the will himself with the intention of revoking it is also rebutted, could the will in any case be considered in law as the last will and testament of Patrick Conlin?

The execution of a second will in 1876 admittedly revoked the will of 1866. Did the destruction of the second will *animo cancellandi*, accompanied by declarations which showed that the testator supposed he had thereby revived the will of 1866, effect that purpose?

This point was not argued before me by counsel except by a mere reference to sec. 7 of the Wills Act, and no authorities on the point were submitted. I have carefully looked into the authorities, and I find the point expressly determined by several English cases.

In *Dickinson* v. *Swatman*, 4 Sw. & Tr. 205 (also reported), 6 Jur. N. S. 831 (30 L. J. P. 84), it was held under the English Wills Act 7 Wm. IV. and 1 Vict. c. 26, that where A. had made a will in 1826, and another in 1851 inconsistent with the former, the destruction of the latter with *animo cancellandi*, even when the act (as in this case) was accompanied by statements that the deceased intended thereby to revive the will of 1826, failed to do so. It was expressly held that a will could only be revived in the manner pointed out by 7 Wm. IV. and 1 Vict. c. 26, and not by declarations of the testator.

See also *Cutto* v. *Gilbert*, 9 Moore P. C. C. 131, which decided upon somewhat similar facts to those mentioned in the preceding case, that the deceased died intestate.

In the *Goods of Steele*, 1 L. R. P. & D. 575, decides that since the passage of the Wills Act, a will cannot be revived by implication. The sections of our own Wills Act are upon this point a transcript of the English statute, and these decisions fully cover the point in dispute.

To give effect to these decisions I must, therefore, find the issues herein in favour of the defendants, and find that the said will of Patrick Conlin, dated 10th May, 1866, is not his last will and testament, and that the said Patrick Conlin died intestate.

With reference to the question of costs, as the legal question upon which the case is now decided, was fully disposed of by the cases I have above referred to years before the litigation was commenced, I cannot allow them out of the estate. I therefore direct the plaintiffs to pay the costs of all the defendants.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

FOURTH DIVISION COURT OF THE COUNTY OF ONTARIO.

SMITH *v.* THE CORPORATION OF THE VILLAGE OF CANNINGTON.

Ditches and Watercourses Act—Right of engineer to recover fees—Parol evidence to vary written contract—Witness fees.

An engineer appointed under the Ditches and Watercourses Act is entitled to his fees, when the by-law appointing him is silent as to his rights, in case his award is set aside.

Parol evidence, inconsistent with the by-law of the corporation, of an agreement between members thereof and the engineer that no fees were to be charged by him in case of his award being set aside, is not admissible.

The Act applies to all municipalities, but

Semble, its powers should not be put in force unless clearly applicable, or if to do so would be oppressive or inequitable, or if the benefits ensuing are out of proportion to the cost of the work.

[DARTNELL, J.J., Whitby.

The plaintiff was the engineer appointed by the defendants under the Ditches and Watercourses Act. He made an award in a certain matter under the Act, which award was set aside by the senior judge of the county, on the ground, chiefly, that the provisions of the Act did not apply to incorporated towns and villages. The by-law appointing the plaintiff was silent as to his remuneration. The plaintiff claimed for his services, and the defence set up was that there was an agreement between the plaintiff and the reeve that there should be no charge to the corporation in case this or any award made by the plaintiff should be set aside.

DARTNELL, J.J.—It is not disputed that the services performed by the defendant were rendered, and were so rendered under the by-law, or that the amount claimed ($40) was not excessive. The question for decision is whether there was any valid agreement under which the plaintiff is precluded from recovering the amount of his claim.

I think the evidence of such an agreement is inadmissible as contradicting or varying the written contract, which must be taken as the Act, the resolution of appointment and the by-law. The two latter were silent as to any conditional agreement. The defendants' soli-