

abortive proceeding a motion was made for relief and for the trial of another action as a test action. Malins, V.-C., then made an order substituting another action as a test action. The defendants appealed; and the sole question upon the appeal was whether the test action had been "tried" within the meaning of the terms of the order. The Court upheld the defendants' contention.

But it is manifest that some, at any rate, of the Judges doubted whether the original order had been properly made: Brett, L.J., saying:

"It seems to me that no such order as this ought to be made unless the questions in the actions are substantially the same and the evidence would be substantially the same if they were all tried."

This view is that now adopted in the case already cited, *Lee v. Arthur*, where the Court of Appeal quote the judgment in the case of *Corporation of Saltash v. Jackman*, 1 D. & L. 851, and state that the Court "cannot compel one defendant against his wish to have his case tied up with those of the defendants in other actions."

The same reasoning shews the impossibility of compelling a plaintiff to tie up his case with those of other plaintiffs without his consent. *Westbrook v. Australian Mail*, 23 L. J. C. P. 42, is an illustration of this. Eight separate passengers, by the same attorney, brought separate actions for damages arising out of a breach of contract for passage whereby the plaintiffs suffered in their health. Maule, J., said: "They have suffered different grievances. Mr. Smith could not be said to have suffered in Mr. Brown's health."

*Williams v. Raleigh*, at 14 P. R. 50, affords another illustration. Several plaintiffs brought separate actions for injury to their several farms by certain drainage works; and it was held by Ferguson, J., a Judge most familiar with the common law practice, that there could not be consolidation in either the true or the modified sense of that expression.

The direction which has been given by the learned Master in Chambers, I think, satisfactorily meets the case. Manifestly damages will have to be assessed in the different cases; and, it would be most unfair to direct the trial of the individual claims to be delayed when this would delay the recovery of final judgment. The circumstances prevent the imposition of the term invariably required; a stay will