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SECOND DIVISION

[G.R. No. L-28870. September 6, 1985]

AMADO D. TOLENTINO, *petitioner, appellant, vs.* **SOCIAL SECURITY COMMISSION, GILBERTO TEODORO and ANGEL PENANO,** *respondents-appellees.*

[G.R. No. L-39149. September 6, 1985]

SOCIAL SECURITY SYSTEM and GILBERTO TEODORO, *petitioners vs.* **THE HONORABLE COURT OF INDUSTRIAL RELATIONS, THE SSS EMPLOYEES' LABOR UNION-NLU, and AMADO TOLENTINO,** *respondent..*

SYLLABUS

1. **REMEDIAL LAW; CIVIL PROCEDURE; CONSOLIDATION OF CASES; WHEN PROPER.**— On January 13, 1975, this Court issued a resolution in G.R. No. L-39149 consolidating the two appeal cases as both involve the same parties and substantially the same issues.

2. **ID.; ID.; JURISDICTION; THE SETTLED RULE IS THAT JURISDICTION OF A COURT OR TRIBUNAL IS DETERMINED BY THE STATUTE IN FORCE AT THE TIME OF THE COMMENCEMENT OF THE ACTION. AND ONCE ACQUIRED, JURISDICTION CONTINUES, REGARDLESS OF "SUBSEQUENT HAPPENINGS,' UNTIL THE CASE IS FINALLY TERMINATED.**— Jurisdiction over the subject matter is vested by law. It is not acquired by the consent or acquiescence of the parties, nor the unilateral assumption thereof by any tribunal. The settled rule is that jurisdiction of a court or tribunal is determined by the statute in force at the time of the commencement of the action. And once acquired, jurisdiction continues, regardless of "subsequent happenings," until the case is finally terminated.

3. **ADMINISTRATIVE LAW; ADMINISTRATIVE AGENCIES; THE SOCIAL SECURITY COMMISSION, AS AN AGENCY OF THE**

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GOVERNMENT, MAY BE CONSIDERED A DEPARTMENT, AND RESPONDENT, ITS DEPARTMENT HEAD.— The Social Security Commission, as an agency of the government, may be considered a department and respondent Gilberto Teodoro, its department head.

4. **CIVIL LAW; CIVIL CODE; WHEN STATUTE DECLARED VOID.**— Clearly, insofar as Republic Act No. 6040 insulates government-owned — or controlled corporations with collective bargaining agreements with their employees from the embrace of the Civil Service Commission, said statute is inconsistent with the fundamental law of the land. As such, it is void.

5. **REMEDIAL LAW; CIVIL PROCEDURE; JUDGMENT; WHEN NULL AND VOID.**— In view of OUR decision in G.R. No. L-28870, WE rule to set aside as null and void the decision of respondent Court of Industrial Relations dated March 5, 1974, and its subsequent *en banc* resolutions dated August 13, 1974 the same having been issued without jurisdiction.

6. **ID.; ID.; JURISDICTION; JURISDICTION OF A COURT IS DETERMINED BY THE STATUTE IN FORCE AT THE TIME OF THE COMMENCEMENT OF THE ACTION.**— *At the time Amado Tolentino was charged with and convicted of dishonesty in 1966 up to the time the Prosecution Division of the Court of Industrial Relations filed with said court the unfair labor suit docketed as Case No. 5042-ULP on May 7, 1968*, the power to impose disciplinary sanctions on erring employees of the Social Security Commission was vested *exclusively* in the Commissioner of Civil Service, without prejudice to appeal to the Civil Service Board of Appeals. Consequently, the Court of Industrial Relations, created under Commonwealth Act No. 103, a statute of earlier vintage, had no jurisdiction over Case No. 5042-ULP. Again, jurisdiction of a court is determined by the statute in force *at the time of the commencement of the action.*

APPEARANCES OF COUNSEL

Ernesto Duran and Mercedes Bala for petitioners SSS and Teodoro.

Eulogio R. Lerum for respondents SSS Labor Union and A. Tolentino.

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DECISION

MAKASIAR, *C.J.*:

The present petitions for review by *certiorari* involve two different decisions of two different tribunals.

