It seems to me impossible to conceive of a case in which our Con. Rule 209 is more to the point—and I do not think the cases prevent its application. . . .

[Reference to Smith v. Matthews, 7 O.W.R. 598, 9 O.W.R. 62; Payne v. Coughell, 17 P.R. 39; Confederation Life Association v. Labatt (No. 2), 18 P.R. 266; Wilson v. Boulter, 18 P.R. 107; Windsor Fair Grounds Association v. Highland Park Club, 19 P.R. 130; Parent v. Cook, 2 O.L.R. 709, 3 O.L.R. 350; Langley v. Law Society of Upper Canada, 3 O.L.R. 245; Miller v. Sarnia Gas Co., 2 O.L.R. 546; Gagne v. Rainy River Lumber Co., 20 O.L.R. 433; Wade v. Pakenham, 2 O.W.R. 1183.]

I am convinced that Con. Rule 209 has been given quite too narrow an application, and hope that the matter may receive full consideration in an appellate Court. But, taking the tests laid down by my brother Teetzel, in Gagne v. Rainy River Lumber Co.; in the present case, there is the implied contract of the auctioneers with the defendants—and the damages recovered by the plaintiff, if any, from the railway company are the measure of damages recoverable by the defendants from the auctioneers, their agents. See also London and Western Trusts Co. v. Loscombe, 13 O.L.R. 34; Budd v. Dixon, 9 O.W.R. 371.

Applying the test in Wilson v. Boulter, it would be unfortunate if the damages on the two contracts should be assessed by two tribunals. See Benecke v. Frost, 1 Q.B.D. 419, 422; Ex p. Smith, In re Collie, 2 Ch. D. 51.

I have not considered the English cases as binding (being upon a Rule differently worded), though I have read those cited and several others.

Then as to time, the notice should have been served (Con. Rule 209) "within the time limited for the service of . . . defence." Power exists in the Court to extend this time (Con. Rule 353), and the time should be extended, if a proper case is made out for such extension.

The reason advanced for such extension is, that it was only recently that the defendants were aware that the auctioneers had had dealings with the plaintiff behind their back. This is to me no reason whatever. The statement is, that the auctioneers, without the knowledge of the railway company, allowed the plaintiff to take away certain of the goods intrusted to them to sell. This conduct, if it resulted in loss to the defendants, *e.g.*, if it prevented the full amount of the charges being obtained, no doubt gives a cause of action to the defendants—no doubt, the defendants could sue both the auctioneers and the plaintiff for taking these goods—and could have counterclaimed in this action. But the liability on the implied contract