the statutory period. Since such a situation might create diplomatic difficulties for the federal government—to which any such complaint of the sovereign would be directed—it would be intolerable to permit the application of a state statute of limitations to the foreign government's claim.

Even if the New York statute were applicable, it might be argued that it was never tolled, but was suspended by the Soviet government's disability to sue as long as it was unrecognized in this country.[14] The New York Civil Practice Act[15] enumerates only infancy, insanity and imprisonment as disabilities which can allay the tolling of the statute. But the instant case would fall within a generally accepted exception for cases of absolute impossibility to sue, not contemplated by the legislature.[16] It would be manifestly unjust to reject a claim of the Soviet government for not having sued before when it would have been refused access to the courts of this country had it attempted to sue. Against this, it might be argued that the Russian claim was barred by the running of the statute of limitations as against the recognized Kerensky government[17] to which the original refusal to pay was addressed by the bank. But the principle of the continuity of governments[18] should not be applied against the Soviet government by charging it with the omissions of the Kerensky government, which was then neither the de facto government of Russia nor one with an interest in prosecuting claims on behalf of the Russian state which had passed out of its control.[19]

Practice—Scintilla of Evidence Held Sufficient To Prevent Directed Verdict—[Illinois].—In a wrongful death action, the plaintiff's own witnesses gave unimpeached and uncontradicted testimony that the deceased, while walking on the right side of a straight two lane highway with his back to traffic, stepped diagonally into the center of the highway and, as he bent to pick up an object, was struck by defendant's car. According to the testimony of the plaintiff's witnesses, the defendant was travelling about 50 miles per hour and was but 20 or 25 feet away from the deceased when he stepped into the road. There was little traffic and visibility was excellent. In Illinois, the plaintiff must show, as part of his prima facie case, that the deceased was free from

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Mighell v. Sultan of Johore, [1894] 1 Q.B. 149; 1 Oppenheim, International Law 222 (5th ed. 1937); Wilson and Tucker, International Law 136 (1901); 1 Fauchille, Traité de Droit International Public 270 (8th ed. 1922); F. von Liszt, Das Voelkerrecht 64 (11th ed. 1918); Research in International Law Part III, Art. 7 (1932).

[14] See Russian Soc. Fed. Soviet Rep. v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); The Penza, 277 Fed. 91 (1921); Republic of China v. Merchant's Fire Assur. Corp. of N.Y., 30 F. (2d) 278 (C.C.A. 9th 1929).

[15] § 60.

[16] Hanger v. Abbott, 6 Wall. (U.S.) 532 (1867) (state of war between contestant's countries suspends statute of limitations); Sands v. Campbell, 31 N.Y. 344 (1865) (an injunction against suit suspends statute of limitations); see Buswell, The Statute of Limitations and Adverse Possession 183 ff. (1889).

[17] Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 296, 410 (C.C.A. 2d 1927); The Rogdai, 278 Fed. 294 (1920).

[18] The Sapphire, 10 Wall., (U.S.) 164 (1870).

[19] As to the question of the possible revival of outlawed Russian claims through their assignment to the United States government in the executive agreement of 1933, see *supra* p. 9000.

contributory negligence.[1] The defendant's motion for a directed verdict, on the ground that the plaintiff had failed to establish the exercise of due care by the deceased, was denied. After a judgment and verdict for the plaintiff, judgment notwithstanding the verdict was granted by the Appellate Court under Illinois Civil Practice Act § 68(3)(b) and Supreme Court Rule 22. On appeal, *held*, (two judges dissenting), "The jury might take into consideration .... that the pedestrian may have observed the coming automobile and believed that .... he would have ample opportunity, with safety, to step into the highway for the purpose of retrieving the glove. ...."[2] Since it would have been error if the trial court had not submitted the issue of contributory negligence to the jury, the Appellate Court was not justified in reversing without remanding for a new trial. *Blumb v. Getz.*[3]