In G.R. No. L-28870, appellant Amado Tolentino seeks the annulment and setting aside of the order of the Court of First Instance (CFI) of Rizal (Branch IX, Quezon City) dated June 5, 1967 in Civil Case No. Q-10566 dismissing said appellant's petition for *mandamus* with preliminary mandatory injunction, thus —

"x x x this Court deems it unnecessary to consider the other grounds raised, and is constrained to dismiss the herein petition for lack of jurisdiction to issue either preliminarily or permanently the writ sought in this petition, considering that the person or body against whom the writ is sought to be applied is of the same rank as this Court" (pp. 97-98, Record on Appeal, p. 13, rec. of G.R. No. L-28870).

This appeal also seeks the annulment of the same Court's order dated December 1, 1967, denying herein petitioner-appellant's motion for reconsideration.

In G.R. No. L-39149, petitioners Gilberto Teodoro and the Social Security System seek the annulment of the decision of the Court of Industrial Relations (CIR) in Case No. 5042-ULP, entitled "*SSS Employees' Labor Union — NLU and Amado Tolentino vs. Social Security System and Gilberto Teodoro,*" the dispositive portion of which reads —

"WHEREFORE, respondents are hereby found to have committed unfair labor practice as charged and are ordered to cease and desist therefrom, reinstate complainant Amado Tolentino to his former position, with back wages from the date of dismissal up to actual reinstatement, and without loss of seniority and other privileges.

"SO ORDERED" (p. 109, rec. of G.R. No. L-39149).

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G.R. NO. L-28870

"Petitioner was employed as an Editorial Assistant in the SSS before April 14, 1961 with a salary of ₱2,400.00 per annum. His appointment as such was duly approved by the Civil Service Commission.

"On April 14, 1961, petitioner was given a promotion in salary from ₱2,400.00 per annum to ₱2,580.00 per annum effective March 1, 1961. This promotion in salary was likewise duly approved by the Civil Service Commission. The copy of petitioner's aforesaid promotional appointment is hereto attached and made an integral part hereof as Annex 'A'.

"On March 16, 1962, petitioner's designation was changed from 'Editorial Assistant' to 'Credit Analyst'. This appointment was also duly approved by the Civil Service Commission. The copy of this appointment is hereto attached and made an integral part hereof as Annex 'B'.

"On June 15, 1964, petitioner was given an appointment reinstating him to his former position as 'Credit Analyst'. This reappointment was extended to petitioner following his resignation from the SSS to run for a municipal position in his municipality in the 1961 elections. The copy of this appointment is hereto attached and made an integral part hereof as Annex 'C'.

"On June 16, 1964, petitioner took his Oath of Office. The copy of the Oath of Office appearing in C.S. Form No. 32 of the Philippine Civil Service is hereto attached and made an integral part hereof as Annex 'D'.

"On May 11, 1965, petitioner's designation was changed from 'Credit Analyst' to 'Technical Assistant' effective January 1, 1965, with an increase in salary from ₱2,580.00 per annum to ₱4,200 per annum. The copy of this appointment is hereto attached and made an integral part hereof as Annex 'E'.

"It was the position of 'Technical Assistant' (Executive Assistant) that petitioner was holding when respondent Commission passed Resolution No. 1003 on September 15, 1966 affirming the decision of respondent Administrator Gilberto Teodoro 'finding petitioner guilty of dishonesty, as charged, and imposing upon him the penalty of dismissal from the service, effective on the first day of his preventive suspension (July 6, 1966) with prejudice to reinstatement'.

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"Under dates of May 23 and 24, 1966, respectively, respondent Administrator filed charges against petitioner for dishonesty and electioneering.

"In two (2) separate letters, dated July 2, 1966, to respondent Administrator, petitioner answered and denied the charges against him.

"On July 6, 1966, petitioner received a copy of a memorandum of the same date signed by Mr. Reynaldo Gregorio as Acting Administrator of the SSS informing him that his answer was not satisfactory and therefore, the charges against him would be formally investigated by a committee composed of Attys. Ernesto D. Duran (as Chairman), Fabiana J. Patag and Florencio Ongkingko theretofore constituted by virtue of Personnel Order 52-G. The same memorandum placed petitioner on preventive suspension effective July, 1966.

"On July 12, 1966, said committee began investigation of the charges against petitioner officially terminating the same on September 7, 1966.

