holders of shares issued in violation of such requirements apart from any tort theory. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057 (1902) (constitutional provision (Cal. Const., Art. 12, § 11) repealed Nov. 4, 1930); Bonbright, Shareholders' Defenses against Liability to Creditors on Watered Stock, 25 Col. L. Rev. 408 (1925); see *Fayette National Bank v. Meyers*, 211 Ky. 185, 277 S.W. 292 (1925). Under these cases only the agreement that the shares should be regarded as fully paid is held void, and an implied statutory obligation to make full payment is enforced. See 39 Harv. L. Rev. 757 (1926). In the instant case the court felt bound to reach a contrary result because of Arizona decisions in which shares issued in violation of the constitution had been characterized as void. None of these cases, however, involved the question of shareholders' liability for the benefit of creditors. In *Frame v. Mahoney*, 21 Ariz. 282, 187 Pac. 584 (1920), the stock improperly issued was cancelled in a minority stockholders' suit; in *Ettlinger v. Collins*, 25 Ariz. 115, 213 Pac. 1002 (1923), it was held that a purchaser of such stock might recover damages from his vendor if he could show bad faith; and in *Overlock v. Jerome-Portland Copper Mining Co.*, 29 Ariz. 560, 243 Pac. 400 (1926), a bona fide purchaser of such shares was denied the status and rights of a shareholder. The opinion in the case last cited expressly recognized that the provision was intended for the protection of corporate creditors. In view of this statement and of the absence of any controlling state decision, the federal court was hardly required to adopt a construction of the constitution frustrating this intention. There is some authority, however, supporting the instant case. *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377 (1897); *Lavell v. Bullock*, 43 N.D. 135, 174 N.W. 764 (1919) (concurring opinion). *Kellerman v. Maier, supra*, the case most relied on by the court in the instant case, has been discredited by being limited to its particular facts in a later California decision. *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057 (1902).

The court's refusal to grant relief to the trustee in bankruptcy upon a tort theory was in accordance with authority. Assuming the acceptance of the shares to involve a representation of full payment and assuming reliance thereon, any cause of action in deceit would be in the individual creditors and not in the corporation or its trustee in bankruptcy. *Courtney v. Georger*, 228 Fed. 859 (C.C.A. 2d 1915). Some courts have been liberal in inferring or presuming knowledge and reliance by creditors. *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N.W. 1117 (1892). But where, as in the principal case, one of the creditors knew all the facts and others were shown not to have relied upon the issuance of the shares, no recovery for their benefit could properly be based upon any fraud theory.

Courts—Retroactivity of Decisions—Right to Collect Taxes from Party Who Relied on Former Decision—[Wisconsin].—The defendant paid income tax on patent royalties in 1926 and 1927. In 1928, the United States Supreme Court in *Long v. Rockwood*, 277 U.S. 142 (1928), held this tax unconstitutional and the plaintiff tax commission refunded these amounts. From 1928 until 1931 when the defendant sold the patents, he listed income from this source under non-taxable income as directed. In 1932, *Long v. Rockwood* was overruled by *Fox Film Co. v. Doyal*, 286 U.S. 123 (1932), which required the defendant therein to pay taxes for the proceding years. Plaintiff now sues for taxes for 1928, 1929, and 1930. *Held*, the *Fox* case is retroactive and therefore plaintiff may recover back taxes for the years after the previous decision until the

sale of the patents, plus the customary interest at 6% from the day when the taxes would have been due. *Laabs v. Wisconsin Tax Commission*, 261 N.W. 404 (Wis. 1935).

Abhorrence for the concept of judicial legislation has been the mental salvation of courts for hundreds of years. Hale, History of the Common-Law 67 (4th ed. 1713). Thus Blackstone stated the true doctrine to be that courts declare but do not make the law. 1 Blackstone, Commentaries *68–71 (ed. 1866). *Cf.* Gray, Nature and Sources of the Law 98–100 (1921); Frank, Law and the Modern Mind 32 *et seq.* (1930). And the logical application of this doctrine requires that an overruling decision must operate retroactively; i.e., the previous decision is not bad law, it never was the law. *Falconer v. Simmons*, 51 W.Va. 172, 41 S.E. 193 (1902); *Crigler v. Shepler*, 79 Kan. 834, 101 Pac. 619 (1919). See 11 N.C. L. Rev. 323 (1932). This doctrine works hardship on parties who acquired their rights in reliance upon the previous decision. Therefore, where the construction or constitutionality of a statute is involved, most state courts refuse to give retroactive effect to the overruling decision where titles have vested (*Haskett v. Maxey*, 134 Ind. 182, 33 N.E. 358 (1893); *Levy v. Hitsche*, 40 La. Ann. 500, 4 So. 472 (1888)), where contract rights have arisen (*Farrior v. Security Co.*, 92 Ala. 176, 9 So. 532 (1890); *Thomas v. State ex rel. Gilbert*, 76 Ohio St. 341, 81 N.E. 437 (1907); *contra: Stockton v. Dundee Mfg. Co.*, 22 N.J.Eq. 56 (1871)), or where criminal acts have occurred (*State v. O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910); *State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904); 29 Harv. L. Rev. 80 (1915)). Parties involved must have relied upon the prior decision for the creation of their rights or immunities. *Nikoll v. Racine Cloak Co.*, 194 Wis. 298, 216 N.W. 502 (1927).