It is now generally accepted, since the case of *Toomey v. London B. & S. Ry. Co.*,[4] that the plaintiff must make out a prima facie case in order to reach the jury, *i.e.*, his version of the evidential facts must be more consistent with the ultimate fact which he must prove than with its contrary. A mere "scintilla of evidence" is insufficient, nor should the jury be allowed to enter into the realms of speculation.[5] The instant decision, however, is a throwback to the "scintilla of evidence" rule since the only conceivable inference for the plaintiff to establish the deceased's lack of contributory negligence was that the deceased *might* have seen the defendant's car and believed he could safely pick up the object. But even if he had looked and seen the car, he was not in the exercise of due care since the defendant's car, travelling at the rate of fifty miles per hour, was but twenty-five feet away when the deceased stepped into the highway. Thus, even though the deceased's contributory negligence was shown by the unimpeached and uncontradicted evidence of the plaintiff's own witnesses, a mere speculation from which no reasonable conclusion of due care could be drawn was held sufficient to prevent a directed verdict.

Placing the stress of an unclear opinion upon the doubtful proposition that a motion for a directed verdict is in the nature of a demurrer to the evidence,[6] the court was led astray to hold, in substance, that every conceivable supposition, even though leading to an unreasonable conclusion, was to be taken for the plaintiff, and that any testimony favorable to the defendant should be ignored. Such a rule is plainly in error. Even where the plaintiff's prima facie case is founded on reasonable inferences, a directed verdict for the defendant has been granted where the inferences are rebutted by the defendant's *direct*, uncontradicted, and unimpeached testimony raising a contrary con-

[1] Newell v. Cleveland, C.C. & St. L. Ry. Co., 261 Ill. 505, 104 N.E. 223 (1914); Berner, Admx, v. E. St. Louis & S. Ry. Co., 207 Ill. App. 544 (1917); *cf.* Code of Civil Procedure, § 841-b, now New York Civil Practice Act, § 265; N.Y. Cahill's Consol. Laws (1930), c. 13, Decedent Estate Law, § 131, Laws of 1920, c. 919.

[2] Blumb v. Getz, 366 Ill. 273, 277, 8 N.E. (2d) 620, 622 (1937).

[3] 366 Ill. 273, 8 N.E. (2d) 620 (1937).

[4] 3 Common Bench Rep. (N.S.) 146, 140 Eng. Reprints 694 (1857).

[5] Libby, McNeil & Libby v. Cook, 222 Ill. 206, 78 N.E. 599 (1906); Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N.E. 651 (1898); Metropolitan Ry. Co. v. Jackson, 3 App. Cases 193 (1877); Improvement Co. v. Munson, 14 Wall. (U.S.) 442 (1871).

[6] See Scott, Fundamentals of Procedure in Actions at Law 94 (1922); Smith, The Power of the Judge to Direct a Verdict: Sec. 457-a of the New York Civil Practice Act, 24 Col. L. Rev. 111, 112–113 (1924); Gibson v. Hunter, 2 H. Bl. 187, 126 Eng. Reprints 499 (1793).

clusion.[7] Similarly, if the plaintiff's prima facie case is avoided by uncontradicted and unimpeached evidence, whether given by his own witnesses[8] or by those of the defendant,[9] a directed verdict for the defendant is proper. Failure of the plaintiff to make out a prima facie case will also result in a directed verdict for the defendant.[10] Furthermore, if the inferences raised by the existence of physical facts of which the court will take judicial notice conclusively rebut what would otherwise be a prima facie case, the plaintiff will not be allowed to reach the jury.[11] *A fortiori*, a verdict should be directed for the defendant where, as in the instant case, there is both a failure of proof and where irresistible conclusions from the testimony of the plaintiff's own witnesses rebut an essential element of his prima facie case.[12] Even a demurrer to the evidence will be sustained in such a situation.[13]

This decision emasculates both the power of the trial court to direct a verdict, and also the power of the Appellate Court to grant judgment notwithstanding the verdict since the Appellate Court can grant a judgment notwithstanding the verdict only where the trial court should have granted a directed verdict.[14] By sending the case back for a new trial, the court indicated that it would not have let the verdict stand. Repeated new trials may thus become necessary since, under the decision of this case, neither the trial court nor the Appellate Court could grant judgment notwithstanding the verdict, nor could they sustain a verdict for the plaintiff on the basis of this evidence.

