tion. At this stage of the cause, the proper course was to compel the plaintiff to elect on which count he would proceed and to order the other count to be stricken out, or to direct the jury to find a verdict upon one only of the two counts. But it was clearly erroneous to put the plaintiff wholly out of court in a case where he had offered evidence which would have well warranted a verdict on one of the counts.

Exceptions sustained.

HENRY A. SHELDON, administrator, *vs.* ITHAMAR H. SMITH.

In a writ of entry brought by an executor to foreclose a mortgage belonging to the estate of his testator, averment of the representative capacity of the demandant is not essential to maintain the action, and his description of himself in the writ as "administrator" instead of "executor" is not available as a defence in bar.

WRIT OF ENTRY brought by a demandant describing himself therein as "administrator of the goods and estate" of Elijah S. Deming, "deceased, intestate," to foreclose a mortgage given by the defendant to Deming. The tenant pleaded *nul disseisin*, and specified in defence that the demandant was not administrator as described.

At the trial in the superior court, the demandant produced the record of the court of probate by which it appeared that he was duly appointed executor of the will of said Deming, deceased; and he offered the mortgage deed in evidence. The tenant objected to its introduction, claiming that under the pleadings the demandant had shown no right to bring or maintain this action. But *Brigham*, J. overruled his objections; a verdict was had for the demandant; and the tenant alleged exceptions.

B. Palmer, for the tenant.

I. Sumner, for the demandant.

HOAR, J. The demandant brings a writ of entry to foreclose a mortgage, describing himself as administrator of the mortgagee. The tenant, under the plea of *nul disseisin*, specifies as a defence that the demandant was not administrator. At the trial

it appeared that the demandant was not administrator, but executor; and the question presented by the bill of exceptions is whether this variance is fatal.

It is apparent that the right of an executor and administrator to maintain an action to foreclose a mortgage, is the same under our statutes. Each sues as the personal representative of the deceased mortgagee, and the land, when recovered, is assets of the estate he represents. In a writ of entry, it is provided by statute that the demandant shall declare on his own seisin, and shall not be required to prove an actual entry under his title; but if he proves that he is entitled to such an estate as he claims in the premises, whether as heir, devisee, purchaser, or otherwise, and also that he has a right of entry therein, this shall be deemed sufficient proof of his seisin as alleged in the declaration. Gen. Sts. *c.* 134, §§ 2, 3. When the suit is to foreclose a mortgage, the seisin must be alleged to be "in mortgage;" but the mortgagee may declare on his own seisin, as in other cases. Gen. Sts. *c.* 140, § 3. If a mortgagee or assignee of a mortgage dies without having obtained possession of the mortgaged premises, his executor or administrator may take possession thereof, by open and peaceable entry or by action, in like manner as the deceased might have done if living. Gen. Sts. *c.* 96, § 9. From those provisions it would seem that the averment of the representative capacity in which the suit is brought is not essential to maintain it, and that the description of the demandant as administrator is only *descriptio personæ*, not available as a defence in bar.

But it is doubtful whether there is any substantial misdescription. An executor is, in one sense, an administrator, and in the only sense material to the prosecution of this suit. He gives bond to "administer according to law, and the will of the testator." In *Cook* v. *Griffin*, reported in 1 Dane Ab. 581, it was held that the deed of one who sells as "executor" is good, although the power from the court was to him as "administrator." In *Cooper* v. *Robinson*, 2 Cush. 184, an executrix, under a license to sell real estate, sold as administratrix, and the sale was held good. The court in that case say, "But we are of opinion that

this is not such a misnomer or misdescription of the capacity in which the executrix acted as to invalidate the sale. By law she was bound to administer the testator's estate, and to render a true account of her administration, and might therefore be described as administratrix, as well as executrix, although the latter would be the more appropriate description." In *Langdon* v. *Potter*, 11 Mass. 313, in which it was held that the objection that the plaintiffs had not taken administration in this commonwealth might be taken by a plea in bar to their writ of entry to foreclose a mortgage, no question was made as to any distinction between letters testamentary and letters of administration. The plaintiffs had no representative capacity which entitled them to sue. *Exceptions overruled.*

JOHN C. WOLCOTT & another *vs.* GEORGE A. BUCK.

Refusal by the superior court to the plaintiff in an action of waste of leave to change the form of his action so as to make it an action of tort in the nature of waste is not subject to exceptions.

ACTION OF WASTE brought in the superior court at June term 1865 for Berkshire. By the pleadings it appeared that the defendant was tenant by the curtesy of a piece of land in Windsor, and the plaintiffs, John C. Wolcott and Elizabeth S. Petitcler, were owners of the remainder; and that on April 16, 1866, the plaintiff Wolcott, by deed of quitclaim with special covenants of warranty, conveyed his interest in the premises to the other plaintiff and her husband, who on the same day took a conveyance by lease of the defendant's life estate, and entered nto possession. The action came to trial at October term 1866, when the plaintiffs moved to amend their declaration "so as to make the action for damages, and not for forfeiture." *Rockwell*, J., refused the leave desired, whereupon the plaintiffs consented to a verdict for the defendant, and alleged exceptions.