to identify it;" and at an early day, in construing this statute, this court held that it was not sufficient to describe a merchant's wares "as a stock of goods, wares, and merchandise," but that an inventory of the goods must be given. *Messner* v. *Lewis*, 20 Tex. 221. From the principle so described, it would follow that, when an attachment is sought to be levied upon several tracts of land, each should be specifically described; and, if the description of each is not certain in itself, then it should at all events refer to some document which would make it certain. If the description above quoted means to point out a survey merely upon which the town of Moulton is situate, it is too vague to show by any definite terms what particular survey it is. If it means a 150 acres which had been laid off into lots and blocks, and designated as the town of Moulton, then it should have described each lot and block by its number, or by some other designation, so that each could be particularly identified, and so that the order of sale under the judgment of foreclosure could direct the sheriff specifically to sell each particular parcel. The levy would have compelled a sale in mass, and was therefore illegal. In *Mackay* v. *Martin*, 26 Tex. 57, it is said: "It is scarcely possible that a sale in gross, pursuant to a levy upon a mass of property without any specific description, embracing undefined and unascertained interests, could be a fair sale of the property for its full value." The part of the levy not quoted above is upon another town tract, and the description is very similar, and no better. We are of opinion that the entire levy is insufficient, and that it should have been held for naught.

The judgment of the court below is accordingly reversed, and is here rendered for the appellee for his debt and interest, and that he take nothing by reason of his attachment.

HAWES *et al.* v. NICHOLAS.

(*Supreme Court of Texas.* January 22, 1889.)

WILLS—REVOCATION—REVIVAL.

Rev. St. Tex. art. 4861, prescribes that a will may be revoked by a subsequent will, codicil or declaration in writing executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence. *Held*, that the cancellation of a will expressly revoking all former wills does not revive a former will.

Appeal from district court, Calhoun county.

Application by Emma J. Nicholas to probate the will of H. W. Hawes, deceased. E. Hawes, the widow, and a number of the children of deceased, opposed the probate; which being granted on appeal to the district court, contestants appeal.

E. Hawes, for appellants. *Glass, Callender & Proctor*, for appellee.

HENRY, J. In the year 1873, H. W. Hawes executed a will, by which he devised specified portions of his estate to one of his sons and his granddaughter Emma J. Nicholas. This paper was styled a "deed," and shortly after its execution was acknowledged by the maker, and recorded as a deed by the county clerk of Calhoun county. The instrument remained in the custody of one of the devisees, and was produced by him after the death of the maker. In the year 1879 the said H. W. Hawes executed another will, in which he expressly revoked all prior wills, and which was inconsistent in some material respects with the will of 1873. In 1883 the testator destroyed the will of 1879 by tearing and burning it. He died in the year 1883.

In the year 1887 appellee, Emma J. Nicholas, filed in the county court of Calhoun county an application to probate the will of 1873, which she produced and proved. This application was opposed by the widow and a number of the children of the deceased, H. W. Hawes. The contestants pleaded,

as reasons why the will of 1873 should not be admitted to probate, the execution and subsequent destruction of the will of 1879. The case was tried in the county court, and appealed to the district court. In the district court exceptions to the answer of contestants were sustained, and the will of 1873, upon proper proof of its execution being produced, was admitted to probate. The contestants offered, but were not permitted to prove, the execution as required by law of the will of 1879, containing a clause expressly revoking all previous wills, and provisions inconsistent with the will of 1873, and the subsequent destruction by tearing and burning of the will of 1879. The contestants appeal, and assign as error that "the court erred in sustaining the exceptions of applicant to contestants' answer, and in holding that the destruction by the decedent of the will of 1879, in 1883, had the effect of reviving the will of 1873."

The question as to whether, and under what circumstances, the destruction of a subsequent will, will revive a prior one, has been much discussed. The authorities are conflicting. In 4 Kent, Comm. 532, it is said: "If the first will be not actually canceled, or destroyed, or expressly revoked, on making a second, and the second will be afterwards canceled, the first will is said to be revived. But the first will is not revived if the testator makes a second, and actually cancels the first by an absolute act rendering it void, and then cancels the second will. It will, in such a case, require a republication to restore the first will." The attorneys for appellee quote in their brief the following language from Redfield on Wills: "The general rule seems to be firmly established from an early day that a later will, revoked, will not prevent an earlier and inconsistent one from remaining in force; and it makes no difference whether the later will contained an express clause of revocation or not." Volume 1, pp. 308, 309. But further on the same author says: "It seems to have been regarded as an unsettled question in the English courts, both in Westminster hall and doctors' commons, whether the cancellation of a later revoking will would have the effect to revive the former will thus revoked. The result of the most careful examination of the cases leaves the question in a state of distressing uncertainty. The most we can say is that it depends upon circumstances; and that extrinsic evidence is admissible, in regard to the intention of the testator, was freely admitted before the late statute, which required some positive act of revival." Id. 320, 322.

