DOES THE GHOST OF *CROWELL V. BENSON* STILL WALK?

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A discussion today of the doctrine of *Crowell v. Benson*[1] might, at first glance, seem no more useful than an analysis of any other supposedly discarded Supreme Court decision. For it has long been thought that *Crowell v. Benson* has been laid to rest by later cases. Thus, Mr. Justice Frankfurter in 1946 referred to "all the casuistic difficulties spawned by the doctrine of 'jurisdictional fact.' In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson* . . . brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose."[2]

Pittsburgh S. S. Co. v. Brown[3] indicates that the ghost of *Crowell v. Benson* may still walk in the lower federal courts. That case involved an action pursuant to Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act[4] to restrain the enforcement of a compensation order made by the defendant deputy commissioner. The plaintiff employer moved in the district court for a new trial on a new record, on the question whether the deceased lost his life as the result of an accidental injury occurring on the navigable waters of the United States. Under *Crowell v. Benson* plaintiff was clearly entitled to a trial *de novo* on that issue, but it was argued that "the holding in that case no longer retains vitality in view of later decisions of the Supreme Court."[5] The Court of Appeals for the Seventh Circuit rejected this argument, asserting that "none of the cases relied upon by the defendants in this respect . . . furnish any substantial basis for the contention that the Crowell case is no longer binding upon inferior federal courts."[6] Though its doctrine has been widely criticized, both by members of the Supreme Court and by legal writers, the case itself has not been overruled. *Crowell v. Benson* was consequently held to be binding, and the finding of the

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1. 285 U. S. 22 (1932).
2. Estep v. United States, 327 U. S. 114, 142 (1946) (concurring opinion).
3. 171 F. 2d 175 (7th Cir. 1948), *reversing* 81 F. Supp. 284, *modified by* 81 F. Supp. 285, *supplemented by* 81 F. Supp. 287 (N. D. Ill. 1947).
4. 44 STAT. 1424 (1927), 33 U. S. C. § 901 (1946).
5. 171 F. 2d 175, 177 (7th Cir. 1948).
6. *Ibid.*

district court was affirmed that since "the instant case presents a dispute as to one of the jurisdictional facts squarely within the doctrine of *Crowell v. Benson,*" [7] plaintiff was entitled to a trial *de novo* on the single issue of where the deceased met his death.

The *Pittsburgh S. S.* case shows that the doctrine of *Crowell v. Benson* has not yet reached the definitive repose urged for it by Mr. Justice Frankfurter. At the same time, it indicates the need for a re-analysis of that doctrine, with emphasis upon its application in the lower federal courts, to determine whether the Court of Appeals for the Seventh Circuit correctly applied it in a case decided in 1948. It is therefore intended in this paper to re-examine the doctrine of *Crowell v. Benson,* by (1) a presentation of the "jurisdictional" fact doctrine and its use in that case; (2) an analysis of Mr. Chief Justice Hughes' opinion in that case; (3) an examination of its application in subsequent cases arising under the Longshoremen's and Harbor Workers' Compensation Act; and (4) a discussion of its effect upon the judicial review of other administrative agencies.

I.

The "law-fact" distinction is one which is fundamental in common-law jurisprudence and has, indeed, been the keystone upon which our whole system of appellate review has been built. As applied to the field of administrative law, this separation of "law" and "fact," as Sir Cecil Carr has pointed out, sounds attractively simple. "The administrative tribunal would find the facts and the courts would not interfere unless the absence of evidence or the perversity of the finding required them to interfere." [8] Working from this distinction, our courts have been constructing a theory of review which has become crystallized in the so-called "substantial evidence" rule, so that "normally the scope of review over administrative action is limited to questions of law and to whether or not the facts underlying the administrative conclusion are based upon substantial evidence." [9]

Under the "substantial evidence" rule, the power of the reviewing court is limited to questions of law. It has no power to examine administrative findings of fact further than to see that they have a substantial evidentiary basis. "Such is the full limit of judicial review of the fact findings of an administrative tribunal when made within the scope of its jurisdiction." [10] But what if the fact in question is

7. 81 F. Supp. 285 (N. D. Ill. 1947).
8. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 108 (1941).
9. LANDIS, *Crucial Issues in Administrative Law,* 53 HARV. L. REV. 1077, 1092 (1940).
10. Sunshine Anthracite Coal Co. v. Adkins, 31 F. Supp. 125, 129 (E. D. Ark. 1940), *aff'd* 310 U. S. 381 (1940).

a *jurisdictional* one in the sense that its existence is a condition precedent to the lawful exercise of the administrative power? "If the right of review is rested on the theory of *ultra vires,* and an administrative officer is given authority, for instance, to destroy infected articles or diseased animals, it is possible to argue that he is 'without jurisdiction' or authority over articles not actually infected or over animals not actually diseased." [11]

To apply the normal theory of limited review to such cases would seem to run counter to the general policy of Anglo-American law against allowing inferior tribunals finally to determine the limits of their own jurisdiction. As stated by Farwell, L. J., in an important case:

> No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe.[12]

In other words, as stated by the Supreme Court, "an agency may not finally decide the limits of its statutory power. That is a judicial function." [13]—and where the administrative power depends upon the existence of a particular fact, it is for the reviewing court to determine for itself whether that fact existed.

