes with the performance of the duties of the other, or whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest." [Barkley vs. Stockdel 66 S.W. (2d) 43, cited in Polley vs. Fortenberry, 105 SW 2d, 143; also Talbot, Auditor, vs. Park, 76 S.W. 2d, 600.]

No mention is made in Republic Act No. 3018 of the position of "Executive Director" of the Rice and Corn Board. The only statutory reference to personnel, outside of members of the Board, is that contained in section 5, which provides that "the Board shall have such personnel as may be necessary who shall be appointed by it and whose compensation shall be fixed by it." The position of "Executive Director" then, is a creation of the board, and appears to be vested with the functions generally associated with a general manager, or an administrator, which is primarily to carry out or implement the policies formulated by the Board.

In the law of business corporations, it is entirely competent for a Board of Directors to establish a mutual understanding that one of their members shall be the active agent of the board in the management of the property and conduct of the business affairs of the corporation (York vs. Mathis, 68 Atl. 746). There is no law forbidding a director to be an agent or employee (Brown vs. State, 128 N.E. 926). In all government-owned or controlled corporations, it is by law provided that the general manager, president, governor or administrator shall be ex officio the vice chairman of the board of directors, board of governors, or board of administrators thereof, unless by law or appointment, he is already the Chairman of such Board. (Republic Act No. 2254; see also Sec. 9(a), Rep. Act No. 663.) There is accordingly no inherent repugnancy or inconsistency between the functions of a member or even a Chairman of the Board of Directors and the general manager or administrator of a corporation, and more, the two offices are advisely consolidated in one incumbent in the government corporations, including those performing governmental functions.

The Rice and Corn Board is, of course, not a corporation, but is a government agency or instrumentality. However, for the same considerations which render desirable the membership in the board of directors of the general manager of a corporation, and in the absence of a contraindication in the statute, there would seem to be no legal objection to the appointment by the Rice and Corn Board of one of its members as the Executive Director of the agency, if the Board believes that such an arrangement will better assure the faithful implementation of its situation where the governmental body is of collegiate composition and meets only now and then. Significantly, Republic Act No. 3018 does not provide for the position of a general manager; the power to administer the provisions of the Act is to be exercised jointly by a composite body.

In such a case, there is not that incompatibility from which the law declares that the acceptance of one office is the vacation of the other, since in the manner of positions held in an *ex oficio* capacity, the investiture of the functions of the second office merely amounts to an imposition of additional duties, and not the acceptance of another office. (See Opinion No. 182, s. 1958, citing State vs. Gordon, 189 So. 437; State vs. Porterfield 25 SE 39, Sparkling vs. Refunding Board, 71 SW 2d, 182.) That the member of the Board so appointed as Executive Director is a representative of the private sector, is beside the point. It is the prerogative of the Board as the body designated to administer the provisions of Republic Act No. 3018, and empowered to provide for and appoint such personnel as may be necessary (section 5), to judge the competence of the member who is proposed to act in behalf of the board between its periodic meetings. For

then, the member is so designated not because he is a representative of the private sector, but because he is *a member* of the board.

With the foregoing considerations as a guide, it is my opinion that the Rice and Corn Board may appoint one of its members who represent the private sector, as Executive Director of the Board.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Voting Power of a Vice-Mayor Acting as Presiding Officer of the Municipal Board.

OPINION NO. 112, S. 1961

Opinion is sought on "whether or not the Vice-Mayor of Pasay City, as presiding officer of the Municipal Board, may vote as member thereof, and, after having voted as such, cast a second vote to break a tie."

By section 12 of Republic Act No. 183, the Charter of Pasay City, the Municipal Board of the City "shall be composed of the Mayor, who shall be its presiding officer, the Vice-Mayor, who shall be ex-officio councilor when not acting as mayor, and seven councilors x x x." Republic Act No. 2259, which made elective the offices of Mayor, Vice-Mayor and councilors in chartered cities, provides "that the Vice-Mayor shall be presiding officer of the City Council or Municipal Board in all chartered cities." (Section 3.)

As the Vice-Mayor of Pasay City is a member of the Municipal Board, duly elected by popular vote, he may exercise the right to vote as a member on any proposed ordinance, resolution, or motion. (Bagasac vs. Tumangan, G. R. L-1077, prom. December 29, 1958.) As to whether the Vice-Mayor may, after having voted as member of the Municipal Board, cast a second vote to break a tie, it is noted that the Charter of Pasay City confers no privilege. Mcquillin, in his treatise "The Law of Municipal Corporations", says —

"The presiding officer is not entitled to vote by virtue of his office, but of course if he is a member of the body he may vote as such member and he may also vote the second time in case of a tie *if the charter confers this privilege.* x x x"

Accordingly, it is believed that the query should be answered in the negative.

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On the Power of the Provincial Governor to Appoint.

OPINION NO. 122, S. 1961

This has reference to the question raised by the Provincial Governor of Albay as to whether he may "create, by means of an Administrative Order, an Anti-Graft Committee, to be composed of three or more persons outside the government service who are well-known for their proven honesty and spotless integrity, which shall be charged with the duty of screening the Statements of Income, Assets and Liabilities of all government employees, both provincial and municipal, in the province of Albay, and to make such recommendation as may be necessary for the faithful and effective implementation of said law."

