rather as conferring an alternative authority than as words of synonymous signification. Be that as it may, still it is evident that the word certificates was used by the testatrix as referring directly to the instruments in the hands of her brother, which were given in the adjustment of her claim for the balance due to her former husband to make his pay as director-general equal to what it would have been if he had been paid in specie.

Strong confirmation of that view is derived from the course pursued in the settlement of her estate and the long acquiescence of the complainants in the pretensions of the respondents and those under whom they claim. Evidence, however, of the most satisfactory character was introduced by the respondents showing that the land warrant never was in the hands of her brother prior to the date of the will, or at any other time, but it is not deemed necessary to enter into those details, as we are all of the opinion that the land warrant, if it passed to the husband by the will, passed under the devise which gave him during his life all the land which the testatrix possessed, that it did not pass to him by the other devise, and that the decree of the Circuit Court dismissing the bill of complaint is correct.

DECREE AFFIRMED.

BANK OF LEAVENWORTH *v.* HUNT, ASSIGNEE.

1. Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted.
2. An agreement between persons insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promise its president to deliver to the bank, whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the meantime retained in their possession, is void as against their other creditors.
3. Such an agreement does not create any lien upon the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act

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Any subsequent sale, made in pursuance of the agreement, does not take effect by relation at its date.

4. A mortgage of personal property, consisting of goods in a retail store, executed in Kansas to secure the payment of certain promissory notes, is void as against creditors of the mortgagors by statute, if the mortgage is not deposited in the office of the register of deeds of the county where the property is situated, or the mortgagors reside, and is void independent of the statute if the mortgagors remained in possession of the goods by the terms of the mortgage, and continued to sell the goods mortgaged with the assent of the mortgagees.

ERROR to the Circuit Court for the District of Kansas.

This was an action brought by the assignee in bankruptcy of Keller and Gladding to recover of the Second National Bank of Leavenworth the value of certain property alleged to have been transferred to it by them in fraud of the provisions of the Bankrupt Act.

On the trial evidence was introduced, on the part of the plaintiff, tending to show that the bankrupts had made a conveyance of their property to the defendants when they were insolvent, and that the defendants had reasonable grounds for believing that the bankrupts were in this condition at the time; that the transfer was not made in the ordinary course of their business; and that, on the first day of August, 1866, they executed a chattel-mortgage on portions of their property to the cashier of the bank to secure the payment of two notes, each for four thousand dollars, belonging to that institution. This chattel-mortgage provided that in case of default in the payment of the notes or interest, it should be lawful for the cashier of the bank to take possession of the property and sell the same. The mortgage was never deposited in the office of any register of deeds of any county in Kansas. The statute of Kansas in force at the time declared a mortgage of goods and chattels, not accompanied by an immediate delivery of the property and followed by an actual and continued change of possession, absolutely void as against creditors and subsequent purchasers and mortgagees in good faith, unless the mortgage or a copy thereof was forthwith deposited in the office of the register of deeds in the county where the property

was situated, or if the mortgagor was a resident of the State, then in the county of which he was a resident.*

Thereupon evidence was given on the part of the defendants, tending to show that the bankrupts, in conversations preliminary to the execution of the chattel-mortgage, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promised its president to deliver to the bank, whenever it should desire, the entire stock of goods which they might have at the time on hand; that in February, 1867, in pursuance of this agreement, they delivered a portion of their stock, amounting in value to $2542, and in July following they turned over the balance to the bank.

Evidence was also given, tending to show that the bankrupts continued to sell the goods included in the mortgage, and all other goods at their store, with the consent of the defendants, until the transfer in July, 1867, and that this was contemplated by the parties when the mortgage was made.

The defendants thereupon prayed the court to instruct the jury, that if they "believe from the evidence that the conveyance by Keller and Gladding, in July, 1867, was made in pursuance of the original agreement between them and the bank, they are to regard the sale or transfer as valid, and not [as made] in contemplation of evading the provisions of the bankrupt law." The court refused to give the instruction, and the defendants excepted. The correctness of this refusal was the question presented for consideration in this court. The plaintiff obtained judgment, and the defendants brought the case here by writ of error.

Messrs. Sherry and Helm, for the plaintiffs in error; Messrs. Stillings and Wheat, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The question presented for our consideration arises upon the refusal of the Circuit Court to give the instruction

* Compiled Laws of Kansas of 1862, p. 723.

prayed; and it is one easily answered. It would have been error to have given the instruction, for it assumes that there was an original valid agreement between the parties that the plaintiffs should deliver to the bank the entire stock of goods when desired.

In the first place, the record does not disclose that any such agreement was established; it only discloses that the evidence introduced tended to show that, in conversations preliminary to the execution of the mortgage, the bankrupts made a promise to the president of the bank to that effect.

Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive province of juries.

In the second place, the supposed agreement, if established, was void as against other creditors of the bankrupts. It did not create any lien upon the property, or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act. The subsequent sale, even if made in pursuance of the agreement, did not take effect by relation at its date. Transfers of personal property, situated as in this case, only take effect as against creditors from the delivery of the property to the purchaser.

The stipulation in the chattel-mortgage, providing that in case of default in the payment of the notes or interest, it should be lawful for the cashier of the bank to take possession of the property and sell the same, does not aid the defendants for two reasons, both equally conclusive. 1st; The mortgage was never deposited in the office of the register of deeds of the county where the property was situated or the mortgagors resided, and was therefore void as against creditors under the statute of Kansas. 2d; The mortgagors remained in possession of the goods notwithstanding the mortgage, and by its terms; and the testimony tended to show that they continued to sell the goods, with the assent of the defendants, until the transfer in July, 1867. The

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court could not assume the instrument to be valid in the face of this testimony, for if the facts were found by the jury which the testimony tended to establish, the mortgage was fraudulent and void as against creditors.*

In any view of the case the instruction prayed was properly refused.

JUDGMENT AFFIRMED.

MISSOURI *v.* KENTUCKY.

1. On a question of the exact ancient course of a river in a wild region of our country, maps made by early explorers being but hearsay evidence, so far as they relate to facts within the memory of witnesses—*ex. gr.* since A. D. 1800—are not to control the regularly given testimony of such persons.
2. It seems that the old maps (those *ex. gr.* prior to A. D. 1800), indicative of the physics and hydraulics of the Mississippi, are not greatly to be relied on.
3. Wolf Island, in the Mississippi River, about twenty miles below the mouth of the Ohio, is part of the State of Kentucky, and not part of the State of Missouri. This fact settled by the testimony of witnesses as to which State exercised jurisdiction; as to where the middle of the main channel of the Mississippi River had been when the boundary between the States was fixed; by the character of the soil and trees of the island, as compared with the soil and trees of Missouri and Kentucky respectively; and by the natural changes produced in the course of the current by the physics and hydraulics of the river since the time mentioned as generally and specifically shown.

THE State of Missouri brought here, in February, 1859, her original bill against the State of Kentucky, the purpose of the bill being to ascertain and establish, by a decree of this court, the boundary between the two States at a point on the Mississippi River known as Wolf Island, which is about twenty miles below the mouth of the Ohio. The State of Missouri insisted that the island was a part of her territory, while the State of Kentucky asserted the contrary. The bill alleged that both States were bounded at that point by the main channel of the river, and that the island, at the

* Griswold *v.* Sheldon, 4 Comstock, 581; Wood *v.* Lowry, 17 Wendell, 492.