with the decisions founded on them, present quite as much conflict *inter se* as assistance towards forming a coherent or symmetrical system of the principles of this topic of the law.

In recurring, therefore, to the older authorities, great discrimination must be exercised in referring to cases, as support can readily be drawn from them for opposite sides of almost every question which arises in this department; and the true rule is rather to eliminate from than attempt to harmonize the various decisions and propositions of the text writers when determining what are powers and what trusts, and who are authorized to execute the former.

In *Tainter* v. *Clark*,* which may be regarded as a leading case in this commonwealth, the court decided that an administrator *de bonis non cum testamento annexo* could not execute a power given by the will to the executor, to sell such of the testator's real estate as in his judgment was best to raise the money necessary to pay testator's debts and certain pecuniary legacies given by the will. The power in question was not coupled with an interest, but was united with a trust to dispose of the proceeds as executor, *i. e.*, to pay debts and legacies, and was given in the same clause in which the executor was appointed, and immediately following the mention of his name. It was also left to his judgment what parcel to sell, but a sale was imperative. The court rely upon the authority of Coke,† that a power given to "executors" to sell may be executed even though one dies, "because the plural number remaine;" but otherwise, if it had been given to "I. S., I. N., &c., his executors," "because the words of the testator would not be satisfied;" and also refer with approval to the distinctions laid down by Mr. Sugden:‡ (1) that a power to two or more *nominatim* will not survive without express words; (2) where it is given not *nominatim*, but to two or more generally, it will survive while the plural number remains; (3) where it is given to "executors" merely, even a single executor may execute it; but (4) if to executors by name, it is at least doubtful if it will survive.

It will be perceived that these authorities were not expressly upon the point in issue in the principal case. They applied, however, to the general question of the transmission or survivorship of powers, and were considered decisive of the incapacity of the power in question to survive, because it was considered a bare discretionary power. But the court also place their decision on a second ground, derivative though distinct from the first, namely, that the administrator cannot succeed to powers as to realty reposed in the executor; relying upon the authority of *Wills* v. *Cowper* § and *Conklin* v. *Egerton*,‖ and cf a case in the Year Books.

To take in their order the two grounds herein relied upon, and which broadly present the two leading questions arising in reference to testamentary powers, it is apparent that the first goes upon the principle that where a testator has confided a power it must be exercised by, and only by, the person or persons selected; and second, upon the collateral ground that an administrator, though clothed with the representative capacity, is not in the confidence of the testator, and cannot act as the testator's grantee, unless expressly named.

In regard to the first of these positions, to which the court in their judgment suggest no exception or modification directly, we must refer to the rules cited from Lord Coke and Mr. Sugden, to see what qualifications the court are disposed to admit. Now it is evident that in neither of these are any further departures from the testator's literal directions approved of, except in two cases, one of which is suggested by both these authorities, the latter only by Mr. Sugden. The first is, that where the power is limited to be exercised by executors generally, it may be executed while a plural number remains; and the second is Mr. Sugden's extension of this, to allow even one executor to sell where the power was merely given *ratione officii*, not *nominatim*.

It is, of course, to be borne in mind that the case above stated, as well as the rules just referred to, related only to what were viewed—whether correctly or not, we shall inquire further on—as mere powers. The distinction, which we main-

* 13 Mete. 220.
† Co. Litt. 112 *b*, 113 *a*.
‡ 2 Sugd. Pow. (1st ed.) 165.

§ 2 Ham. 134.
‖ 21 Wend. 480.