Sharland v. *Mildon* was decided on *Padgett* v. *Priest*, but that was a case of intestacy, and therefore Priest and Porter (the agents of the administrators) were wrongdoers; but here Shaw was appointed manager and agent by the persons named as executors in the will. If there was any analogy between *Sharland* v. *Mildon* and *Padgett* v. *Priest* it was rightly decided. *Sharland* v. *Mildon* is cited by the Lord Chancellor as rightly decided, but he applied the doctrine of trusts in the case of an agent acting for a person before she has obtained administration. The rule must therefore be discharged as far as the sheriff is concerned, and the verdict must stand; for the executors before probate could lawfully appoint an agent to carry on their business.

Montague Smith, J.—Love entered up judgment by default against Shaw, as executor of Ellen Sykes, and then a *fi. fa.* is directed to the sheriff which in terms followed the judgment. The sheriff then seizes and sells the goods in possession of Shaw. There is no doubt that the judgment binds Shaw, and if he had brought the present action against the sheriff he could not have denied that they were his goods or the goods of Ellen Sykes. The present plaintiffs are the executors of Ellen Sykes, and they say that the goods in the possession of Shaw belong to them as her executors, that they are in his possession as their agent, and that they are not in his possesssion as executor of Ellen Sykes.

The question here is, if these goods were in the hands of Shaw as executor of Ellen Sykes, so as to be liable to be taken by the sheriff on a *fi. fa.* issued against him as such executor. Shaw was employed by the plaintiffs to manage the business of Ellen Sykes, and was their agent for that purpose, and this was so found by the jury. It is then said that, notwithstanding that the goods were liable to be seized in execution because probate at that time had not been taken out by the executors, that they could not appoint an agent, and that therefore Shaw was liable to be sued as an executor *de son tort*, and the goods were rightly seized. There is no doubt that he was not in possession of the goods as a *tort-feasor*, but under the authority of the rightful executors; and, unless the mere fact of executors acting before they have obtained probate makes them *tort-feasors*, and therefore makes Shaw executor *de son tort*, the sheriff does not establish his defence to this action. But executors have the same power to act before obtaining probate as subsequently to having obtained it. Probate is only the evidence of their title under the will, and not the title itself. This is clearly shown in this way:—Executors may issue a writ and proceed with their action before they have obtained probate, and it is sufficient if they obtain it before they go to trial. It therefore follows that executors can rightly dispose of property before probate, and that subsequently they can appoint agents for that purpose. This act of theirs cannot be treated as a wrongful act; they were no wrongdoers. Doubts have arisen in cases like the present, and it seems to be thought by some that, as an executor before probate must be sued as an executor *de son tort*, that therefore he has committed a wrongful act. Where an executor named in a will is sued before probate on account of his having intermeddled with the property, he is estopped from denying that he is executor, and I should say that is a more proper term to use than executor *de son tort* in that case would be, executor by estoppel. Then it appears that this misapprehension has arisen from treating an executor *de son tort* as a wrongdoer. When that term is applied to an executor before probate it is a wrong term to use. These goods were not leviable by the sheriff because they were not in Shaw's hands as executor.

Brett, J.—It has been argued that Shaw was to be considered as an executor *de son tort* although he acted only as servant to the executors, because the executors were wrongdoers before probate of the will; and that they must be treated as such until the will is proved. Executors named in a will can never be treated as wrongdoers. Mr. Field was obliged to argue that the question left to the jury in *Cottle* v. *Aldrich*, as to whether the defendant voluntarily interfered as executor of C. A. without authority or acted merely as an agent was wrong. If *Sharland* v. *Mildon* is treated in the same way and the conclusion was arrived at, that Hewish intermeddled with the debts not only as servant to the testator's widow, it is intelligible. Besides that there are reasons why a court of equity should decide that such a person must remain a party to a suit. The rule must therefore be discharged against Love. The rule obtained by the plaintiff was not argued, and was therefore discharged.

Rule discharged.

IRISH REPORTS.

Margaret Leahy (*a minor*), by John Leahy, *her next Friend* v. James Phelan.

Practice—Obtaining extension of time to plead—Taking a step in the cause after notice of irregularity—179th General Order.

Obtaining an extension of time to plead is not a waiver of the defendant's right to move to set aside the plaint for irregularity.

[18 W. R. 584.]

Motion by defendant that the filing of the plaint be set aside as irregular, as no consent in writing by any person to act as next friend of the minor plaintiff had been lodged in the proper office of the court pursuant to the statute.

The plaint in this case was filed on the 18th February, 1870. On the 1st March, 1870, the defendant obtained an order extending the time for pleading, and on the 4th March the time was further extended up to the 8th March.

It was admitted that the filing of the plaint was irregular for want of the proper consent, and the only question was whether this irregularity had been waived by obtaining an extension of time for pleading.

Lyster, in support of the motion.—It may be contended that, as the defendant obtained an extension of time to plead after notice of the irregularity, that he has waived his right to have this irregularity amended under the 179th General Order, 1854. This order is to the effect that no application to set aside proceedings for irregularity shall be allowed if the party applying have