"On September 30, 1966, petitioner received a letter dated September 20, 1966 from respondent Administrator informing him, among others, of his dismissal from the service by virtue of Resolution No. 1003 of respondent Commission" (Brief for Petitioner-Appellant, pp. 3-5, p. 19, rec. of L-28870).

On November 10, 1966, appellant Amado Tolentino filed with the Court of First Instance of Rizal (Quezon City, Branch IX) a petition for *mandamus* with preliminary mandatory injunction questioning the validity of Resolution No. 1003. His theory was "that Resolution No. 1003 of respondent Commission and the decision of respondent Administrator which it affirmed, is null and void and of no effect whatever, for lack of jurisdiction because the power, nay, jurisdiction to decide administrative cases against civil service employees like petitioner is vested by the Civil Service Act of 1959 and the Civil Service Rules exclusively in the Civil Service Commissioner" (pp. 5-6, Record on Appeal, p. 13, rec. of G.R. No. L-28870).

"Under date of December 8, 1966, respondents filed their answer raising, among others, the affirmative defense of lack of jurisdiction of the lower court over respondent Social Security Commission (Commission, for short), the latter being of the same rank as the former.

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"On June 5, 1967, after the parties had submitted memoranda to support their respective contentions on the question raised by the pleadings, among others — whether respondents Social Security Administrator (Administrator, for short) and Social Security Commission have the jurisdiction and authority to decide cases of administrative discipline against employees of the Social Security System (SSS, for short) — the lower court rendered an order dismissing petitioner's petition for lack of jurisdiction over respondent Commission because the latter ranks with the Court of First Instance in the exercise of the quasi-judicial powers granted to it by the Social Security Act of 1954, as amended, following the decision of this Honorable Tribunal in *Poblete Construction Co., et al. vs. Social Security Commission, et al.* (G.R. No. L-17605, promulgated January 22, 1964).

"On August 12, 1967 — within the reglementary period to appeal — petitioner filed a motion for reconsideration of the above-mentioned order of the lower court, which the latter denied in an order dated December 1, 1967" (Brief for Petitioner-Appellant, pp. 2-3, p. 19, rec. of L-28870).

Not satisfied with the last two mentioned orders, petitioner-appellant Tolentino elevated the case to this Court.

G.R. No. L-39149

"On May 7, 1968, the Prosecution Division of the CIR filed with said court a complaint x x x on motion of the SSS Employees Labor Union — NLU and Amado Tolentino charging the SSS and Gilberto Teodoro with commission of unfair labor practices. This case, docketed as Case No. 5042 - ULP, was entitled *The Employees' Labor Union - NLU and Amado Tolentino, petitioners, versus Social Security System and Gilberto Teodoro, respondents.*

"On May 16, 1968, in answer to the complaint filed before the CIR, the herein petitioner Social Security System (hereinafter referred to as SSS, for short) denied the charges of unfair labor practices and asserted that Amado Tolentino was dismissed from the service after being charged and found guilty of Dishonesty on two counts which was preceded by a formal investigation.

"On March 5, 1974, the CIR rendered a decision declaring the SSS and Gilberto Teodoro guilty of unfair labor practice and ordering the reinstatement of herein respondent-appellee Tolentino with back wages.

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"On August 13, 1974, the CIR *en banc* denied the motion for reconsideration dated March 12, 1974 filed by the SSS, hence, this petition for review on *certiorari*" (Brief for Petitioners, pp. 2-3).

On January 13, 1975, this Court issued a resolution in G.R. No. L-39149 consolidating the two appeal cases as both involve the same parties and substantially the same issues.

The primordial question is one of jurisdiction — whether or not the Social Security Commission has jurisdiction over administrative actions filed before it against its own erring employees.

Jurisdiction over the subject matter is vested by law. It is not acquired by the consent or acquiescence of the parties, nor the unilateral assumption thereof by any tribunal (*Bacalso vs. Ramolete*, G.R. No. L-22488, October 26, 1967; *De Jesus vs. Garcia*, L-26816, February 28, 1967). The settled rule is that jurisdiction of a court or tribunal is determined by the statute in force at the time of the commencement of the action (*Aquisap vs. Basilio*, L-21293, December 29, 1967; *Rilloraza vs. Arciaga*, L-23848, October 31, 1967; *People vs. Pegarum*, 58 Phil. 715). And once acquired, jurisdiction continues, regardless of "subsequent happenings," until the case is finally terminated (*People vs. Pegarum*, 58 Phil. 715).

