SMITH, C.J. & MIDDLETON, J. 1895.

[SMITH, C.J. AND MIDDLETON, J.]

Dec. 30.

SHEKERZADE ABDUL AZIZ *Plaintiff,*

v.

NEDJIMIE HANOUM *Defendant.*

PRACTICE—JUDGMENT CREDITOR—ATTACHMENT OF MONEYS UNDER CONTROL OF A CADI—DECEASED MOSLEM'S ESTATE—DISTRIBUTION OF—COURT—MAHKEME-I-SHERIEH—SHERI LAW—THE CIVIL PROCEDURE AMENDMENT LAW, 1885, SECTIONS 38, 42 AND 43.

A Cadi in his capacity as Judge of a Mahkemé-i-Sherieh is not a "Court" within the meaning of Section 42 of the Civil Procedure Amendment Law, 1885.

Money under the control of a Cadi, in his official capacity as a Judge of a Mahkemé-i-Sherieh, is property under the control of a public officer in his official capacity, and is only liable to attachment in execution of a judgment with the consent of the Queen's Advocate.

The heirs of a deceased Moslem have no beneficial interest, within the meaning of Section 38 of the Civil Procedure Amendment Law, 1885, in the estate of the deceased, till it be shewn that a surplus remains, after paying the funeral expenses and all debts due by the deceased.

APPEAL from the District Court of Nicosia.

Templer, Q.A., for the appellant.

Pascal Constantinides for the respondent.

The facts and arguments sufficiently appear from the judgment.

Dec. 31. *Judgment:* This is an appeal from the order of the District Court of Nicosia refusing the application of the plaintiff, for the issue of an order attaching certain moneys in the hands of the Cadi.

The facts of the case appear to be that the late Cadi of Cyprus, Mustapha Fevzi Eff., owed to the plaintiff the sum of £35. After the death of Mustapha Fevzi Eff., the plaintiff instituted an action against the heirs, and judgment went by default.

Mustapha Fevzi having left minor heirs, his estate is being administered by the Mahkemé-i-Sherieh, and there is in the hands of the Cadi of Nicosia as Judge of the Mahkemé-i-Sherieh a sum of 5,622*p.* forming the whole or a portion of the estate of Mustapha Fevzi.

The plaintiff applied to the District Court for the issue of a writ of attachment, under the provisions of the Civil Procedure Amendment Law, 1885, to attach this sum in the hands of the Cadi.

The District Court refused to issue a writ, on the ground that as the estate was being administered by the Sheri Court, and as there were other creditors who had proved their claims before the Cadi, it would be contrary to justice to allow the plaintiff to obtain a priority over all the other creditors by means of a writ of attachment.

The plaintiff has appealed, and it is contended for him that the fact that the estate of Mustapha Fevzi is being administered by the Mahkemé-i-Sherieh does not disentitle the plaintiff, who has obtained a judgment, from having that judgment satisfied out of the moneys representing the estate found in the hands of the Cadi as administrator; that there is nothing to shew that under the law the moneys representing an estate are to be divided as though it were a bankrupt estate: and that the refusal of the Court to issue this writ, in such circumstances as the present, is to engraft a new principle whereby all privileged creditors may lose their priorities, and be relegated to the position of simple creditors.

We are of opinion that the order of the District Court was right. In the first place if it is open to the plaintiff at all to obtain execution in such a case as the present by way of attachment, and for reasons which we shall presently give we do not think that it is, it seems to us that the application must (as it was contended in the District Courts was the case), be founded upon Section 42 of the Civil Procedure Amendment Law, 1885.

Having considered that law, we are of opinion that this is not money under the control of a Court within the meaning of Section 42. The word "Court" in that section appears to us not to be intended to include the Mahkemé-i-Sherieh, but to refer only to the District Courts and Supreme Court. Whenever in the law the Mahkemé-i-Sherieh is intended to be referred to, it is referred to as the Mahkemé-i-Sherieh, and not as a Court. There is no definition of Court in the law, though there is a definition of "the Court," as the Court before which the action in which any application or order is made or any writ is issued has been instituted, etc.

