the defendants his costs of suit, and that the defendants recover the costs of the counter-claim: "

Held (reversing the judgment of the Exchequer Division), that the plaintiff was entitled to the general costs of the cause.

[C. of A., April 26—50 L. J. R., p. 465.

The facts sufficiently appear from the above head-note. The Master, on taxation, gave the defendants the costs of the cause. The plaintiff appealed, and LOPES, J., having referred the matter to the Court, the Exchequer Division dismissed the summons to review the taxation.

The plaintiff appealed.

BRAMWELL, L. J.—I am of opinion that this appeal must be allowed, because of the terms in which the judgment was expressed; the plaintiff has not had "his costs of suit" taxed to him. No doubt the judgment of the Exchequer Division would be right if the old rule, that the party in whose favour the balance is, on the whole, is entitled to the costs of the cause, which still exists, applied to this case; but that is not the judgment which was here given. I may add that I think cases of set-off and counter-claim are susceptible of different considerations.

BRETT, L. J.—I also think that this appeal must be allowed. The judgment is entered and the costs by it are dealt with as if the defendants had met the plaintiff's claim by a counter-claim in the nature of a cross-action, and not of a set-off, and such judgment stands unchallenged. The question is, How ought the costs to be taxed, when in such a case the plaintiff succeeds on his claim, and the defendants on their counter-claim? If this had been treated as a pure set-off to the amount of the plaintiff's claim, as I think it might have been, and had so appeared on the judgment, then it seems to me that the defendants would have been entitled to the costs of the action, because then the defendants would have denied by way of defence that the plaintiff had any right to bring an action at all. There may be a case where the defence is partly by way of set-off and partly by way of counter-claim, as where the defendant asserts his right to recover the amount of balance due after satisfying the plaintiff's claim by his set-off. It is not necessary to say now how the costs in such a case are to be taxed, because here the judgment is in form not that the defendants have a set-off, but a counter-claim only. It is as if the defendants chose to deny the whole of the plaintiff's claim and to rest on their cross-action. The costs have been taxed, however, as if the plaintiff had not succeeded at all in his action, but only on certain issues, and I think that that was wrong. That alone is sufficient to sustain the appeal. I have, however, a firm opinion that where there is a claim with issues taken on it, and a counter-claim, not a set-off, but in the nature of a cross-action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counter-claim, the proper principle of taxation, if not otherwise ordered, is to tax the costs of the counter-claim and its issues as if it were an action, and then to give *the allocatur* for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions, the Master would divide them. Where the so-called counter-claim is a set-off there is but one action.

COTTON, L. J.—The sole question is whether under this order and judgment the costs have been rightly taxed. The judgment was that the the plaintiff "recover his costs of suit," and not merely the cost of issues found in his favour. I is clear that the judgment has not been followe d those costs have not been allowed to the plaintiff, and the taxation must be allowed.

Appeal allowed.

[NOTE.—*Imp. O. 55 r. 1., and Ont. O. 56 r 1 (No. 428) are identical.*]

WALKER v. ROOKE.

Imp. O. 45, *r.* 2—*Ont. O.* 45, *r.* 5, *No.* 370—*Garnishee order—Partnership firm.*

A garnishee order will not be granted on partners in the name of their firm.

[Q. B. D., April 26.—50 L. J. R., p. 470.

This was an application *ex parte* on appeal from a judge at chambers. The order sought was a garnishee order attaching a debt due "from Messrs. Marshall and Snelgrove to the defendant."

The Master refused to grant the order, and the Judge at Chambers affirmed his decision Plaintiff appealed to Divisional Court.

Horne Payne, for the plaintiff. Before the consolidation of the three common law divisions