This was the "jurisdictional" fact doctrine at the time *Crowell v. Benson* was decided. That case arose under the Longshoremen's and Harbor Workers' Compensation Act, and concerned a suit to enjoin the enforcement of a compensation award made under that Act. The plaintiff alleged that the award was contrary to law for the reason that the claimant was not at the time of his injury an "employee" of the plaintiff and that his claim was consequently not within the juris-

11. DICKISON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 309 (1927).
12. Rex v. Shoreditch Assessment Committee, [1910] 2 K. B. 859, 880.
13. Social Security Board v. Nierotko, 327 U. S. 358, 369 (1946).

diction of the Deputy Commissioner. "The fact of employment was thus made the decisive issue" [14] and the Court had to determine the scope of the review available over the administrative finding of that fact. First of all, according to Mr. Chief Justice Hughes, who delivered the opinion of the majority, the enabling Act contains two fundamental limitations upon the right of compensation which it confers. "It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States' . . ., and it applies only when the relation of master and servant exists." [15] The administrative fact findings upon these two issues, the opinion goes on, cannot be vested with the same finality as ordinary factual determinations. These "determinations of fact are fundamental or 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme." [16] The existence of these facts is "indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions." [17]

What is the scope of review then with regard to these "fundamental" or "jurisdictional" facts? Clearly, says Chief Justice Hughes, the reviewing court may determine the question of their existence upon its own independent judgment. The court in determining whether a compensation order is in accordance with law may determine for itself the existence of the "jurisdictional" facts which underlie the operation of the statute. The opinion does not, however, stop here, for the reviewing court is not limited to exercising its own independent judment upon the administrative record. "There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is 'through injunction proceedings mandatory or otherwise' " [18]—and, on such review proceedings, the party aggrieved is entitled to a trial *de novo* upon the issues of "jurisdictional" fact referred to above. The Court thus held, with regard to the issue of employment, that the plaintiff in the injunction proceeding "was entitled to a trial *de novo;* that all the evidence introduced before the deputy commissioner should go for naught; and that

14. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. OF PA. L. REV. 1055, 1056 (1932).
15. 285 U. S. 22, 37 (1932).
16. *Id.* at 54.
17. *Id.* at 55.
18. *Id.* at 63.

[plaintiff] should have the privilege of presenting new, and even entirely different, evidence in the District Court." [19]

Such, briefly stated, was the decision of the Supreme Court in *Crowell v. Benson.* As a leading critic has admitted, "the logical cogency of the Court's reasoning is impressive." [20] The doctrine of "jurisdictional" fact is applied with almost mathematical exactness to reach the result of the majority opinion. The reasoning of the Court can be stated in syllogistic form as follows:

Major Premise: It is the function of the courts to determine whether administrative agencies have exceeded their jurisdiction.

Minor Premise: The existence of the employment relationship is essential to administrative jurisdiction under the enabling Act.

Conclusion: The existence of the employment relation must therefore independently be found by a court in order for the court to conclude that the agency was acting within its jurisdiction; otherwise the agency would itself be finding the facts upon which the very exercise of administrative power depends.[21]

II.

Under the Longshoremen's Act, the administrative power to act is dependent upon the finding that the claimant is an employee, for the authority to make a compensation award does not exist in the absence of such a finding. The existence of an employment relationship is, however, but one of many facts upon which the administrative power to award compensation depends. This, indeed, is one of the great difficulties with the "jurisdictional" fact doctrine. Most statutory schemes imply a large number of facts upon which jurisdiction turns and broad review over them could, in effect, do away with the limitations of the "substantial evidence" rule. This is strongly urged by Mr. Justice Brandeis in his dissent in *Crowell v. Benson:*

> Logically applied, the suggestion would leave the deputy commissioner powerless to hear or determine any issue of asserted non-liability under the Act. For non-existence of the employer-employee relation is only one of many grounds of non-liability. Thus, there is no liability if the injury was occasioned solely by the intoxication of the employee; or if the injury was due to the wilful intention of the employee to injure or kill himself or another; or if it did not arise "out of or in the course of employment;" or if the employer was not engaged in maritime employment in whole or in part; or if the injured person was the employee of a subcontractor who has secured payment of com-

19. Brandeis, J., dissenting, *id.* at 66.
20. Dickinson, *supra,* note 14, at 1059.
21. Compare Landis, THE ADMINISTRATIVE PROCESS 127 (1938).

> pensation; or if the proceeding is brought against the wrong person as employer; or if the disability or death is that of a master or a member of the crew of any vessel; or if it is that of a person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or if it is that of an officer or employee of the United States or any agency thereof; or if it is that of an officer or employee of any State, or foreign government, or any political subdivision thereof; or if recovery for the disability or death through workmen's compensation proceedings may be validly provided by state law. And obviously there is no liability if there was in fact neither disability nor death. It is not reasonable to suppose that Congress intended to set up a fact-finding tribunal of first instance, shorn of power to find a portion of the facts required for any decision of the case; or that in enacting legislation designed to withdraw from litigation the great bulk of maritime accidents, it contemplated a procedure whereby the same facts must be twice litigated before a longshoreman could be assured the benefits of compensation.[22]

The majority opinion in *Crowell v. Benson* does not, however, go as far as Mr. Justice Brandeis asserts. Not every fact upon which the administrative authority to decide depends is to be subject to a trial *de novo* in the district court. In the opinion of Mr. Chief Justice Hughes, only two limitations are singled out as "fundamental" and it is only as to them that the "substantial evidence" rule does not apply. "These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists." [23] Aside from these two "fundamental" facts, "there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final." [24] This is true even with regard to facts upon which the coverage of the Act depends—*i. e.*, facts upon which the administrative authority to award compensation turns. Thus, the "substantial evidence" rule is said to apply to the factual question whether the injury "was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another"—in which case, no compensation shall be payable.[25] "While the exclusion of compensation in such cases is found in what are called 'coverage' provisions of the Act . . ., the question of fact still belongs to the contemplated routine of administration, for the case is one of

22. 285 U. S. 22, 73 (1932).
23. *Id.* at 55.
24. *Id.* at 46.
25. Longshoremen's Act, 33 U. S. C. § 903 (b) (1946).

employment within the scope of the Act, and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation." [26]

Why does the majority in *Crowell v. Benson* hold that a trial *de novo* is required only on the two "fundamental" facts of employment and place of injury? Should there not be the same broad review of other facts upon which the power to award compensation depends, for is not the administrative jurisdiction dependent upon their existence also?

