

the plaintiffs had a vested right to be compensated for the loss they had sustained to the extent to which the council was bound to award compensation, and the defendants were under a liability to award and pay compensation, and this right of the plaintiffs and this liability of the defendants was not affected by the repeal of the earlier legislation.

Reference was made to the recent decisions in *Re Hogan v. Township of Tudor* (1915), 34 O.L.R. 571; *Hogle v. Township of Ernesttown* (1917), 41 O.L.R. 394; and *Noble v. Township of Esquesing* (1917), 41 O.L.R. 400; and the Chief Justice said that in coming to his conclusion he was not differing from the reported opinion of any Judge except that of the trial Judge in this case.

There remained the question of the right of the plaintiffs to the mandatory order which they claimed. It was contended by the appellants that such an order could not be made in an action. The weight of judicial opinion was against the right to invoke the remedy of the prerogative writ in an action: *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329; *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48; *City of Kingston v. Kingston etc. R.W. Co.* (1897-8), 28 O.R. 399, 25 A.R. 462, 468, 469; *East-view Public School Board v. Township of Gloucester* (1917), 41 O.L.R. 327.

The mandamus ought not to be awarded, for two reasons: (1) because it cannot be awarded in an action; and (2) because the members of the council, to whom, if issued, it would be directed, were not parties to the action.

The only mandamus which the plaintiffs would be entitled to, on a proper application, would be a mandamus to the members of the council to make the inquiry and the award which, by sec. 18 of R.S.O. 1914 ch. 246, the council is required to make, and the members of the council would be the respondents in any such application, and not the corporation. That being the case, no declaration of the right of the plaintiffs to such a mandamus could or ought to be made in a proceeding to which the members of the council were not parties.

The appeal should be allowed and the action dismissed without prejudice to any other proceedings which the plaintiffs might be advised to take in respect of their claim for compensation.

There should be no costs of the action or of the appeal to either party. The plaintiffs had failed, but the merits were with them to some extent at least, and the council was at fault for not having performed the duty which rested upon it under sec. 18 of the revised statute.

*Appeal allowed.*