in another jurisdiction. *Platto v. Deuster*, 22 Wis. 460 (1868); *Endter v. Lennon*, 46 Wis. 299, 50 N.W. 194 (1879).

Probably the best solution of the difficulty of obtaining immediate relief from repeated injunction suits in other courts would be through an extension of the writ of prohibition. This writ is normally used by a higher court to prevent a lower court from hearing a case only when the lower court lacks jurisdiction in the strict sense, *i.e.*, the power to make a decree which will be binding upon the parties. See 1 Univ. Chi. L. Rev. 146 (1933); Cook, The Powers of Courts of Equity, 15 Col. L. Rev. 106 (1915). The writ has, however, been used successfully to stop proceedings in a lower court having jurisdiction over the parties where an injunction had been issued by a foreign court of concurrent jurisdiction. *State ex rel. New York, C. & St. L. Ry. Co. v. Nortoni*, 331 Mo. 764, 55 S.W. (2d) 272 (1932); 1 Univ. Chi. L. Rev. 146 (1933); 46 Harv. L. Rev. 1030 (1933). Although a wide use of writs of prohibition would be both undesirable and unnecessary, it is but a slight extension to make them available as an immediate remedy where judicial differences have become acute.

The dispute which culminated in the instant decision has been the subject of much comment. The President in his message proposing that "direct and immediate appeal to the Supreme Court" from district court rulings on the constitutionality of federal statutes be provided, and that lower courts be prevented from enjoining their enforcement without permitting the Attorney General to intervene, pointed to cases like the principal case as an illustration of the need for effective means of curbing differences between courts. 81 Cong. Rec. 1084 (Feb. 5, 1937). This proposal would undoubtedly tend to prevent a duplication of the instant situation in cases involving federal statutes; but a substantial part of the business of the federal courts involves cases in which constitutional questions are not raised. American Law Institute, Study of the Business of the Federal Courts, pt. 2, p. 113 (1934). The possibility of cross-injunctions of the present type would therefore remain even though the President's recommendations were adopted. If the writ of prohibition were made issuable *ipso facto* by either a circuit court of appeals or the Supreme Court upon a showing of a prior federal adjudication, competition for advantage pending appeal would be eliminated.

Evidence—Burden of Proof on Sub-issue Raised by Improper Pleading—[Iowa].—The plaintiff brought an action for personal injuries alleged to have been caused by the defendant's striking her with his car. The defendant both entered a general denial and specially pleaded that the car which struck the plaintiff was not the one which he was driving. At the trial two witnesses testified that the defendant's car struck the plaintiff. The defendant and his wife testified to the contrary; but the defendant introduced no evidence that another car hit the plaintiff. The trial court instructed the jury that the burden was on the plaintiff to prove that the defendant's car struck her. *Held*, the instruction was erroneous. The defendant asserted the affirmative of the issue and therefore had the burden of proof. Since he introduced no evidence, it was a non-disputed issue and should not have gone to the jury. *Griffin v. Stewart*, 270 N.W. 442 (Iowa 1936).

Contrary to the result reached in this case, it seems that the burden of persuasion should be assigned on a more substantial ground than the accidents of pleading in a particular case. See 5 Wigmore, Evidence § 2485 (2d ed. 1923). If the court were cor-

rect in its application of the rule that the burden of persuasion is on the party who asserts the affirmative of an issue, the result would be that the burden of proving the identity of the tortfeasor in this case was on the defendant. Yet it was part of the plaintiff's *prima facie* case to show that the defendant hit the plaintiff. The plaintiff by her complaint introduced the issue of identity; and the defendant by his general denial and by the testimony offered at the trial prevented this issue from being dropped. Employing the test of "pleading the affirmative of the issue," it follows that the plaintiff should have had the burden on this issue. See *First Nat'l Bank v. Fard*, 30 Wyo. 110, 216 Pac. 691 (1923); *Matt v. Baxter*, 29 Colo. 418, 68 Pac. 220 (1902); *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (1889). The defendant's assertion that a third party hit the plaintiff was substantially a contradiction of the plaintiff's allegation. The only issue that could have been raised by the defendant's assertion was the issue of identity. The defendant's special pleading constituted an argumentative denial of one element of the plaintiff's case.