The question is discussed in the case of *Colvin* v. *Warford*, 20 Md. 391, and there it is said: "The authorities undoubtedly established the principle that an unconditional revocation is not essentially testamentary in its nature, and, like the will containing it, liable to vary with the testamentary purpose, but a positive consummated act, producing an immediate and conclusive effect. * * * The principle established in the ecclesiastical courts of England is that the canceling of a will containing an express revocation of a previous will does not necessarily revive the will revoked, although the presumption of an intention on the part of the testator to revive the previous will may be raised by his destruction of the revoking will."

In the case of *James* v. *Marvin*, 3 Conn. 577, Chief Justice HOSMER says: "An express revocation is a positive act of the party, which operates, by its own proper force, without being at all dependent on the consummation of the will in which it is found, and absolutely annuls all precedent devises." "It is because an express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously, and *per se*. As a clear consequence resulting from this principle, all prior wills are recalled or reversed,—the proper meaning of the word 'revoked,'—and must remain in this condition until revived by republication. * * * A deed of revocation, separate from a will, has the effect of annulling a prior will instantaneously; and the operation is the same whether the revoking clause be in deed or will, for it is never a necessary part of the latter."

In the case of *Peck's Appeal*, 50 Conn. 563, it appears that Lucy Peck made a will in 1875, and in 1880 made another inconsistent with the first. She died not long afterwards. The last will was never found, but the first one was. The new will did not expressly revoke the first one. The court held that "prior to 1821 any will might be revoked in writing, and it was not necessary that the writing should be executed with every particular formality. It was then held that a revocation contained in another will was not ambulatory, but took effect immediately, and that the will revoked could not be revived without a republication."

In 1821 a statute enacted that "no devise of real estate shall be revoked otherwise than by burning, * * * or by some other will or codicil in writing. * * *" That section required that a written revocation should be in another will. The statute changes the aspect of the question. Before the statute any written declaration to that effect revoked a will, irrespective of any statute, and without regard to the death of the testator. Now, the statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments.

In our state a statute prescribes the method of revoking a will to be "by a subsequent will, codicil, or declaration in writing executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence." Rev. St. art. 4861. A written declaration, properly executed, as effectually revokes a will from the date of its execution as does its destruction. If the purpose to revoke is sufficiently expressed, and the writing is properly executed, it cannot be controlled or limited by the name given the instrument, or by its containing other provisions. If the will of 1879 was properly executed as a will, and contained a clause expressly revoking the will of 1873, we do not think that the subsequent destruction of the will of 1879 had the effect of reviving the will of 1873.

We think there was error in sustaining exceptions to the answer of contestants, and that for this cause the case must be reversed.

HOLSTEIN *v.* ADAMS *et al.*

(*Supreme Court of Texas.* January 22, 1889.)

1. TRESPASS TO TRY TITLE—PLEADING—IMPROVEMENTS.
   Evidence of improvements offered by defendant in trespass to try title cannot be excluded because his plea does not state the grounds for alleging himself to be a possessor in good faith, such plea being otherwise sufficient, and not having been excepted to, though Rev. St. Tex. art. 4813, requires such grounds to be set out. The objection should be taken by special demurrer.

2. APPEAL—REVIEW—RULINGS ON EVIDENCE—HARMLESS ERROR.
   But where the bill of exceptions states that defendant proposed to show by certain witnesses that the improvements were made in good faith, but does not show that such witnesses would testify to any facts from which good faith may be found, the rejection of the evidence is harmless, as a witness could not be permitted to state his conclusion that the improvements were made in good faith.

3. SAME—OBJECTIONS NOT MADE BELOW.
   Where plaintiffs show that a certain person acquired title on a specified date, and that a person of the same name, who was in the state about that time, died in another state, and that they are his heirs, and there is nothing to disprove the identity of the owner and such ancestor, a judgment for plaintiffs will not be reversed for want of further proof of identity; the objection not having been made below.

4. ADVERSE POSSESSION—ACTUAL AND CONTINUOUS.
   Adverse possession, to be available, must have been continuous for the statutory period, Rev. St. Tex. art. 3198, defining adverse possession to be an actual and visible appropriation, commenced and continuous under claim of right, etc.

Appeal from district court, Fayette county.