Mr. Chief Justice Hughes indicates that it is not enough that the particular fact be one upon which the administrative authority under the enabling Act turns for the doctrine of *Crowell v. Benson* to apply. The facts of employment and place of injury are "fundamental" not because their existence is necessary to administrative jurisdiction under the statute. "These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly . . ., but also because the power of the Congress to enact the legislation turns upon the existence of these conditions." [27]

The place of the injury is fundamental in this respect because, unless the injuries to which the Longshoremen's Act relates occur upon the navigable waters of the United States, they fall outside the legislative authority of the Congress under the admiralty power. "The locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute." [28] Similarly, says the Chief Justice, the authority of the Congress to impose liability without fault in maritime cases depends upon the existence of an employer-employee relationship. "The fact of that relation is the pivot of the statute and . . . underlies the constitutionality of this enactment." [29] The facts of employment and locality of injury are thus conditions precedent to the constitutional validity of the operation of the statutory scheme. "If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates." [30]

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26. 285 U. S. 22, 47 (1932).
27. *Id.* at 55.
28. *Ibid.*
29. *Id.* at 56.
30. *Ibid.*

Looked at in this way, the doctrine of *Crowell v. Benson* is only an application of the doctrine of "constitutional" fact articulated in *Ohio Valley Water Co. v. Ben Avon Borough.*[31] The *Ben Avon* case is the logical fulfillment of the "jurisdictional" fact doctrine, for, in this country, the ultimate limits to the lawful exercise of any power are those contained in the organic instrument. Whenever a constitutional issue is raised, said the Court in the *Ben Avon* case, a fair opportunity must be provided "for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause." [32] To vest the administrative finding with finality would be to allow the administrative body itself to find the facts upon which the constitutional exercise of its power depends. *Crowell v. Benson* applies the "constitutional" fact doctrine to cases arising under the Longshoremen's Act, though, it should be noted, it goes one step further, for it requires a trial *de novo* upon the issue of "constitutional" fact and not merely independent judgment upon the administrative record.

The doctrine of "constitutional" fact as it is applied in *Crowell v. Benson* is, as Professor Dickinson has pointed out, the doctrine of "jurisdictional" fact in a special form.[33] It "applies to constitutional limitations on administrative jurisdiction the same reasoning which the doctrine of jurisdictional fact applies to statutory limitations." [34] In both cases, the administrative power to act depends upon the existence of a particular fact. In the one, however, the limitation upon the administrative authority is imposed by the enabling Act; in the other it is imposed by the organic instrument.

Even if this be the correct interpretation of the doctrine of *Crowell v. Benson,* one is not altogether clear why the opinion there limits its application under the Longshoremen's Act to the locality of injury and the existence of the employment relation. As pointed out by Groner, C. J., with regard to the two fundamental facts listed by Chief Justice Hughes, "The first is easily understandable, the latter has been sometimes said to be more difficult. Critics of the *Crowell-Benson* opinion have wondered what is the difference between the employment relation and the question whether the injury occurred in

31. 253 U. S. 287 (1920). *Ben Avon* is still showing remarkable vitality for a supposedly defunct doctrine. It was adopted by the highest court of New York in Staten Island Edison Corp. v. Maltbie, 296 N. Y. 374, 73 N. E. 2d 705 (1947), discussed in Schwartz, *Administrative Law,* 23 N. Y. U. L. Q. REV. 601, 618 (1948), and was applied in two federal decisions last year, Pichotta v. Skagway, 78 F. Supp. 999 (D. Alaska 1948); Atlantic Coast Line R. Co. v. Pub. Utilities Comm'n, 77 F. Supp. 675 (E. D. S. C. 1948).

32. 253 U. S. 287, 289 (1920).

33. Dickinson, *supra,* note 14, at 1072.

34. *Id.* at 1067.

the course of the employment or arose out of the employment, or happened at all, or was self-inflicted." [35] Does the fact of employment stand upon a different constitutional basis than these other questions?

It is difficult to see why, if Chief Justice Hughes was correct in his assertion that the existence of an employer-employee relationship was essential to the power of Congress to impose liability without fault, the same was not also true of the relation of the injury to the employment. If an employment relationship is necessary for the validity of a compensation scheme, may it not also "be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution"? [36] And would not the same apply to the question of whether there was, in fact, any injury or disability? Yet *Crowell v. Benson* lists only the two "fundamental jurisdictional" facts.

One wonders, too, whether Chief Justice Hughes' assertion that the existence of an employment relation is essential to the constitutional operation of a compensation scheme would be followed by the present Court. In the first place, it is the Congress who have the constitutional authority to define the classes of "employees" who are to receive compensation.[37] But, it may be argued, this does not detract from the proposition that the legislative power is limited by the bounds set by the concept of "employment." This "argument assumes that there is some simple, uniform and easily applicable test which the courts have used in dealing with such problems, to determine whether people doing work for others fall in [the] class [of employees]. Unfortunately this is not true. . . . Few problems in the law have given greater variety of application and conflict than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." [38] The tendency in the present Court is to leave the task of setting the definitive bounds to the concept of employment to the legislature. If a labor relations statute can constitutionally be applied to "a wider field than the narrow technical legal relation of 'master and servant,' " [39] why is not the same true today of a workmen's compensation act?

35. Gudmundson v. Cardillo, 126 F. 2d 521, 524 (D. C. Cir. 1942).
36. Cudahy v. Parramore, 263 U. S. 418, 423 (1923).
37. South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 256 (1940).
38. National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 120, 121 (1944).
39. *Id.* at 124.

III.

What has been the effect of *Crowell v. Benson* upon subsequent cases which have arisen under the Longshoremen's Act? Here again, one must distinguish between the two "constitutional-jurisdictional" facts pointed to by Mr. Chief Justice Hughes in his opinion in that case and other "statutory-jurisdictional" facts—*i. e.*, between those whose existence the Chief Justice asserted was necessary to the constitutional operation of the Act and those whose existence was necessary to administrative authority under the Act.

