that they were the goods of Ellen Sykes, and that they were in Shaw's possession. The question is if they were in his hands to be administered by him, as executor, at the time of seizure. The executors, who had been appointed by the will, had acted, but they did not prove the will until after the goods were levied under the writ of execution. The question left to the jury was whether the goods were in the hands of Shaw to be administered by him as executor *de son tort*, or whether they were in his hands as the agent of the plaintiffs in the present action, the executors named in the will. There was evidence on both sides, and the jury found that the goods were in Shaw's possession as the plaintiffs' agent. We must take their verdict as conclusive in these facts. This was the proper question to be left to the jury, and is the same question as was left to the jury in *Cottle* v. *Aldrich*, for the question there was whether the evidence showed that the defendant was acting merely as the agent of one of the executors who had not proved the will. The jury found that he voluntarily interfered as executor without authority. Notwithstanding the finding of the jury in the present case, it has been argued that in law, as Shaw had possession of the goods, he is executor *de son tort*, and must be treated as such. The questions, therefore, arise if Shaw can be treated as executor *de son tort*, and if the goods were in his possession in that character. Now, in point of fact, the jury have decided that Shaw acted as agent for the executors named in the will, and said that the goods were in his possession in that capacity. If Shaw had brought the present action it would not have been competent for him to deny that he was executor, because he suffered judgment to be recovered against him in that character. No doubt, in the former action, if he dealt with the goods of the deceased without any authority, and goods of the deceased are in his possession, the defendant was right in seizing them. But that is not the case here. Are the executors before probate wrong-doers in dealing with the goods? For if so, Shaw, their agent, is also a wrong-doer, and is consequently executor *de son tort*, and the sheriff acted rightly in seizing the goods. This depends on what the position is of executors before they have obtained probate. Executors obtain their title from the will itself. Whereas administrators only obtain their title from the Ordinary.

Executors have power to deal with the property before probate as well as subsequent to it, their title is just as good, they have nearly the same powers except in certain matters regarding suits when probate is required as evidence of their title. If acts done by executors before probate are lawful acts; acts done by their agents are equally lawful. It is equally true, that a person cannot be charged as executor *de son tort* when the will is proved, if he intermeddles with the estate; but that if he intermeddles with the estate before probate, he can be so sued. The reason is apparent: if persons act as executors before probate, they cannot afterwards deny they are so; when an executor is sued before probate it is not stated in the writ that he is executor *de son tort*, he is only estopped from denying at the trial that he is executor, and is called executor *de son tort*. But it does not follow from that that either he or his agents are *tort-feasors*, they are not. If his acts are lawful, his agent's acts are also lawful, if they are acts that might have been done and are authorised by him. If an executor proves a will and employs a person to intermeddle, the agent cannot be treated as an executor *de son tort*. And also if an executor is named in a will, he has a legal title, and can appoint an agent to act for him, and when the agent has so acted he cannot be treated as an executor *de son tort*.

In *Hooper* v. *Summersett* it was assumed that the husband and wife were acting together, and that the husband acted on his own behalf, and not as his wife's agent. If it could have been made out that he was acting as the agent of his wife, the case would have been differently decided, and it appears that is correct by the case of *Cottle* v. *Aldrich*. The question there was whether after the death of J. A., the defendant voluntarily interfered as executor of C. A. without authority, or merely acted as an agent of the executor before probate. From the case of *Hall* v. *Elliott* it appears that a man who possesses himself of the effects of the deceased, under the authority and as agent for the rightful executor, cannot be charged as executor *de son tort*. Where a person intermeddles in an intestate's affairs, and his servant, by his orders, sells goods of the deceased, and pays over the money to him, not only the master would be a *tort feasor* and liable to be sued as executor *de son tort*, but also his servant. That was so decided in the case of *Padgett* v. *Priest and Porter*. The rule, however, is subject to the qualification, stated by the present Lord Chancellor in *Hill* v *Curtis*, that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account. In that case, in answer to a bill filed for an account against an executor *de son tort*, the defendant pleaded that he acted as agent of the rightful administratrix, and had subsequently accounted to her for all the assets of the deceased which had come to his hands. The Lord Chancellor said, "Here the agency did exist, supposing the lady acting at that time was acting rightfully. She was acting wrongfully, and therefore, at that period there could be no agency; but the moment she acquired a rightful title the title related back to all her intermediate acts. If so, was he not the agent of the lady, and properly suable only by her? It is not necessary to inquire into what the rule may be as regards a person employed by an administrator before administration, except that if the rule laid down by the Lord Chancellor is correct, *a fortiori*, would the agent of an executor before probate be relieved. The case of *Sharland* v. *Mildon* was the case chiefly relied upon by Mr. Field. There the widow of the deceased person, intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and employed Hewish to collect the debts owing to the testator. The Vice-Chancellor, Wigram there treated the widow as a *tort-feasor*. But that is not the case here, for here the executors are not proved to have been *tort feasors* at all, for if that had been proved, Shaw would certainly have been liable.