We are not aware of any provision of law authorizing the creation by the Provincial Governor of an "anti-graft committee" for the purpose stated above. On the other hand, the Provincial Law provides that the Provincial Board shall fix the number of assistants, deputies, clerks and other employees for the various branches of the provincial government, and fix the rates of salary or wage they shall receive (section 2081, Rev. Adm. Code).

Since the "anti-graft committee" contemplated by the provincial Governor of Albay would in effect be an office in the provincial government, it is believed that, in view of the cited section, the query should be answered in the negative.

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On the Meaning of the Term "Public Appointive Office" under the Revised Election Code.

OPINION NO. 123, S. 1961

Opinion is requested regarding the effect of the filing of a certificate of candidacy for an elective position upon tenure as board chairman and acting general manager of the Cebu Portland Cement Company (hereinafter referred to as the CEPOC). The elective position in question is that of a member of the House of Representatives.

It is asked: (1) whether the filing of certificates of candidacy by directors and management officials of the CEPOC "would result in auto-

matic resignation or cessation from office"; and (2) if not, and should the President not accept the resignation of the official concerned, whether the later could be proceeded against under Article 238, in connection with Article 203, of the Revised Penal Code and "Section 2 of the Civil Service Law of 1959".

"SEC. 26. AUTOMATIC CESSATION OF APPOINTIVE OFFICERS AND EMPLOYEES WHO ARE CANDIDATES. — Every person *holding a public appointive office or position* shall *ipso facto* cease in his office or position on the date he files his certificate of candidacy."

One of my distinguished predecessors in office, the late Justice Pedro Tuason, had occasion to rule on the connotation of the term "public appointive office or position" as employed in the above-quoted provision. After citing Mechem's definition of the term "public office" (Mechem, Public Officers, sec. 1, 42 Am. Jur. Sec. 2) and the statutory definitions of the terms "officer" (sec. 2, Revised Administrative Code) and "public officer" (Article 203, Revised Penal Code), he concluded that "the investment of the incumbent with some of the functions pertinent to sovereignty is an essential element of public office"; and that the question to be resolved in determining whether the chairmen of the boards of directors of government-owned or controlled corporations hold public appointive offices within the intendment of the above-quoted provision, *is whether they discharge public or governmental functions* which "in turn, hinges upon the nature of the functions performed by the [these] corporation [s]." (See Opinion No. 219, s. 1957.) I have found no cogent reason to doubt the soundness of, and to deviate from, this conclusion. Accordingly, I must reiterate the Department's ruling that an officer of a government-owned or controlled corporation would *ipso facto* cease in his office when he files his certificate of candidacy if the corporation performs governmental functions but would not, where the corporation's functions are merely proprietary in nature. (See Opinions Nos. 219, s. 1957; Nos. 257 and 283, s. 1959.)

Since the CEPOC is not performing governmental functions (Opinions No. 230, s. 1941; No. 213, s. 1958), your first query should be answered in the negative.

I might add that this view was affirmed by the President himself in upholding the right of former Executive Secretary Juan Pajo to remain in office as a member of the Board of Directors of the Philippine National Bank, after he had filed his certificate of candidacy for senator in the elections held in November 1959. The PNB is not a government-controlled corporation performing governmental functions; hence, a director thereof does not hold a "public appointive office" within the contemplation of section 26 of the Revised Election Code.

I am also aware that a contrary view has been advanced by certain quarters. It is averred that under Republic Act No. 2260 (Civil Service Act of 1959), the Philippine Civil Service embraces all branches, subdivisions, and instrumentalities of the Government including government-owned or controlled corporations, and the directors of said corporations belong to the

non-competitive or unclassified service (secs. 3 &5); that section 29 of the same law prohibits "officers and employees in the civil service, whether in the competitive or classified or non-competitive or unclassified service" from engaging directly or indirectly in partisan political activities or taking part in any election except to vote; that this provision would be violated by a director of a government-owned or controlled corporation performing proprietary functions who, under section 26 of the Revised Election Code, continues in office despite the filing of his certificate of candidacy, which violation is penalized by removal or dismissal from the service (section 687, Rev. Adm. Code); and that this result which is allegedly "worse than mere cessation in office under Section 26 of the Revised Election Code", may be avoided only if such a director should be deemed separated from the service upon the filing of his certificate of candidacy.

It is beyond question that persons holding positions in all government-owned or controlled corporations, whether performing governmental or proprietary functions, are embraced in the civil service. Any doubt on this point has been erased by the comprehensive language used in section 3 of Republic Act No. 2260. And it is also manifest that the injunction against partisan political activity applies to officials and employees "in the non-competitive or unclassified service" (Section 29). The ultimate question that emerges, however, is whether the phrase "non-competitive or unclassified service", as used in the cited section, includes without any exception *all* persons holding positions in all government-owned or controlled corporations whether performing governmental or proprietary functions.