There appears to have been some confusion in the lower federal courts for several years after *Crowell v. Benson* as to whether that case required a trial *de novo* on all facts upon which administrative jurisdiction might depend or whether its doctrine was limited to the two "fundamental" facts enunciated in the opinion.[40] Later cases have, however, made it clear that the doctrine of *Crowell v. Benson* must be limited to the two "constitutional-jurisdictional" facts mentioned by Chief Justice Hughes.

The first important case which indicates that a trial *de novo* is not required where "statutory-jurisdictional" facts under the Longshoremen's Act are concerned is *South Chicago Coal & Dock Co. v. Bassett.*[41] Under the coverage section of the Longshoremen's Act, no compensation shall be payable in respect of the disability or death of "a master or member of a crew of any vessel." [42] The Supreme Court in the *Bassett* case held that the administrative finding that a particular employee was or was not a "member of a crew" was, for purposes of judicial review, to be treated as an ordinary finding of fact. "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not a 'member of a crew' turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive." [43] The opinion in the *Bassett* case was written by Chief Justice Hughes and the opinion in *Crowell v. Benson* is nowhere cited. Implicit in the decision of the Court is the holding that, where the two facts named in *Crowell v. Benson* are not in dispute, the scope of review is limited

40. *Compare, e. g.,* Maryland Casualty Co. v. Lawson, 94 F. 2d 190 (5th Cir. 1938), *with* South Chicago Coal & Dock Co. v. Bassett, 104 F. 2d 522 (7th Cir. 1939), *aff'd* 309 U. S. 251 (1940).

41. 309 U. S. 251 (1940).

42. 44 STAT. 1426 (1927), 33 U. S. C. § 903 (a) (1) (1946).

43. 309 U. S. 251, 257 (1940). *Accord,* Norton v. Warner Co., 321 U. S. 565 (1944); Schantz v. Am. Dredging Co., 138 F. 2d 534 (3d Cir. 1943); Hagens v. United Fruit Co., 135 F. 2d 842 (2d Cir. 1943). *Cf.* Taylor v. McManigal, 89 F. 2d 583, 584 (6th Cir. 1937).

by the "substantial evidence" rule. This is true even though the fact at issue be one upon which the administrative power to award compensation depends—as was the fact involved in the *Bassett* case.

The principle of the *Bassett* case has been applied to a large number of factual determinations by the federal courts. Thus, the "substantial evidence" rule has been held to apply to review of findings by the deputy commissioner that the injury arose out of and in the course of employment;[44] that the disability or death arose out of an "accidental injury";[45] that the claimant had suffered a "disability" within the meaning of the Act;[46] that the employment involved was maritime in character;[47] that the death was not occasioned by the willful intention of the employee to kill himself;[48] that the claimant was "dependent" upon the deceased employee;[49] that the claimant was the wife of the deceased employee;[50] that the claimant widow was living apart from the deceased employee "for justifiable cause or by reason of his desertion";[51] and that the employer had timely notice of injury.[52]

Thus it seems clear that the doctrine of *Crowell v. Benson* has not been applied to findings of fact other than the two "fundamental" facts enumerated by Chief Justice Hughes in that case. Have the two facts expressly named by Chief Justice Hughes as subject to a trial *de novo—i. e.,* the locality of injury and the employment relation—been treated any differently by the Longshoremen's Act cases since *Crowell v. Benson?*

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44. Cardillo v. Liberty Mutual Ins. Co., 330 U. S. 469 (1947); Parker v. Motor Boat Sales, 314 U. S. 244 (1941); Voehl v. Indemnity Ins. Co., 288 U. S. 162 (1933); Southern Stevedoring Co. v. Henderson, 175 F. 2d 863 (5th Cir. 1949); Kwasizur v. Cardillo, 175 F. 2d 235 (3d Cir. 1949); Granholm v. Cardillo, 116 F. 2d 948 (D. C. Cir. 1940); Grain Handling Co. v. Sweeney, 102 F. 2d 464 (2d Cir. 1939); McNeely v. Sheppeard, 89 F. 2d 956 (5th Cir. 1937); Todd Dry Docks v. Marshall, 61 F. 2d 671 (9th Cir. 1932).

45. Powell v. Hoage, 57 F. 2d 766 (D. C. Cir. 1932); Southern S. S. Co. v. Norton, 41 F. Supp. 108 (E. D. Pa. 1941); Wood Preserving Corp. v. McManigal, 39 F. Supp. 177 (W. D. Ky. 1941); Southern Shipping Co. v. Lawson, 5 F. Supp. 321 (S. D. Fla. 1933).

46. Southern S. S. Co. v. Norton, 101 F. 2d 825 (3d Cir. 1939); St. Regis Paper Co. v. McManigal, 67 F. Supp. 146 (N. D. N. Y. 1946); McCarthy Stevedoring Corp. v. Norton, 40 F. Supp. 960 (E. D. Pa. 1940); Valeri v. Lowe, 26 F. Supp. 761 (S. D. N. Y. 1938); Eastern S. S. Lines v. Monahan, 21 F. Supp. 535 (D. Me. 1947).

47. Massachusetts Bonding Co. v. Lawson, 149 F. 2d 853 (5th Cir. 1945).

48. Del Vecchio v. Bowers, 296 U. S. 280 (1935); Salmon Bay Sand Co. v. Marshall, 93 F. 2d 1 (9th Cir. 1937).

49. Harris v. Hoage, 66 F. 2d 801 (D. C. Cir. 1933); Texas Employers' Ins. Ass'n v. Sheppeard, 62 F. 2d 122 (5th Cir. 1932); Traveller's Ins. Co. v. Parker, 40 F. Supp. 692 (E. D. Va. 1941).

50. Freeman S. S. Co. v. Pillsbury, 172 F. 2d 321 (9th Cir. 1949). *Cf.* Green v. Crowell, 69 F. 2d 762 (5th Cir. 1934).

51. J. E. Haddock v. Pillsbury, 60 F. Supp. 806 (N. D. Cal. 1945); Associated Operating Co. v. Lowe, 52 F. Supp. 550 (E. D. N. Y. 1943). *Cf.* Southern Ry. Co. v. Cartwright, 77 F. 2d 546 (D. C. Cir. 1935).