One possible reason for the difficulties found in this case is the lack of clarity in the statement that the burden of proof is on the party who "pleads the affirmative of the issue." *Kuchan v. Strong*, 39 N.M. 281, 46 P. (2d) 55 (1935); *Co-operative Sales Co. v. Van Der Beek*, 219 Iowa 974, 259 N.W. 586 (1935); *Zillah Transp. Co. v. Aetna Ins. Co.*, 175 Minn. 398, 221 N.W. 529 (1928); Chamberlayne, Modern Law of Evidence § 943 (1911). This sometimes means the literal affirmative. *Berty v. Dormer*, 12 Mod. 526 (1701); see 5 Wigmore, Evidence § 2486 (2d ed. 1923). Sometimes it means the legal affirmative, the burden being placed upon the party to whose case the assertion of the fact is essential. *Dickson v. Evans*, 6 Term R. 57 (1794); *Starratt v. Mullen*, 148 Mass. 570, 20 N.E. 178 (1889); *Kohlsaat v. Parkersberg & M. Sand Co.*, 266 Fed. 283 (C.C.A. 4th 1920). In a few cases, as in the present, the burden is put upon the party who specially pleads a fact in question though not required to do so. *Coogan v. Lynch*, 88 Conn. 114, 89 Atl. 906 (1914); *Distin v. Bradley*, 83 Conn. 466, 76 Atl. 991 (1910). But see *Ferrie v. Sperry*, 85 Conn. 337, 82 Atl. 577 (1912); *Miller v. Pierpont*, 87 Conn. 406, 87 Atl. 785 (1913) (affirming rulings which allowed the substance of the pleading to control). The last mentioned rule has been defended on the ground that the emphasis on the particular issue makes the defense appear stronger and more aggressive. *Coogan v. Lynch*, 88 Conn. 114, 89 Atl. 906 (1914). But if the defendant has specially pleaded a defense which he might have shown under a general denial, he is being penallized for having defined the issues. If the assertion is neither a specific denial nor a true affirmative defense, it must be either an entirely irrelevant statement or an evidentiary proposition bearing on the defendant's case. In either event it should be ignored or struck from the pleadings instead of becoming the basis for a new procedural rule.

A further possible source of difficulty in allocating the burdens of persuasion or of producing evidence is the presence of a presumption. In *Scott v. Morse* (54 Iowa 732, 6 N.W. 68, 7 N.W. 15 (1880)), a defense of gratuity to an action for services rendered was held to put the burden of proof upon the defendant. That case, however, differed from the present case in that the plaintiff was aided by the presumption that payment was due, arising upon the showing of performance at the defendant's request. If there is a strong policy back of a presumption, the defendant may be required to overcome it by a preponderance of evidence. *In re Findlay*, 253 N.Y. 1, 170 N.E. 471 (1930) (presumption of legitimacy shifting burden to contestant of a will); *Brosnan v. Bros-*

nan, 263 U.S. 345 (1923) (presumption of sanity of testator); *Wilson v. Hodges*, 2 East 312 (1802) (surety relying on death of principal to avoid liability on bail bond required to prove the death). In the present case, however, the plaintiff was not aided by any presumption that the defendant hit her, and she should have been required to sustain the burden of showing that he did. Of course, it might be argued that the evidence recited in the opinion reveals that the trial court should have directed a verdict for the plaintiff; but that is not the ground on which this decision was based.

Labor Law—Constitutionality of Procedural Provisions of State Model of Norris–La Guardia Act—[Washington].—Two rival unions, the Brewery Workers Union and the Teamsters Union, were engaged in a struggle for jurisdiction over truckers and teamsters employed in the brewing industry. A trade association representing the employers agreed with representatives allegedly acting for members of both unions to follow the decision of the American Federation of Labor which had awarded jurisdiction to the Teamsters Union. A supplemental agreement provided that upon the "expressed desire" of the association, the "unions interested" would "organize" (presumably in the Teamsters Union) members of the Brewery Workers Union if the latter did not comply with the decision of the American Federation of Labor. Pressure from the Teamsters Union induced the employers to exercise their option. Members of the Brewery Union sued to enjoin the Teamsters Union and the employers from proceeding under the supplemental agreement. The Washington model of the Norris-La Guardia Act provides, *inter alia*, that no injunction shall issue in a labor dispute unless: there is testimony by witnesses in open court that unlawful acts will be committed; the balance of convenience is on the plaintiffs' side as to each item of relief granted; the public officers are unwilling or unable to furnish protection (§ 7); the plaintiff has made a reasonable attempt at mediation (§ 8). It further provides that an injunction shall issue only on the basis of facts found and shall be restricted to specific acts complained of (§ 9). Remington's Rev. Wash. Stat. 1933, § 7612. Although these conditions precedent were not fulfilled, the lower court issued an injunction restraining, *inter alia*, the Teamsters Union from coercing by strike or boycott the members of the Brewery Union to join the Teamsters Union. The defendant was adjudged guilty of contempt for violating the injunction and appealed. *Held*, the controversy was a labor dispute within the meaning of the act. The provisions setting up procedural conditions to the issuance of an injunction violate the provision of the Washington constitution vesting the superior court with original equity jurisdiction. Consequently, the injunction and the citation for contempt were valid. *Blanchard v. Golden Age Brewing Co.*, 63 P. (2d) 397 (Wash. 1936).

The procedural conditions precedent to the issuance of an injunction were designed primarily to prevent the crippling of strikes by the issuance of temporary injunctions on the basis of flimsy partisan testimony. See Frankfurter and Greene, The Labor Injunction 47, 221 (1930); Sayre, Labor and the Courts, 39 Yale L. J. 682 (1930). Previous decisions of the Washington court, made in a different social context, suggest that the objective of these provisions rather than any compelling constitutional doctrine gave rise to the instant decision. In passing on the validity of legislation affecting the procedure and jurisdiction of courts, the Washington court has held that although the legislature may not abridge the jurisdiction granted to courts by the constitution, it