WE recall that the petition before US originated from administrative charges of dishonesty and electioneering filed by the Administrator of the Social Security Commission before the same office on May 23 and 24, 1966. The Commission's Resolution No. 1003, the validity of which is questioned here in G.R. No. 28870 for jurisdictional reasons, was promulgated on September 15, 1966.

G.R. No. L-28870 was submitted for decision on January 21, 1969.

The pertinent laws under the circumstances are the Social Security Act of 1954 (R.A. 1161), as amended by R.A. 2658 (which took effect June 18, 1960) and the Civil Service Act of 1959 (R.A. 2260).

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Re: G.R. No. L-28870

The question posed in this appeal is not an untrodden path. *Mendoza vs. Social Security Commission, et al.* (L-29189, April 11, 1972, 44 SCRA 373) penned by Justice J.B.L. Reyes, is in point.

"The case arose in this wise: appellee herein, Victor D. Mendoza, then Manager of the Commercial and Industrial Loans Department in the Social Security System was subjected to formal investigation of various irregularities allegedly committed by him. Hearings were duly conducted by the Investigating Committee on the formal charges filed and the explanations offered by appellee. The records and proceedings were reviewed by a Committee of Commissioners that found Mendoza guilty on four charges, and recommended his separation from the service. But the Commission *en banc* decided instead that said officer be only demoted in rank and salary, from that of Manager, Commercial and Industrial Loans Department, to that of Division Chief. The decision was embodied in Resolution No. 198 dated 9 February 1967.

"Mendoza then resorted to the Court *a quo* in quest of a writ of prohibition, with preliminary injunction, contending that the Commission had no authority to impose the penalties embodied in its Resolution No. 198, the petitioner being covered by the Civil Service Law of 1962 (Republic Act 2260), Section 33 whereof provided the following:

> 'Sec. 23. Administrative Jurisdiction for Disciplining Officers and Employees. — The Commissioner may, for dishonesty, oppression, misconduct, neglect of duty, conviction of a crime involving moral turpitude, notoriously disgraceful or immoral conduct, improper or unauthorized solicitation of contributions from subordinate employees and by teachers or school officials from school children, violation of the existing Civil Service Law and rules of reasonable office regulations, or in the interest of the service, remove any subordinate officer or employee from the service, demote him in rank, suspend him for not more than one year without pay or fine him in an amount not exceeding six months' salary.
>
> 'In meting out punishment, like penalties shall be imposed for like offenses and only one penalty shall be imposed in each case.'

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"The Commission answered the petition averring that it was empowered by Section 5 of the Social Security Act (Republic Act No. 1161): x x x and that the Court of First Instance had no jurisdiction to review the resolutions of the Commission.

"After due trial, the court below, by decision of 13 January 1968, ruled that Section 5 of the Social Security Act was inapplicable to the case since it did not involve a settlement of benefit claims; that the assailed Resolution No. 198 was void *ab initio*, the Commission having no power to discipline and penalize civil service officers to the exclusion of the Commissioner of Civil Service x x x. The latter duly appealed to this Court.

"It is clear that under Section 33 of the Civil Service Act (Republic Act 2260) heretofore quoted, before the amendments introduced therein by Republic Act No. 6040, *the sole power to impose disciplinary sanctions on civil service employees was vested exclusively in the Commissioner of Civil Service*. This is emphasized by the provisions of Section 27 of the Civil Service Rules requiring the Department Head concerned —

> 'within 15 days from receipt of the complete record of the case, to forward such record with his comment and recommendation to the Commissioner for decision',

so that, as pointed out by the court below, the Department Head's powers were purely recommendatory; it had no power to decide nor impose any penalty, much less to implement the decision or carry it out into execution.

"That the petitioner, as Manager of the Loans Department in the Social Security System, was and is a civil service official is plain from Article II (Section 3) of the Civil Service Act of 1959, as well as from Section 3 of the Social Security Act of 1954, as amended by Republic Act No. 2658.

> "'ARTICLE II. —
> Scope of the Civil Service —
>
> "SEC. 3. Positions embraced in the Civil Service. — The Philippine Civil Service shall embrace all branches, subdivisions and instrumentalities of the Government, including government-owned or controlled corporations, and appointments therein except as to those which are policy-determining, primarily

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confidential or highly technical in nature, shall be made only according to merit and fitness, to be determined as far as practicable by competitive examination. Positions included in the civil service fall into three categories; namely, competitive or classified service, non-competitive or unclassified service and exempt service. The exempt service does not fall within the scope of this law (italics supplied)".

