

Moore moved for a mandamus to compel the corporation of the united counties of York and Peel to collect \$3,081 78, a portion of the expense of erecting the grammar school-house, &c., for the grammar school at Weston; the trustees of the grammar school having applied to them for that purpose on the 22nd June last.

He referred to Con. Stat. U. C., cap. 63, secs. 16, 17, 20, 21, 22, 23, 24, and 25, and sub-sections of the latter sec. from 1 to 5 inclusive, and also to cap. 64, secs. 222 and 224, as shewing that the corporation were bound to raise the money on the application of the trustees.

He also referred to Tapping on Mandamus, p. 30, where it is stated it is a general rule that whenever an act of parliament gives power to, or imposes an obligation on, a particular person to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court of Queen's Bench will, in order to prevent a failure of justice, grant *ex debito justitiæ* a mandamus to command the doing of such act or duty.

RICHARDS, C.J.—Con. Stat. U. C. c. 63, s. 16, enacts that the municipal council of each county, township, city, town, and incorporated village, may from time to time levy and collect by assessment such sums as it judges expedient to purchase the sites, to rent, build, and repair all grammar school-houses and their appendages, and for providing the salary of teachers, &c., and all sums so collected shall be paid over to the treasurer of the county grammar school for which the assessment is made; sec. 17 merely provides that the county council may establish additional grammar schools within their municipality and appoint trustees according to the 20th section; sec. 20 provides for the appointment of a board of trustees for each grammar school by the county council; sec. 21 states that two members of the board shall retire annually; sec. 22 authorises the council to fill up any occasional vacancy in the board; sec. 23 directs the council to name two trustees on the 1st of January in each year, to fill the vacancies caused by the annual retirement of the two members; sec. 24 constitutes the trustees of each grammar school a corporation; sec. 25 declares their duties—sub-sec. 1, to appoint a chairman, secretary, treasurer, &c.; sub-sec. 2, to take charge of the county grammar school for which they are appointed, and the buildings and lands appertaining thereto; sub-sec. 3, to appoint and remove the master and other teachers, and to fix their salaries, &c.; sub-sec. 4, to appoint such other officers and servants as they may deem expedient, and fix their remuneration; sub-sec. 5, to do whatever they deem expedient with regard to erecting, repairing, warming, furnishing, and keeping in order the buildings of such school and their appendages, lands, &c., and enclosures belonging thereto, and to apply (if necessary) for the requisite sums to be raised by municipal authority for such purposes. The other sub-sections are not material. The sections in the Municipal Act merely refer to the authority of the municipalities to pass by-laws to raise money to pay their debts. Now contrast the language used in the Grammar School Act with that used in the Common School Act, on which latter act, section 27 of Consol. Stats., cap. 64, writs of mandamus have frequently been issued. Duties of trustees, sub-sec. 12, to apply to the township council at or before its meeting in August, or to employ their own lawful authority as they may judge expedient for the levying and collecting by rate according to the valuation of taxable property * * * all sums for the support of their schools * * * or for any other school purposes authorised by the act to be collected from the freeholders and householders of such section.

Then sec. 34, under the head of Duties of Township Councils: For the purchase of a school site, the erection * * * of a school house * * * the salary of the teacher, each township council shall levy by assessment on the taxable property in any school section, such sum as may be required by the trustees of such school section, in accordance with the desire of the majority of the freeholders and householders expressed at a public meeting called for that purpose.

Under the Common School Act the trustees of a school section have power to apply to the township council to raise the money they require, but the 34th section is the one which declares that the council shall levy. It does not, like the 16th section of the Grammar School Act, say that certain municipalities may from time to time levy and collect, but it is obligatory, shall collect.

Then which of the municipalities under the Grammar School Act are to levy and collect the amount—the township in which the grammar school is situate, or the county municipality? Each of the municipalities has the power if it be compulsory who is to say which municipality shall raise this sum of \$3,000 odd dollars. If the board of grammar schools for the particular locality where the expense has been incurred, then the county council, as a general rule, would, I apprehend, always be compelled to pay.

The section in Tapping referring to parties having the power by act of parliament to do an act, being compelled to do so by mandamus, can never apply to a case where a municipality has the power given to it to raise such sums as it judges expedient. If it judges it expedient not to raise the sum applied for, it surely must be acting within the law, and cannot be compelled to do what is now sought for on this application. We are all of opinion that the county council are not bound to raise this money, and that consequently no mandamus can go to compel them.

Per cur.—Mandamus refused.

IN RE GLASS AND SPRING—AND THE HON. JOHN A. MACDONALD, ONE, &c.

Attorney—Owts of sale under mortgage.

Held, that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, (Consol. Stats. of U. C., ch. 35,) though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto.
Semble, per *Richards, C.J.*, an application to set aside a judge's order should be made within a reasonable time after the issuing of the order. [T. T., 27 Vic.]

In Trinity Term last *Vinkoughnet* obtained a rule nisi to set aside the order of the Honourable the late Chief Justice of Upper Canada, dated the 6th of July, 1863, or so much thereof as the court might think fit, on the ground that the taxation on which the order was made having been a taxation between third parties under the third parties' clauses of the Attorneys Act, Consol. Stats. of U. C., cap. 35, there was no power to order the costs of the taxation to be paid by the said John A. Macdonald to the said W. & D. Glass, there being no privity between them, and the statute not providing for the same. And on the ground that the order irregularly calls on the Trust and Loan Company of Upper Canada and the said John A. Macdonald to pay over to the said Messrs. Glass the sum of money therein named as the sum deducted from the said Macdonald's bill under the order of taxation thereof, there being no power to order the said Trust and Loan Company to pay over, as not being parties to the taxation, and not being subject to the summary jurisdiction of the judge, and there being also no power to order the paying over the said sum of money to the said Messrs. Glass, they having only a right to tax the said bills, and being left to their remedy against the said Trust and Loan Company for the said amount.

The order of the late Chief Justice was dated the 6th of July, 1863, and was to the following effect: He ordered the said John A. Macdonald and the Trust and Loan Company of Upper Canada, or either of them, forthwith to pay over to Messrs. W. & D. Glass, the sum of nineteen pounds, nine shillings and nine pence, being the amount deducted from the said Macdonald's bills under the order of taxation thereof of the Honourable Mr. Justice Hagarty, dated the ninth day of May last, the same having been retained by the Trust and Loan Company out of moneys in their hands belonging to the said Messrs. W. & D. Glass, and now due and owing to the said Messrs. W. & D. Glass. He further ordered the said Honourable John A. Macdonald to pay all costs incurred by the said Messrs. W. & D. Glass in obtaining said order for taxation, and incurred in and by said taxation and in the course thereof, and of that application.

The above order was entitled in the matter of the Honourable John A. Macdonald, Gentleman, one, &c.

The order of Mr. Justice Hagarty was dated the 9th of May, 1863, and was entitled the same as the order of the Chief Justice McLean, and was to the effect that he ordered that the said Honourable John A. Macdonald's bill of costs, incurred in selling the lands under the power of sale, and in the causes and matters mentioned in the papers filed on said application arising from mortgage given by D. Glass to the Trust and Loan Company, be