52. Seaboard Marine Repair Co. v. Cardillo, 166 F. 2d 431 (2d Cir. 1948).

So far as an analysis of the reported decisions reveals, subsequent cases arising under the Longshoremen's Act have afforded a trial *de novo* on the factual issues of locality of injury and employment, where one has been demanded.[53] Yet even with regard to these two "fundamental" facts, limitations have been imposed. In the first place, even under *Crowell v. Benson,* the action to set aside the compensation award must be brought within the 30-day period provided in the statute[54] or the award becomes final, even as to the "fundamental" facts specified by Mr. Chief Justice Hughes.[55] If one carries the reasoning in *Crowell v. Benson* to its logical conclusion, it would seem that judicial review of the two "constitutional-jurisdictional" facts specified in that opinion should be available even after the period specified in the enabling Act has expired. If these "fundamental" facts did not exist, the order of the deputy commissioner should still be subject to collateral attack within the common-law rule that judgments made without jurisdiction are void.[56] The time limit in the statute should not be binding upon the court where review is sought on the jurisdictional issue. "The jurisdiction of the administrative officer to take any action at all is dependent upon the fact of employment, and this factual question is one which Congress had no power to take away from the court." [57] *Crowell v. Benson* is not, however, extended this far. The failure to seek a judicial review of the jurisdictional question of employment within the 30-day period specified in the Act has been held to foreclose that question.

An even more important limitation upon the requirement imposed by *Crowell v. Benson* of a trial *de novo* is that stated in *Moran v. Lowe.*[58] That case dealt with the important question of whether the trial *de novo* of issues of "constitutional-jurisdictional" fact was a mandatory or discretionary requirement.[59] The court in the *Moran* case held that the granting of a trial *de novo* on such issues was within the discretion of the district court. An interpretation of *Crowell v. Benson*

53. Pittsburgh S. S. Co. v. Brown, *supra* note 3; Cardillo v. Mockabee, 102 F. 2d 620 (D. C. Cir. 1939); Metropolitan Casualty Co. v. Hoage, 72 F. 2d 175 (D. C. Cir. 1934); Ford v. Parker, 52 F. Supp. 98 (D. Md. 1943); West Ky. Coal Co. v. McManigal, 51 F. Supp. 781 (E. D. Ill. 1943); Tucker v. Norton, 49 F. Supp. 483 (E. D. Pa. 1943); State Comp. Fund v. Pillsbury, 27 F. Supp. 852 (S. D. Cal. 1939). *Cf.* Tyler v. Lowe, 138 F. 2d 867 (2d Cir. 1943); Wood Towing Corp. v. Parker, 76 F. 2d 770 (4th Cir. 1935); Baltimore & O. R. R. Co. v. Clark, 59 F. 2d 595 (4th Cir. 1932); Luckenbach S. S. Co. v. Norton. 54 F. Supp. 1 (E. D. Pa. 1944).

54. 33 U. S. C. § 921 (a) (1946).

55. Pillsbury v. Alaska Packers Ass'n, 85 F. 2d 758 (9th Cir. 1936).

56. *See* Swofford v. Int. Mercantile Co., 113 F. 2d 179, 182 (D. C. Cir. 1940); Campbell v. Lowe, 10 F. Supp. 288 (E. D. N. Y. 1935).

57. Circuit Judge Wilbur, dissenting in Pillsbury v. Alaska Packers Ass'n, 85 F. 2d 758, 762 (9th Cir. 1936).

58. 52 F. Supp. 39 (D. N. J. 1943).

59. *See* Larson, *The Doctrine of "Constitutional Fact,"* 15 TEMP. L. Q. 185, 206 (1941).

any other way, asserts District Judge Meaney, "would nullify the whole purpose of the creation of the Commission for determination of compensation matters. If a trial *de novo* were a matter of right, without discretion of the reviewing court, then the Commission would have no proper reason for existence and all matters relating to employee's compensation might more effectively be heard by this court in the first instance without preliminary recourse to futile appearances before the Commission." [60]

Aside from the limitations just discussed, the doctrine of *Crowell v. Benson* has been consistently applied by the lower federal courts in cases where the facts of locality of injury and/or employment have been at issue.[61] At the same time, as we have seen, the cases since 1932 have strictly limited the doctrine of *Crowell v. Benson* to the two "fundamental" facts expressly named in that case. As recently put by Circuit Judge Frank, "that doctrine strictly limits the category of jurisdictional questions." [62] Beyond this, the lower federal courts have been unable to go. There may be no logical reason for differentiating the fact of employment from other "statutory-jurisdictional" facts under the Longshoremen's Act. But there is still the authority of *Crowell v. Benson* for such differentiation—and that case has never been expressly overruled by the Supreme Court. The present status of *Crowell v. Benson* in cases under the Longshoremen's Act is thus that stated by a district judge who admitted that he was "in full accord with the dissenting opinion of Justice Brandeis" in *Crowell v. Benson.* "But unless and until the decision is overruled by the Supreme Court, it is controlling upon me. . . . While [later] decisions indicate that the Supreme Court has no intention of extending the doctrine of 'jurisdictional fact' and while they may indeed presage the overruling of *Crowell v. Benson,* they do not go far enough to warrant me in refusing to consider as 'jurisdictional facts' the exact facts which the Supreme Court in that case held to be such." [63]

IV.