At first blush, it would seem that the clause is all-embracing and brooks of no exceptions and that it must perforce be applied to officers and employees of *all* government-owned or controlled corporations. Such an interpretation, however, becomes untenable when said section 29 is read together with section 26 of the Revised Election Code. For under the latter, which is a special provision which deals with automatic cessation in office of public appointive officers who are candidates, a director of a government corporation performing proprietary functions — not being one holding a "*public* appointive office" — does not cease in his office when he files his certificate of candidacy; and, although still in office, he would of necessity have to campaign for his election.. It seems quite absurd that an officer who is by specific provision of law allowed to remain in office after filing his certificate of candidacy would at the same time be prohibited from, and penalized for, performing acts necessary to pursue such candidacy to a successful end. Section 29 of the Civil Service Act, insofar as it would forbid such a candidate from engaging in partisan political activities, should accordingly be deemed inapplicable to him and others similarly situated. This view is in consonance with the well-settled rule in the construction of statutes that general terms in statutes should be so limited in their application as not to lead to absurd consequences. (See 50 Am. Jur. 389.)

It should also be emphasized that we cannot lightly presume that section 29 of the Civil Service Act has impliedly repealed section 26 of the Revised Election Code which in clear and unmistakable terms dicloses the legislative

intent that only those holding *public* appointive offices shall vacate their posts upon the filing of their certificates of candidacy. Repeals by implication must be avoided. "If two constructions are possible, that one will be adopted which operates to support the earlier act, rather than to repeal". (50 Am. Jur. 542-546.) We cannot imply from section 29 of the Civil Service Act a partial repeal of section 26 of the Revised Election Code as no such intention is manifest from the former and since effect can reasonably be given to both provisions by holding that the first mentioned provision is applicable to all officers and employees who belong to the classified and unclassified service, save those *not* holding public appointive offices who run for elective offices.

Anent the second query, suffice it to say that Articles 203 and 238 of the Revised Penal Code do not apply to your case. The former defines the term "public officers" and the latter penalizes the offense of *abandonment of office or position* which is committed by "any officer who before the acceptance of his resignation shall abandon his office to the detriment of the public service". It was precisely Article 203 which this office cited and quoted in Opinion No. 219, abovementioned, to bolster the proposition that a director of a government-owned or controlled corporation performing proprietary functions is not a public officer and therefore does not hold a "public appointive office".

Be that as it may, it is of course wise and prudent, in case the resignation has not yet been accepted by the President, to go on leave from the positions in the CEPOC before engaging actively in any political activity in furtherance of one's candidacy.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Meaning of the Term "Public Officer" under the Anti-Graft and Corrupt Practices Law.

OPINION NO. 126, S. 1961

Opinion is requested on whether "the members of the Committee on the Selection of Appropriate Designs for Stamps created under Department Order No. 21, series of 1947, who are not government officers or employees but receiving allowance at the rate of ₱20.00 for each meeting not oftener than once a month under Republic Act No. 2700, should each be required to file statement of assets and liabilities."

The pertinent provision of the Anti-Graft and Corrupt Practices Act, Republic Act No. 3019, reads as follows:

"Sec. 2. (b) 'Public Officer' includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service *receiving compensation, even nominal, from the government* as defined in the preceding subparagraph. Underscoring ours.)

It is provided in Department Order No. 21 which created the said committee and designated the members thereof, that the members are to "serve without compensation, the work being purely voluntary, particularly on the part of those not in the Government service." However, since the said members are actually receiving an "allowance" of ₱20.00 for each meeting, we believe that they fall within the broad breadth of the definition of a "public officer" in Republic Act No. 3019.

The fact that they do not receive regular salaries does not bring them out of the scope of the definition. As previously stated by this Office, "if the law covers, as it does, even those receiving nominal compensation from the government, such as the one-peso-a-year agents, I perceive no reason why one receiving per diem, which is a more substantial remuneration. should be excluded from the operation of the law. (Opinion No. 266, s. 1960).

Again, the circumstance that the decisions and recommendations of said Committee are "merely advisory and not mandatory" does not constitute an exception that may be justified by the phraseology and intent of the Act.

In view whereof, the query should be answered in the affirmative.

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On the Meaning of the Term "Relative by Affinity" under the Anti-Graft and Corrupt Practices Law.

OPINION NO. 130, S. 1961

Opinion is requested on whether Atty. Nino Ramirez, the husband of a sister of Mrs. Carlos P. Garcia, is related to the President by affinity within the third civil degree such that under Section 5 of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019), he is debarred from acting as agent or representative of a company seeking a contract with the Bureau of Posts for the printing of postage stamps.

By Section 5 of the cited law, "it shall be unlawful for the spouse or for any relative, by consanguinity or affinity, within the third civil degree, of the President of the Philippines... to intervene, directly or indirectly, in any business, transaction, contract or application with the Government". Echoing this stricture, Administrative Order No. 359, current series, of the President prohibits "all officers and employees of the Government who are holding positions of trust and responsibility from dealing directly or indirectly