

In the second place, it is said that, while Rule 1132 enables a trial Judge to deal with the question of costs when he gives judgment for an amount within the jurisdiction of an inferior Court, it does not enable him to make an anticipatory order dealing with the question of costs in a case where he gives a judgment for an amount beyond the jurisdiction of the inferior Court, but which may be reduced by an appellate Court. It is said that the appellate Court, and the appellate Court alone, has power to "order to the contrary," when it so reduces the amount as to place the plaintiff in jeopardy.

Both these contentions appear to me to be exceedingly formidable; but, upon the best consideration I can give to the matter, I do not think it necessary to determine either of them in this case; because the judgment, as varied by the Court of Appeal, is not, in my view, one within the proper competence of a County Court. The action was not merely for a money recovery—it was also for a declaration; and, as modified by the Court of Appeal, it contains, first, a declaration "that the injuries which the plaintiff received on the occasion mentioned in the statement of claim resulted in temporary total disability, but were not received while he was a passenger within the meaning of the policy sued on;" and then follows a recovery for \$650, "26 weeks' benefit accrued at the time of the issue of the writ herein." This is followed by an award of costs, which will carry costs upon the High Court scale, unless it can be said that the action is within the competence of the County Court.

It may well be that the effect of an action to recover the accrued instalments would be to determine all the matters in issue so as to bind the parties litigant in any action for instalments which subsequently accrue; but the judgment here does not leave the rights with respect to the subsequent instalments to be determined upon any principle of *res judicata*; it makes them the subject of a substantive adjudication; so that it cannot be said that this action was concerned merely with the past-due instalments: it is in form, as well as in substance, an action dealing with the instalments yet to accrue. The learned trial Judge thought—and apparently the Court of Appeal agreed with him—that this made the case one in which the plaintiff was entitled to have his full costs, even though he failed in recovering the full amount sued for; as the defendants, instead of admitting liability to the extent of the single indemnity, denied liability altogether.

For this reason, the appeal should be dismissed; and I can see no ground for withholding costs.