Two years after *Crowell v. Benson* was decided, Circuit Judge Learned Hand asserted that its doctrine was expressly confined "to transactions inter partes; dealings of the government with its citizens were expressly excluded. . . . Were its scope not so confined, it would have overthrown the accepted procedure of the Interstate Com-

60. 52 F. Supp. 39 (D. N. J. 1943). *But cf.* Tucker v. Norton, 49 F. Supp. 483, 484 (E. D. Pa. 1943); Gudmundson v. Cardillo, 35 F. Supp. 527 (D. D. C. 1940).
61. Cases cited note 53 *supra.*
62. Seaboard Marine Repair Co. v. Cardillo, 166 F. 2d 431, 432 (2d Cir. 1948). *Cf.* Eschbach v. Brown, 84 F. Supp. 825, 827 (N. D. Ill. 1949).
63. Tucker v. Norton, 49 F. Supp. 483, 484 (E. D. Pa. 1943).

merce Commission, the Federal Trade Commission, the Shipping Board, the Board of Tax Appeals, and, we should suppose, the assessment of damages in the admiralty by a commissioner." [64]

In Judge Hand's view, *Crowell v. Benson* is limited to cases such as those under the Longshoremen's Act, where the dispute is between two private parties—*i. e.*, "where the State supplies, in the agency that conducts the proceeding, a special tribunal for determining a controversy between two or more outside interests." [65] This would leave unaffected by *Crowell v. Benson* by far the more important group of cases involving decisions by administrative agencies—*i. e.*, those where "the State, acting through the agency that conducts the proceeding, is itself in effect one of the two parties to the proceeding." [66] The basis for this distinction is to be found in Chief Justice Hughes' statement in *Crowell v. Benson* that "the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." [67] Illustrations of agencies created for the determination of cases of the latter class "are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." [68]

The view of Judge Hand thus finds some support in the opinion of the Court in *Crowell v. Benson.* On the other hand, aside from the passage of Chief Justice Hughes just quoted, there is no reason to suppose that the doctrine was not intended to be applicable to the entire field of administrative law. If the scope of review of a compensation award under the Longshoremen's Act is not limited by the "substantial evidence" rule insofar as the facts upon which the constitutional jurisdiction of the agency depends, why should not the same be true of any other agency which makes a decision under its particular enabling Act? [69]

A number of cases since *Crowell v. Benson* have applied its requirement of broad review to agencies other than that administering the Longshoremen's Act, and these cases have not been limited to those involving disputes between two private parties, to which alone, Judge

64. Kreutz v. Durning, 69 F. 2d 802, 804 (2d Cir. 1934). *Accord:* Sheridan Mills v. Cassidy, 17 F. Supp. 598, 600 (D. Wyo. 1937).

65. 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK 25 (1942).

66. *Ibid.*

67. 285 U. S. 22, 50 (1932).

68. *Id.* at 51. See Note, 46 HARV. L. REV. 478, 483 (1933).

69. The problem under *Crowell v. Benson* is one of the scope, not of the availability, of review. Paramino Lumber Co. v. Marshall, 95 F. 2d 203 (9th Cir. 1938); The Olympia, 58 F. 2d 638 (D. Conn. 1932).

Hand asserted, *Crowell v. Benson* could be applied.[70] Thus, a few years after *Crowell v. Benson,* Circuit Judge Sibley assumed that its doctrine was applicable in cases involving orders of the National Labor Relations Board. "Nor do we think," said he by way of *obiter* in an action to enjoin that agency, "that the Board's findings of the facts on which jurisdiction rests will conclude a court when reviewing a final order under the procedure fixed by the act, but under a proper construction of the act jurisdictional findings will be subject to full judicial review." [71]

United States v. Appalachian Electric Power Co.[72] is of great interest in this respect, for it is the one case involving a direct application of *Crowell v. Benson* to another administrative agency to reach the Supreme Court. That case involved an action by the Government to enjoin the construction of a dam upon a certain river otherwise than under a license to be issued by the Federal Power Commission. The question of whether a license was required from the Commission was dependent upon whether the river concerned was a navigable water of the United States or whether the proposed structure would interfere with the navigable capacity of a navigable water of the United States. The FPC had found that the river was navigable and that the dam would affect interstate commerce and it was contended that the Commission's findings on these points were conclusive if supported by substantial evidence. The district court, however, held that administrative findings on these matters were not final but subject to the determination of the courts upon a trial *de novo* under *Crowell v. Benson,*[73] and, after a lengthy trial, the court found that the river was non-navigable and that the dam would not adversely affect navigability or interstate commerce. The decision was affirmed by the Circuit Court of Appeals for the Fourth Circuit, who expressly approved the granting of a trial *de novo* on the issues of navigability and effect upon interstate commerce:

> Assuming that the finding of the Commission is a relevant fact for the consideration of the court, and that it is entitled to

70. The examples given in the opinion in *Crowell v. Benson,* 285 U. S. 22, 59 (1932), indicate also that its doctrine is not so limited. On cases involving disputes between two private parties, see Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358 (10th Cir. 1942). *But cf.* Universal Carload Co. v. Railroad Retirement Board, 172 F. 2d 22 (D. C. Cir. 1948).

71. Bradley Lumber Co. v. National Labor Relations Board, 84 F. 2d 97, 100 (5th Cir. 1936. *Cf.* Mooresville Cotton Mills v. National Labor Relations Board, 110 F. 2d 179, 180 (4th Cir. 1940); National Labor Relations Board v. Cherry Cotton Mills, 98 F. 2d 444, 446 (5th Cir. 1938); David L. Moss Co. v. United States, 103 F. 2d 395, 397 (C. C. P. A. 1939). The *Moss* case has seemingly been overruled by United States v. Bush & Co., 310 U. S. 371 (1940).

72. 311 U. S. 377 (1940), *reversing* 107 F. 2d 769 (4th Cir. 1939); 23 F. Supp. 83 (W. D. Va. 1938).

73. 23 F. Supp. 83, 116 (W. D. Va. 1938).

