posed to that embodied in their resolution had been laid down, and that its terms were framed merely with reference to the class of cases which had thus been brought under the consideration of those who drew it up. The principle, it was pointed out, on which the rule in question rests is, that if the plaintiff has anything to prove, either as to his case itself, or as to the amount of damages, he should begin, and this principle obviously applies to a host of cases of contract as well as of tort. Thus it was said by Patteson, J.: "I have always thought the general rule to be that, if on the defendants proof failing, the verdict might be given directly for the plaintiff, as would be the case where the damages were fixed, or merely nominal, the defendant should begin.". *Mercer* v. *Whall* was an action for breach of covenant in dismissing an apprentice; the plea alleged misconduct justifying the dismissal, and the plaintiff was allowto begin, on the ground that he went in for substantial damages, the amount of which he would have to prove. "The natural course would seem to be," it was said by Lord Denman, C. J., "that the plaintiff should bring his own cause of complaint before the court and jury in every case he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him." In actions of contract no less than of tort, the plaintiff who desires more than nominal damages may have to prove the amount to which he is entitled, even where it stands admitted on the record that he has a right of action. It is in tort, indeed, that the privilege of opening and replying is more particularly valuable, the amount of damages being left more to the discretion of the jury, which may account for the circumstance that the resolution so often quoted is confined to cases of this kind, but the reason on which the resolution rests is of much wider application.

The doctrines so clearly laid down in *Mercer* v. *Whall* are also exemplified in *Absalom* v. *Beaumont*, (1 M. & R. 441, note), an action upon a policy of fire insurance where, although the affirmative issue lay upon the defendants, the plaintiff began on the ground that he would have to prove the amount of compensation to which he was entitled under a policy which is a contract to indemnify. And the result is the same where the declaration is in the ordinary *indebitatus* counts the defendant, by a plea in avoidance which he fails to prove, admits that he is indebted to the plaintiff but not the amount of his indebtedness. The plaintiff will have to prove the value of the work done, or of the articles supplied, in order to get a more than nominal verdict, and so retains his right to begin: (*Morris* v. *Lotan*, 1 M. & R. 233; *Lacon* v. *Higgins*, 3 Starkie, 178.) In all these cases, it will be observed, the application of the test usually suggested, that he begins against whom in the absence of proof on either side the verdict must pass, would lead to the erroneous conclusion that the defendant is the party to begin.

The plaintiff is, of course, *primâ facie* the party who should open the case, and he will retain this right so long as there is a single material issue, the affirmative of which lies upon him and as to which he means to adduce evidence. In *Rawlins* v. *Desborough*, for example (2 M. & R. 328), where the declaration was upon a policy of life insurance with the ordinary money counts and the pleas were in avoidance and, to the money counts, "never indebted," Lord Denman ruled "that the plaintiff should begin, on the ground that there was a traverse of the *indebitatus* counts as to one of which his counsel stated that there really was evidence to be adduced on behalf of the plaintiff." The rule is the same in replevin, although there, when there is an avowry or cognizance, either party may be said to be plaintiff. Apart from any considerations as to the proof of damages, the real plaintiff, he who has brought the action, is entitled to begin whenever the affirmative is with him as to any material plea, although all the others lie upon the defendant: (*Collier* v. *Clarke*, 5 Q. B. 467; *Curtis* v. *Wheeler*, M. & M. 493). In the latter of these cases there was an avowry to which the plaintiff pleaded traverses of the tenancy and of the fact that rent was due, and also a plea, the affirmative of which was held to lie upon the plaintiff. It was argued that, since in replevin both parties are actors, the plaintiff should not have his usual privilage of beginning whenever any single issue lies upon him; but Lord Tenterden replied that he could make no distinction between replevin and other forms of action, and that the principles applicable to all were the same.

The defendant, however, who has pleaded none but affirmative pleas, will have the privilege of opening the case when the action has been brought really to try a right, and the plaintiff would be satisfied with merely nominal damages. Under such circumstances, if the true nature and object of the action appear to be at all doubtful, the plaintiff's counsel will be asked whether he really goes for substantial damages, and even when the reply is in the affirmative the Judge will exercise his discretion as to whether this is really so. Thus in *Mercer* v. *Whall*, in answer to the observation that the right of the plaintiff to begin could hardly well depend on his having to prove the amount of his damages, since in many cases it was almost impossible to say beforehand whether substantial damages were really sought, it was said by Lord Denman, "The Judge takes upon himself to say whether the plaintiff really proceeds for damages, or whether a right only is in question;" "the Judge, perhaps, decided this matter without very adequate materials, but he would not have done so at all, if the right depended on the issue as it appeared on the record." In such cases if the plaintiff's counsel decline to