"'SEC. 3. Social Security System. — x x x

'(c) The Commission, upon the recommendation of the Administrator, shall appoint an actuary, medical director, and such other personnel as may be deemed necessary, shall fix their compensation, prescribe their duties and establish such methods and procedures as may insure the efficient, honest and economical administration of the provisions and purpose of this Act: Provided, however, That the personnel of the system shall be selected only from civil service eligibles certified by the Commissioner of Civil Service and shall be subject to civil service rules and regulations' (italics supplied)."

"By way of avoidance of the application of the legal dispositions cited, the respondent Social Security Commission contends that its officers and employees are not covered by the Civil Service Law and Rules, invoking the memorandum circulars of Commissioner Abelardo Subido, dated 8 January 1964 and 23 January 1964 (Exhibits '4' and '5', pages 217 and 218, Record), that —

'officers and employees of government owned or controlled corporations performing proprietary functions who have entered into collective bargaining contracts with the management of their respective corporations, through their labor unions, fall in the exempt service and are not covered or protected by the Civil Service Act' (Exhibit '4').

In the memorandum of 23 January 1964 (Exhibit '5'), the Commissioner of Civil Service further broadened the preceding circular, remarking that —

'This office has observed that there are officers and employees of these corporations who, while not union members, accept benefits under the collective bargaining contract between union and management and in so doing, have by implied acquiescence, become parties to said collective bargaining contract. They,

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therefore, likewise fall under the exempt service and are not governed or protected by the Civil Service Act of 1959.'

"We entertain serious doubts on the validity of the foregoing circulars, in view of the fact that under Section 6 of the Civil Service Act of 1959, the Exempt Service —

'shall consist of the following:

'(a) Elective officers

'(b) Members of the commissioned and enlisted service of the Army, Navy and Air Force of the Philippines.

'(c) Persons employed on a contract basis.'

"It is clear from the foregoing that in order to belong to the exempt service and thus forfeit the protection of the Civil Service Law, a civilian non-elective officer must have obtained employment through a contract. In fact, Section 2, paragraph (j), of the Civil Service Rules, interpreting Section 6 of the Act, declares that —

'(j) x x x the term 'persons employed on a contract basis' refers to independent contractors and those who may be employed by them; it does not include employees or laborers who serve under the direction and supervision of a governmental agency, except aliens who may be thus employed on a contract basis when the exigencies of the service so require. In this context, the term 'independent contractor' refers to one who undertakes to do a piece of work for the government under his own responsibility, with minimum interference on the part of any governmental agency in the performance or accomplishment thereof.'

"Plainly, the circulars in question invoked by respondent Commission improperly attempted to broaden the scope of the exempt service under the law, which was not within the powers of the Civil Service Commissioners to do.

"x x x x x x' x x x

"We are not unmindful of the fact that by Republic Act No. 6040 the Legislature extended the scope of the exempt service to persons employed in government owned or controlled corporations primarily performing proprietary functions with collective bargaining agreements; and that furthermore, the same Act also amended Section

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33 of the Civil Service Act by adding at the end of the original section the following provisos:

> 'Provided, however, that heads of departments, agencies and instrumentalities, provinces and chartered cities, shall have original jurisdiction to investigate and decide on matters involving disciplinary action: Provided further, that when the penalty imposed is a reprimand or a fine not exceeding one month salary or suspension without pay for a period not exceeding one month, the decision of the aforementioned heads shall be final; but if the penalty imposed is heavier the decision shall be appealable to the Commission as provided in this Act: Provided finally, that a decision imposing removal shall always be subject to review by the Commission.'

"Had the present case arisen, therefore, under Republic Act 6040, the Social Security Commission would have had jurisdiction, after due investigation, to impose the penalty of demotion subject only to appeal by the officer or employee affected to the Civil Service Commission. Unfortunately for appellant Commission, Republic Act No. 6040 was enacted on 4 August 1969, and the case at bar had been litigated, decided and appealed to the Supreme Court and submitted for decision as of February, 1969. Republic Act No. 6040 cannot be retroactively applied to the case, specially since the same act expressly provides in its Section 47 that —

> 'rights and privileges vested or acquired under the provisions of the Civil Service Law, rules and regulations prior to the effectivity of this Act shall remain in force and effect'" (italics supplied).

