plaintiff begins, although the affirmative lies upon the defendant on the record. In other words, he begins who, in the absence of proof on either side, would fail in the action; for, where heavy damages were sought, a verdict for a mere nominal sum is a victory for the defendant. That this test is more accurate than that usually suggested will appear from an examination of the reported decisions.

In actions upon bills and promissory notes, or upon policies of life insurance, the amount which the plaintiff seeks to recover is liquidated and appears on the face of the declaration. If the defendant has not traversed any allegations therein contained, the plaintiff's case—and the amount of his claim in consequence of it—stand admitted upon the record; and upon this admission, without adducing any further evidence, the plaintiff would be entitled to a verdict for the sum really claimed by him, should the defendant fail to make good his pleas in avoidance. There is no doubt that, under such circumstances, the defendant is entitled to begin: (*Mills* v. *Barber*, 1 M. & W. 425; *Geach* v. *Ingall*, 14 M. & W. 95.) And even where in an action on a promissory note interest not made payable upon the face of the note was claimed, the only plea being one of coverture, the defendant was held entitled to begin, on the ground that a note of itself carries interest, and that the plaintiff's right to it appeared on the declaration as admitted on the record without any evidence: (*Cannam* v. *Farmer*, 3 Ex. 698.)

But the case is very different if the action, instead of being on a bill or on a policy of life insurance, is in tort, as for a trespass or libel, or on a policy of fire insurance, which, as distinguished from a life policy, is a contract of indemnity, or in the ordinary *indebitatus* counts, since in all these cases the plaintiff, even if his right of action stands admitted upon the record, will have to adduce evidence to show the amount to which he is entitled. The plea in confession and avoidance carries no admission of the sum to be awarded the plaintiff should the defence not be made good, since the amount mentioned at the foot of the declaration is merely nominal, and the affirmative lies upon the plaintiff on this point. In the absence of evidence on either side the plaintiff would fail in the action, in this sense, that he would get a verdict for merely nominal damages. At one time, however, the defendant was sometimes allowed to begin in such cases if the pleas were such as to throw the affirmative upon him. Thus, in *Cooper* v *Wakley* (1 M. & M. 248), an action for libel, the only plea being one in justification, Lord Tenterden, after consulting with two of his colleagues, ruled that the defendant should begin. This decision was, according to Lord Denman, universally felt in the Profession to be erroneous, and gave rise, some years afterwards, to a resolution of the Judges, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." (5 Q.B. 462). In accordance with this resolution was decided the case of *Carter* v. *Jones* (1 M. & R. 281), when the plaintiff was held entitled to begin in an action of libel, with no plea on the record but one of justification.

The applicability of the principle on which this resolution of the Judges rests to cases other than those which strictly fall within its terms, we propose to consider in our next number.—*Law Times*, July 11, 1868.

We drew attention last week to the principle determining the question whether it is the plaintiff or the defendant that is to have the first and the last word with the jury—a question which (as was remarked by Pollock, C. B. in *Ashby* v. *Bates*, 15 M. & W. 589), the increasing intelligence of juries may in time render of small importance, but which, as matters at present stand, is in a vast number of cases practically decisive of the issue. The ruling in *Cooper* v. *Wakley*, 1 M. & M. 248, that, even in such actions as those for libel or personal injuries, in which a great part of the evidence and of the speeches of counsel, whatever may be the pleas on the record, must have reference solely to the quantum of damages, the defendant might deprive his antagonist of the formidable advantage of opening the case by pleading only in avoidance and abstaining from the general issue, led to the resolution of the Judges reported by Lord Denman, 5 Q. B. 462. This resolution was in its terms confined to libel, slander, and injuries to the person, and, no doubt, it is precisely in cases of this description that it is of the greatest consequence to the plaintiff that he should retain his right to begin, although the affirmative issue lies on the defendant. In several Nisi Prius cases accordingly we find it laid down that, except in such actions as those mentioned in the resolution, the right to begin is with him upon whom the pleadings have cast the affirmative issue. In *Reeve* v. *Underhill*, 1 M. & R. 440, and in *Wootton* v. *Barton*, 1 M. & R. 518, it was held that in an action of covenant, though the damages are unascertained, the defendant is entitled to open the case if he has pleaded only in confession and avoidance. Tindal, C. J. remarked in the former of these cases that the new rule was never meant to apply under such circumstances; that hardly ever in actions for the breach of special agreements could the damages be said to be precisely ascertained; but that in such cases they were mere matter of calculation, and not liable to be increased by what the plaintiff could urge in aggravation, as in actions for libel or other malicious injuries. These decisions however, are entirely overruled by that of the full court in *Mercer* v. *Whall*, 5 Q. B. 447. It is there observed (pp. 456, and 467), that the sole reason for the fact that the judges confined the rule to injuries of a personal kind is, that it was only in such cases that a doctrine op-