If this be so, it seems to us that an application to attach moneys forming part of the estate of a deceased person in the hands of a Cadi, is an application to attach moneys in the hands of a public officer in his official capacity. Before such a writ can be issued, the leave of the Queen's Advocate must be obtained, and as there is no evidence of this having been done, this application would fail on this ground.

Apart from this question, however, we think that the refusal of the District Court to issue this writ can be justified. Had the Court granted this application, the result would have been that the Cadi would have been directed to

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appear before the District Court for the purpose of being examined touching the moneys under his control. On the return to the writ, the Cadi would have represented that these moneys were under his control as being the Judge administering the estate, that the estate is to be administered according to Sheri Law, and that according to Sheri Law the moneys are distributed amongst the creditors *pro rata* in case of insufficiency of assets.

The various laws of 1884, 1886 and 1894, dealing with the administration of the estates of deceased persons who have left heirs under disability, do not appear to us to affect the present case. The estate being administered is that of a deceased Moslem, and the laws of 1884 and 1894 state that the estates of deceased Moslems are to be administered in the same way as they were prior to the passing of these laws.

The notes of the proceedings on this application are somewhat meagre. A certain Ahmet Muheddin appeared and stated that the Cadi objected to pay over this money, as there are other creditors who have filed their claims and the Cadi says it should be divided.

Ahmet Muheddin who thus appears, as it seems to us, on behalf of the Cadi is, we are informed, the clerk of the Cadi, and his statement of the reason of the Cadi's objection leads us to think that that objection is founded upon the Sheri Law. On referring to those works in the Court dealing with the subject Neil Baillie's "Digest of Mohammedan Law" and "The Mohammedan Law of Inheritance," by the same author, we find it laid down with regard to debts of health, *i.e.*, such as can be established by witnesses or by the debtors' acknowledgment when in a state of health, that "no creditor is preferred to another but each receives "the full amount of his claim or a rateable share of the "property when it is insufficient to meet all the debts." If this be the Sheri Law, it appears to us that the mere fact that a person is a judgment creditor does not give him any priority over other creditors, but that he must appear before the Cadi, and lodge his claim, and receive a proportionate part of the estate with other creditors, if the estate is not sufficient to pay all the creditors in full.

It would, perhaps, have been better that this should have been more clearly stated at the proceedings in the Court below, but we have little doubt that this is the meaning of the Cadi's objection, as stated by Ahmet Muheddin.

Another point occurs to us also, which appears to be fatal to the plaintiff's claim for the issue of this writ. Under Section 38 of the Civil Procedure Amendment Law, 1885,

the writ may be issued where the judgment debtor is beneficially interested in any moneys, etc., in the custody or under the control of any person in Cyprus. Now the estate of a deceased Moslem is under the Sheri Law to be applied: 1st, in payment of his funeral expenses; 2nd, in payment of his debts; 3rd, in payment of legacies as far as one-third of the residue, and the remaining two-thirds, and (so much of the one-third as is not absorbed by legacies), are to be divided amongst the heirs. Now we do not see how there can be any beneficial interest of the heirs capable of being attached under the law of 1885, until the funeral expenses and debts have been paid. But the attachment is asked for to secure payment of a debt, whereas there is no beneficial interest to be attached until the debts are paid. This goes strongly to shew that the remedy by attachment is inappropriate, and that a judgment creditor must claim along with other creditors in the administration proceedings. We are, therefore, of opinion that it is not open to the plaintiff to attach these moneys, and for the reasons we have mentioned, we are of opinion that the order of the District Court was right, and that this appeal must be dismissed with costs.

It is said that this is a hardship upon the plaintiff, who has established his debt in a Court of Law and obtained a judgment: but the answer to this is that he need not have done so, but might have proved his claim before the Cadi together with the other creditors. The Cadi, no doubt, will admit a judgment debt without further proof, and the plaintiff has thus of his own choice adopted a rather expensive method of proving his debt.

Appeal dismissed.