them, if such suit relate to the same subject or substantially involve the same material questions.

And in an action in which a witness had given evidence at a trial but on appeal a new trial of the action was granted for which he could not be found it was sought to have his evidence given in the first trial used on the second.

It was shewn that the witness had called at the defendant's place of business between the two trials and stated that he was going to the "other side" and that on enquiries being made a couple of weeks before the second trial at his address, where he had been stopping the persons there could not tell his address except that he had gone to the States, they thought to Cleveland,

Held, that it was not necessary to prove that he was out of the jurisdiction and that the answers to the enquiries were admissible to prove the unsuccessful search for the witness and the inability to find him and should not be treated as hearsay evidence and that sufficient diligent enquiry was shewn and the evidence of the witness should have been received.

Munro v. *Toronto Railway Co.* (1904) 9 O.L.R. 299 at p. 312 distinguished.

Held, also, that there was sufficient evidence to entitle the plaintiff to have the case left to the jury.

Judgment of ANGLIN, J., reversed.

Wm. M. Hall, for the appeal. *Godfrey* and *Phelan*, contra.

Riddell, J.] RUETSCH *v.* SPRY. [April 11.

Vendor and purchaser—Sale of house and portion of land—Fence on boundary line—Interference with enjoyment of vendee's portion—Derogation from grant—Injunction.

Defendant being the owner of certain land on the east end of which was a house which was lighted by windows on the west side, sold part of the land including the part upon which the house was built to the plaintiff. After an action to determine the boundary line which had been incorrectly defined in the deed and which was decided in the action to be very close to the house the defendant built a high close board fence entirely on his own land but up to the boundary line.

Held, in a second action that the defendant could not derogate from his own grant and as the trial judge found on the