The United States Supreme Court has abetted the repudiation of retroactivity by (1) declaring that refusal to apply retroactivity raises no constitutional problems (*Great Northern Ry. Co. v. Sunburst Oil Co.*, 287 U.S. 358 (1932); see *Central Land Co. v. Laidley*, 159 U.S. 103 (1895); *Fleming v. Fleming*, 264 U.S. 29 (1924)); (2) arbitrarily following the prior decision of the state in cases in which federal jurisdiction is concurrent with that of the state (*Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863); *Douglass v. County of Pike*, 101 U.S. 677 (1879)); (3) declaring outright that a court rendering an overruling decision has the power to decide whether its decision shall operate retroactively or prospectively. (*Great Northern Ry. Co. v. Sunburst Oil Co.*, 287 U.S. 358 (1932)). *Cf.* 17 Minn. L. Rev. 811 (1933); 85 A.L.R. 262 (1933). The exercise of such power by state courts has evoked particular doctrinal criticism. Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409 (1924). But see Kocourek and Koven, Renovation of the Common Law through Stare Decisis, 29 Ill. L. Rev. 971 (1935). But the recognition of such power seems only a clearer recognition of the power of state courts to except cases at bar which involve the contract or property rights, noted *supra*, from the effect of an overruling decision. For irrespective of any mention of retroactivity, the holding in the overruling case declares the effect intended. If the court applies its overruling to a factual situation occurring after the previous case, it is declaring its decision retroactive. The conclusion that retroactivity was applied in the supposed case follows directly from the fact that the losing party has relied on the previous decision which was overruled. Similarly, when the court excepts the case at bar, it declares its decision prospective in operation. *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 So. 635 (1891); *Hill v. Brown*, 144 N.C. 117, 56 S.E. 693 (1907); Freeman, The Protection Afforded against the Retroactive Operation of Overruling Decisions, 18 Col. L. Rev. 230 (1918). Then as to the instant case, the fact that the overruling

decision failed to except the defendant therein (whose obligations had arisen after the previous decision) was properly interpreted by the Wisconsin court to make the defendant liable here.

But the court was not so obliged to add interest since interest was not assessed in the *Fox Co.* case. Two possible bases for the decision are offered by the court: (1) that the interest was a penalty under the Wisconsin Statute (Wis. Stats. 71.06 § 3(a) (1933)); (2) that by the application of retroactivity in the *Fox Co.* case, the tax was due all the time and this is merely interest on money past due. As a penalty, the charge is unjustifiable since in no real sense can the tax be considered delinquent. (3 Cooley, Taxation § 1274 (4th ed. 1924); *cf.* dissenting opinion in principal case, 261 N.W. 404, 408 (Wisconsin 1935)). As ordinary interest on money due, policy would seem to dictate that money is not due until payable and since the tax was not payable in the past, it was not then due.

Evidence—Admissibility of Opinions of Medical Experts—Testimony that Involves Legal Conclusions—[United States].—A war veteran sued on a war risk insurance policy. It was necessary that he prove his total and permanent disability in order to recover under the provisions of the War Risk Insurance Act (40 Stat. 409 (1917), 38 U.S.C.A. § 511 (1928)). The trial court permitted the plaintiff's physicians to testify that in their opinions the plaintiff was not capable of continuously carrying on a substantially gainful employment without injury to his health, that if he did do work he would die sooner and that he was totally and permanently disabled. The jury found for the plaintiff and the court entered judgment for him. This was affirmed in 68 F. (2d) 656 (1934). On appeal, *held*, judgment reversed. The weight of the evidence required a directed verdict for the defendant. The medical opinions that the plaintiff had become "totally and permanently disabled" should not have been admitted in evidence because that was the question for the jury to decide on all the evidence and in obedience to the court's instructions as to the meaning of the words. *U.S. v. Spaulding*, 293 U.S. 498 (1935).

American courts have been inclined to exclude the opinion evidence of expert witnesses on matters which include the issue that ultimately goes to the jury, on the theory that the admission of such testimony usurps the function of the jury. *Keefe v. Armour & Co.*, 258 Ill. 28, 101 N.E. 252 (1913); *Yost v. Conroy*, 92 Ind. 464 (1883); *U.S. v. Steadman*, 73 F. (2d) 706 (C.C.A. 10th 1934). Some courts indicate that the objection is avoided if the opinion is presented as an answer to a hypothetical question which raises the same problem as the ultimate issue. *Western Coal and Mining Co. v. Berberich*, 94 Fed. 329 (C.C.A. 8th 1899). Other courts have thrown off these self-imposed restrictions and admit the opinion testimony even though it involves the same issue that is to go to the jury. *Transportation Line v. Hope*, 95 U.S. 297 (1877); *Cropper v. Titanium Pigment Co.*, 47 F. (2d) 1038 (C.C.A. 8th 1931); *Poole v. Dean*, 152 Mass. 589, 26 N.E. 406 (1891); *Snow v. Boston & Maine R.R.*, 65 Me. 231 (1875). Courts adhering to this view deny that the function of the jury is being usurped because the opinion testimony will be weighed by the jury in the same manner as any other testimony. *Dayton Power Co. v. Utility Commission*, 292 U.S. 290 (1934); *Kennedy v. Upshaw*, 66 Tex. 442, 1 S.W. 308 (1886); *Dodge v. Sawyer*, 193 N.E. 15 (Mass. 1934).

A recognized limitation in all jurisdictions is that opinion evidence is to be excluded when the facts from which the inference is to be drawn can be set before the jury in