

a payment by an executor de son tort; such an executor is treated as an executor only for the purpose of fixing liability upon him, and his acts are good against the lawful representative of the deceased only where they are lawful and such as the new representative was bound to perform in the due course of administration: *Graysbrook v. Fox*, Plowd, 282; *Buckley v. Barber*, 6 Ex. at p. 183. And even where letters of administration have been subsequently granted to him, the previous acts of an executor de son tort to the prejudice of the estate are not made good by the subsequent administration: *Morgan v. Thomas*, 8 Ex. 302.

Grant v. McDonald, 8 Gr. at p. 475, and *Haselden v. Whitesides*, 2 Strobhart L. 353, are in accordance with this view.

But, granting this, it does not follow necessarily that plaintiff was not entitled to recover. Neither the rights of a lawful representative of the deceased nor those of the persons beneficially entitled to the estate of the deceased are in question. All that plaintiff is seeking is that the executrix de son tort be made answerable to her to the extent of the goods of the deceased which have come to her hands. . . .

Where the defendant pleads ne unques executor, and that plea is found against him, and . . . it will be found against him though it is shewn that he is but an executor de son tort, it appears to me that it is not open to him for the purpose of preventing a payment made by him, which, if it had been made by the lawful personal representative, would have prevented the Statute of Limitations from operating to bar plaintiff's claim, to rely upon his having been a wrongdoer and not the true personal representative; in other words, that, as between him and plaintiff, as respects the payments made by him and their effect, he must be treated as the true representative of the deceased. If the creditor may for the recovery of his debt proceed against him as the true personal representative of the deceased, in order to reach the personal estate of the deceased which has come to his hands, why may he not for the same purpose treat him as the true representative in making the payment on account of his claim against the deceased?

As I have already pointed out, in *Grant v. McDonald*, and in the South Carolina case, the true representative was sought to be made liable, and in the latter case *Withers, J.*, who delivered the judgment of the Court, pointed out that their decision had nothing to do with actions instituted against executors de son tort as such.