> careful and respectful consideration as the opinion of a body informed by experience, nevertheless it cannot properly be regarded as controlling judicial determination on the record in the case. Clearly the decision of the district court involved a constitutional question of the jurisdiction of the Commission in relation to the distribution of state and federal power, and of riparian property rights of the defendant. . . . In that view it is clear that the district judge was required to determine the question of fact *de novo* on the record made at the trial before him.[74]

The Supreme Court reversed the decision of the courts below that the particular river was non-navigable—its "conclusion resting on findings of fact made here *de novo,* and in contradiction of the concurrent findings of the two courts below." [75] With regard to the question of the applicability of the doctrine of *Crowell v. Benson,* there appears only the following brief footnote in Mr. Justice Reed's opinion:

> In both courts below the Government unsuccessfully urged that the findings of the Commission, if supported by substantial evidence, were conclusive. Although it still regards this contention as correct, the Government does not seek to have this Court pass on it in this case.[76]

It is not clear just what this statement means. "There is something almost mysterious about this abrupt abandonment of a contention which was vigorously urged in the two courts below, and which the Government still says it believes to be correct." [77] At any rate, it is clear that the conclusion of the lower courts that *Crowell v. Benson* required a trial *de novo* of the issues of navigability and effect upon interstate commerce was not interfered with by the Supreme Court. If *Crowell v. Benson* has no applicability to such a case, should not the Supreme Court have reversed for the failure of the courts below to confine the scope of their review to that imposed by the "substantial evidence" rule? Does not its failure to do so imply a belief by the Court in 1940 that *Crowell v. Benson* did apply in other than Longshoremen's Act cases?

The *Appalachian Electric Power Co.* case can thus be considered as impliedly holding that the doctrine of *Crowell v. Benson* is not limited to cases arising under the Longshoremen's Act, or even to cases involving disputes between two private parties. In the opinion of at least one district court, indeed, *Crowell v. Benson* has imported the doctrine of "jurisdictional fact" in the broadest sense into the gen-

74. 107 F. 2d 769, 791 (4th Cir. 1939), citing *Crowell v. Benson. Accord:* Appalachian Electric Co. v. Smith, 4 F. Supp. 6, 19 (W. D. Va. 1933), *rev'd on other grounds,* 67 F. 2d 451 (4th Cir. 1933).

75. Roberts, J., dissenting in 311 U. S. 377, 429 (1940).

76. *Id.* at 402, n. 7.

77. *Larson, supra* note 59 at 188, n. 15.

eral law of judicial review of administrative action. "Upon a judicial review of administrative orders and decisions, a court may receive new evidence to determine whether the administrative official or body acted within the scope of the *statutory* authority conferred." [78]

Even if *Crowell v. Benson* is applicable to judicial review generally, its effect is not as broad as this statement indicates. In cases arising under the Longshoremen's Act, as we have seen, *Crowell v. Benson* does not require a broad review of all factual issues upon which the administrative power to act under the enabling statute depends. It requires such review only with regard to the two "fundamental" facts whose existence Chief Justice Hughes asserted was necessary to the constitutional operation of the statutory scheme. The application of *Crowell v. Benson* to other than Longshoremen's Act cases should be limited in the same manner, and most of the cases which have applied its doctrine to other agencies have so limited it.

The most recent cases to illustrate this have arisen under the Selective Training and Service Act of 1940.[79] Under section 5 (d) of that statute, "Regular or duly ordained ministers of religion . . . shall be exempt from training and service . . . under this Act." *Cox v. United States* [80] presented the question of the scope of review of a selective service classification in a trial for absence without leave from a civilian public service camp. Defendants were Jehovah's Witnesses who were classified as conscientious objectors despite their claim to classification as ministers of religion. They claimed that their status as ministers was a "jurisdictional" fact which may be determined *de novo* in a criminal trial. "That is, since ministers of religion are exempted from any service, the registrant under trial for violating section 311 may show the fact to be that he is a minister of religion and not merely that the evidence before the board was in substantial support of the board's classification." [81] But, says Circuit Judge Stephens in the court below, *Crowell v. Benson* holds only "that findings of fact of an administrative agency which go to the jurisdiction of the agency and which affect constitutional rights are not conclusive and may be tried by the courts *de novo*. Where only statutory rights are involved, as in our cases (ministers of religion have no *constitutional* rights to exemption from military or other service) the findings of fact are final if substantially supported by evidence before the

78. United States v. Int. Freighting Corp., 20 F. Supp. 357, 358 (S. D. N. Y. 1937) (Emphasis added). *Cf.* Pettibone v. Cook County, 31 F. Supp. 881, 886 (D. Minn. 1940); Hudson & Manhattan Co. v. Hardy, 22 F. Supp. 105, 113 (S. D. N. Y. 1938). The *Hudson & Manhattan* case is apparently inconsistent with Shields v. Utah I. C. R. Co., 305 U. S. 177 (1938).

79. 54 STAT. 885 (1940); 50 U. S. C. App. § 301 (1946).

80. 332 U. S. 442 (1947), *affirming* 157 F. 2d 787 (9th Cir. 1946).

81. 157 F. 2d 787, 789 (9th Cir. 1946).

agency." [82] With this statement of the scope of review, the Supreme Court concurred. "It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the Board acted." [83]

The doctrine of *Crowell v. Benson* is thus limited to issues of fact on which the constitutional validity of administrative action depends,[84] both in cases under the Longshoremen's Act and in the general law of judicial review. Yet even so limited, the application of the doctrine presents some difficulty. As Professor Dickinson has pointed out:

> It would be not merely inconvenient and burdensome to the courts, but altogether disruptive of administrative processes, to hold that every fact-issue on which a claim of constitutional right can be made to depend becomes thereby entitled to a retrial on new evidence in a review proceeding at law. The reason is that . . . there is practically no issue going to the substantial merits of a controversy which if "unreasonably" decided by an administrative tribunal cannot be made the basis of a claim of constitutional right.[85]

This is the great weakness of *Crowell v. Benson.* Must the court in an action brought to enforce a National Labor Relations Board order containing provisions for reinstatement of employees with back pay afford a trial *de novo* merely because of the employer's allegation that he is deprived of property without due process when he is ordered to pay back wages? [86] Must a complainant who asserts that he was entitled to a permit under the "grandfather" clause of the Motor Carrier Act [87] be given a trial *de novo* in an action to set aside an order of the Interstate Commerce Commission which denied his application because he contends that an adverse decision under the grandfather clause, if it puts the applicant out of business, constitutes a violation of due process? [88]

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82. *Ibid.*

83. 332 U. S. 442, 454 (1947). *Accord:* Smith v. United States, 157 F. 2d 176, 184 (4th Cir. 1946). For like holdings involving other types of administrative action, Standard Oil Co. v. United States, 107 F. 2d 402, 409 (9th Cir. 1939); Ispass v. Pyramid Motor Corp., 59 F. Supp. 341, 343 (S. D. N. Y. 1945); Board of Pub. Ut. Com'rs. v. United States, 21 F. Supp. 543, 549 (D. N. J. 1937). *Cf.* National Broadcasting Co. v. United States, 47 F. Supp. 940, 947 (S. D. N. Y. 1942).

84. Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 224 (2d Cir. 1942), *affirmed* 317 U. S. 501 (1943); Hartford Gas Co. v. Securities & Exchange Com'n., 129 F. 2d 794, 796 (2d Cir. 1942).

85. Dickinson, *supra* note 14 at 1077.

86. See National Labor Relations Board v. Louisville Refining Co., 102 F. 2d 678 (6th Cir. 1939).

87. 49 STAT. 543 (1935), 49 U. S. C. § 301 (1946).

88. Transamerican Freight Lines v. United States, 51 F. Supp. 405 (D. Del. 1943).

As we have seen, in cases under the Longshoremen's Act, the lower federal courts will continue to afford a trial *de novo* of the facts of locality and employment—at least until *Crowell v. Benson* is expressly repudiated by the Supreme Court. If *Crowell v. Benson* is applicable to cases under the National Labor Relations Act,[89] the analogous "fundamental" facts which have to be found under that statute would seem to be that the employer is engaged in interstate commerce[90] and that there is an "employer-employee" relationship.[91] But *National Labor Relations Board v. Hearst Publications*[92] indicates that the finding of the NLRB that there is an employment relationship is now given the same degree of conclusiveness as any other administrative fact findings. The task of making a "completely definitive limitation around the term 'employe'," Mr. Justice Rutledge asserted in that case, has been assigned primarily to the Board:

> Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board . . . the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.[93]

And other cases imply that the same is true of the Board's finding that the employer's business affects interstate commerce.[94]

It is difficult to see why the existence of an employment relationship is "fundamental" to administrative jurisdiction under the Longshoremen's Act but not under the Labor Act. The *Hearst* case thus indicates one of two things. Either the doctrine of *Crowell v. Benson* is not now applicable to non-Longshoremen's Act cases, in which event review of all administrative fact findings in such cases is governed by the "substantial evidence" rule; or Chief Justice Hughes'

89. 49 STAT. 449 (1935), *as amended* 61 STAT. 136 (1947), 29 U. S. C. § 151 (Supp. 1948).

90. *See* Washington Coach Co. v. National Labor Relations Board, 301 U. S. 142, 147 (1937).

91. *See* Mooresville Cotton Mills v. National Labor Relations Board, 110 F. 2d 179, 180 (4th Cir. 1940).

92. 322 U. S. 111 (1944).

93. *Id.* at 130, 131.

94. *See* National Labor Relations Board v. Cudahy Packing Co., 34 F. Supp. 53, 60 (D. Kan. 1940). *Cf.* Santa Cruz Fruit Co. v. National Labor Relations Board, 303 U. S. 453, 467 (1938).

assumption in *Crowell v. Benson* that the existence of an employment relationship is essential to the constitutional operation of a statutory scheme such as workmen's compensation is no longer true. For, if the "employer-employee" relation is necessary to the validity of a compensation statute, why is not the same also true of a labor relations act?

Regardless of which proposition is the correct one, the application of *Crowell v. Benson* to non-Longshoremen's Act cases appears to have been definitely limited by the *Hearst* decision. Either it is not applicable at all in such cases or it applies to an even narrower class of fact findings than those of the type named in Chief Justice Hughes' opinion. The doctrine of *Crowell v. Benson* is thus well on the way (if, indeed, it has not gone all the way under the *Hearst* case) to suffering the fate of the "statutory-jurisdictional" fact doctrine. A number of Supreme Court decisions in the past decade show clearly that today "jurisdictional facts, which are such because of statute, are entitled to no greater scope of review than non-jurisdictional facts." [95] If *Crowell v. Benson* is no longer applicable to non-Longshoremen's Act cases, the same is now true in such cases of "fundamental jurisdictional" facts of the type indicated by Chief Justice Hughes in his opinion in that case.

V.

Does the ghost of *Crowell v. Benson* still walk? In cases under the Longshoremen's Act, as we have seen, that case is still alive; for it is followed by the lower federal courts in cases where the exact facts enumerated as "fundamental" by Chief Justice Hughes are involved. In non-Longshoremen's Act cases, on the other hand, *Crowell v. Benson* has not been cited favorably since the *Appalachian Electric Power Co.* case,[96] and the decision of the Supreme Court in the *Hearst* case seems clearly inconsistent with it. It thus appears most unlikely that *Crowell v. Benson* will be applied today to statutes other than the Longshoremen's Act. As far as the latter statute is concerned, however, the lower courts will probably follow it until it is expressly overruled. Consequently it will take an express Supreme Court decision for *Crowell v. Benson* to be relegated definitely to the deserved repose which Mr. Justice Frankfurter asserts it has earned.[97]

95. Larson, *supra* note 59 at 205. The important Supreme Court decisions, other than the *Hearst* case and those under the Longshoremen's Act previously cited are Packard Motor Co. v. National Labor Relations Board, 330 U. S. 485 (1947); Unemployment Com'n. v. Aragon, 329 U. S. 143 (1946); Gray v. Powell, 314 U. S. 402 (1941); Rochester Tel. Co. v. United States, 307 U. S. 125 (1939); Shields v. Utah I. C. R. Co., 305 U. S. 177 (1938).

96. But see Judge Waller, concurring in National Labor Relations Board v. Robbins Tire Co., 161 F. 2d 798, 805 (5th Cir. 1947).

97. *Supra* note 2.