

I perceive no miscarriage in the trial or frame of the record on the other points argued, and no case is made for a new trial on the ground of surprise.

As to the statute R. S. O. 1897 ch. 129, sec. 11, *Hunter v. Boyd*, 3 O. L. R. 183, is an example of a so-called "joint tort," where the action was against surviving tort-feasors and the representatives of the deceased.

The judgment is affirmed with costs.

A collateral matter of no small importance has been brought to the notice of the Court incidentally in reading the affidavits filed upon the application for a new trial.

The notice of motion was dated 21st December, 1905, and served on the next day, and referred to no affidavits.

We find on the files of the Court two affidavits of Robert Forsyth, sworn on 23rd December, 1905, and two by William Forsyth, sworn on the same day, and another made by defendants' solicitor, sworn on 29th January, 1906. The 4 Forsyth affidavits were filed on 27th January, 1906, and that by the solicitor was filed on 30th January. So far as related to matters involving a new trial and the manner of getting evidence, these were answered by affidavits of plaintiff and his solicitor, sworn on 7th and 8th February and filed on 10th February.

One of the affidavits of William Forsyth was not then answered by the solicitor, upon whom serious imputations were thereby cast as to the terms on which he was to conduct the litigation for plaintiff. This phase of the controversy was not brought to our attention on the argument.

The solicitor, upon being notified by the registrar of his unanswered affidavit, sent in his answer under oath by affidavits sworn 22nd February, in which he says that this particular affidavit of Forsyth was not served upon him nor was his attention called to it until he read the letter of the registrar.

It is highly undesirable that litigation should be conducted in this way; if the affidavit impeaching the conduct of plaintiff's solicitor was to be availed of, the point should have been brought emphatically before the Divisional Court and discussion had in open court. But, finding the affidavit on the files of the Court, we gave the solicitor an opportunity