Clearly at the time the questioned Resolution No. 1003 was promulgated and implemented dismissing petitioner-appellant Amado Tolentino, the respondents-appellees Social Security Commission, Gilberto Teodoro and Angel Penano did not have the power to hear and decide administrative and disciplinary charges filed against erring employees of the Commission.

WE are not, however, ready to dismiss the questioned Resolution No. 1003 as inutile. The Social Security Commission, as an agency of the government, may be considered a department and respondent Gilberto Teodoro, its department head. Resolution

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No. 1003 may be treated as the recommendation of the department head which may be submitted to the Civil Service Commission for decision and/or appropriate action.

At this juncture, and to pave the way for a complete resolution of the case at bar, WE must consider the constitutionality of the amendments to the Civil Service Act of 1959 as contained in Republic Act No. 6040, enacted ten years after or on August 4, 1969.

As earlier noted, by Republic Act No. 6040, the legislature extended the scope of the exempt service to persons employed in government-owned or controlled corporations primarily performing proprietary functions with collective bargaining agreements; in addition, it appended the following proviso to Section 33 of the Civil Service Act —

"Provided, however, that heads of departments, agencies and instrumentalities, provinces and chartered cities, shall have original jurisdiction to investigate and decide on matters involving disciplinary action: Provided further, that when the penalty imposed is a reprimand or a fine not exceeding one month salary or suspension without pay for a period not exceeding one month, the decision of the aforementioned heads shall be final; but if the penalty imposed is heavier the decision shall be appealable to the Commission as provided in this Act: Provided finally, that a decision imposing removal shall always be subject to review by the Commission."

However, Section 1(1), Article XII (B) of the 1973 Constitution reads —

"The Civil Service embraces every branch, agency, subdivision, and instrumentality of the Government, including every government-owned or controlled corporation x x x."

Clearly, insofar as Republic Act No. 6040 insulates government-owned — or controlled — corporations with collective bargaining agreements with their employees from the embrace of the Civil Service Commission, said statute is inconsistent with the fundamental law of the land. As such, it is void (Article 7, New Civil Code).

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RE: G.R. No. L-39149

In view of OUR decision in G.R. No. L-28870, WE rule to set aside as null and void the decision of respondent Court of Industrial Relations dated March 5, 1974, and its subsequent *en banc* resolutions dated August 13, 1974 the same having been issued without jurisdiction.

At the time Amado Tolentino was charged with and convicted of dishonesty in 1966 up to the time the Prosecution Division of the Court of Industrial Relations filed with said court the unfair labor suit docketed as Case No. 5042-ULP on May 7, 1968, the power to impose disciplinary sanctions on erring employees of the Social Security Commission was vested *exclusively* in the Commissioner of Civil Service, without prejudice to appeal to the Civil Service Board of Appeals (Sections 18 and 36, R.A. 2260). Consequently, the Court of Industrial Relations, created under Commonwealth Act No. 103, a statute of earlier vintage, had no jurisdiction over Case No. 5042-ULP. Again, jurisdiction of a court is determined by the statute in force *at the time of the commencement of the action* (*Aquisap vs. Basilio, supra; Rilloraza vs. Arciaga*, L-23848, October 31, 1967; *People vs. Pegarum, supra*).

WE find no further need to scrutinize the findings of the Court of Industrial Relations. To do so would benefit no one.

WHEREFORE, THE QUESTIONED RESOLUTION NO. 1003 TOGETHER WITH THE RECORDS THEREOF ARE HEREBY REMANDED TO THE OFFICE OF THE COMMISSIONER OF CIVIL SERVICE FOR APPROPRIATE ACTION.

THE DECISION AND RESOLUTION APPEALED FROM IN G.R. NO. L-39149 ARE HEREBY SET ASIDE AS NULL AND VOID FOR HAVING BEEN RENDERED WITHOUT JURISDICTION.

NO COSTS.

Concepcion Jr., Escolin, Cuevas, and *Alampay, JJ.*, concur.

Aquino (*Chairman*) and *Abad Santos, JJ.*, on leave.