

Although the point was not directly in issue in *Dublin, Wicklow and Wexford Ry. Co. v. Slattery*, 3 App. Ca. 1155 (1878), the opinions of several eminent judges may be found there. Lord Hatherly said: "It appears that the course in Ireland is to raise such a case by a plea, but the form in which it is raised can make no difference in the substance of the case. Whether introduced under the plea of 'not guilty,' or by a special plea, such a defence must be proved *by the party asserting it.*" Lord Penzance said: "I entirely fail to see how the shifting of the *onus* or burthen of proof in the course of the trial can alter the issue itself, *which is an affirmative, and not a negative one.* Whether the plaintiff gives any evidence or not, the affirmative of the issue in question is none the less ultimately upon *the defendant*, and he must satisfy the jury, and not the judge, that the evidence has established it." Lord Blackburn said: "If in the present case no evidence at all had been given to shew that there was neglect of duty in the deceased occasioning the accident, no doubt it must have been taken that there was no such neglect of duty. So far the *onus* was at the beginning of the trial on the *defendants.*" Lord Coleridge agrees that "there are two things for him (the plaintiff) to establish," but his catalogue is not the same as that of the Master of the Rolls in the Davey case:—"There must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . The plaintiff fails, if he fails to shew that the defendants caused the wrong, and he does so fail, if he shews that he caused it, or that the deceased caused it himself. . . . The plaintiff may fail to prove his cause of action, by proving his own negligence, as well as by not proving the negligence of the defendant. It is, therefore, I think the duty of the judge to withdraw the case from the jury if by the plaintiff's own evidence, at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides, at the end of the whole case, it is proved, either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did."