The decision of the instant case is contrary to the trend toward increasing the power of the court to direct a verdict.[15] Nor can it be justified on the theory that a presumption of due care of the deceased operated to create a prima facie case for the plaintiff, since under the orthodox view the presumption vanished when direct evidence was introduced showing the deceased to have been contributorily negligent.[16] In fact,

[7] McCormack v. Standard Oil Co., 60 N.J. L. 243, 37 Atl. 617 (1897).

[8] Porter v. New York City Interborough Ry. Co., 235 App. Div. 525, 257 N.Y. Supp. 757 (1932), aff'd 261 N.Y. 587, 185 N.E. 750 (1933); Cleveland, C. C. & St. L. Ry. Co. v. Lee, Adm'r., 111 Ohio St. 391, 145 N.E. 843 (1925); Rich dem. Lord Cullen v. Johnson, 2 Str. 1142, 93 Eng. Reprints 1088 (1740).

[9] Lonzer v. Lehigh Valley Ry. Co., 196 Pa. 610, 46 Atl. 937 (1900); Davis v. Hardy, 6 Barn. & C. 225, 108 Eng. Reprints 436 (1827) (non-suit); Lomer v. Meeker, 25 N.Y. 361 (1862) (non-suit).

[10] Austin v. Public Service Co. of Northern Ill., 299 Ill. 112, 132 N.E. 458 (1921); Greenwald v. Baltimore & O. Ry. Co., 332 Ill. 627, 164 N.E. 142 (1928); Searles v. Manhattan Ry. Co., 101 N.Y. 661, 5 N.E. 66 (1886).

[11] Hunter v. New York, O. & W. Ry. Co., 116 N.Y. 615, 23 N.E. 9 (1889); Lamp v. Penn. Ry., 305 Pa. 520, 158 Atl. 269 (1931); Cleveland, C.C. & St. L. Ry. Co., v. Lee, Adm'r., *supra* note 8; Kwiotkowski v. Ry. Co., 70 Mich. 549, 38 N.W. 463 (1888).

[12] Wallner v. Chicago Traction Co., 245 Ill. 148, 91 N.E. 1053 (1910); Porter v. New York City Interborough Ry. Co., *supra* note 8.

[13] Cooley v. Galyon, 109 Tenn. 1, 70 S.W. 607 (1901).

[14] Illinois Civil Practice Act, § 68(3)(b) and Supreme Court Rule 22.

[15] *E.g.*, New York Civil Practice Act, § 457-a, Laws of 1921, c. 372; see Smith, The Power of the Judge to Direct a Verdict: Section 457-a of the New York Civil Practice Act, 24 Col. L. Rev. 111 (1924).

[16] Baker v. Delano, 191 Mich. 204, 157 N.W. 427 (1916); Gillet v. Mich. United Traction Co., 205 Mich. 410, 171 N.W. 536 (1919); Petro v. Hines, 299 Ill. 236, 132 N.E. 462 (1921).

if the trial court had instructed the jury that, in determining the question of contributory negligence, it might consider this speculation that ". . . . the pedestrian may have observed the coming automobile and believed that . . . . ," such instruction might well have been reversible error as having enlarged the issues presented by the evidence since no evidence was presented upon which to base this speculation.[17] Judicial hostility toward the minority rule requiring the plaintiff to prove lack of contributory negligence may be a possible explanation of the decision. The result reached, however, is deplorable since the difficulty of repeated new trials, already existing where there is a direct conflict in the evidence,[18] is extended to cases where the trial court should have directed a verdict in the first instance.

Torts—False Imprisonment—Probable Cause—Punitive Damages—[Illinois].—The plaintiff in payment of some purchases tendered a clerk in the defendant's store a counterfeit $5.00 bill. The bill was turned over to the manager, the defendant, who went to the plaintiff and said, "Madam, I am sorry; this bill is counterfeit. I have called the police. You will have to wait here!" He then remained in the plaintiff's vicinity until the police arrived a few minutes later. The plaintiff was taken to the defendant's office by the police for questioning and then to the police station whence she was discharged after an hour and a half. *Held*, affirming the trial and appellate courts, that there was sufficient evidence of false imprisonment to support a verdict, including punitive damages, and that $750 for the plaintiff was not excessive. *Lindquist et al. v. Friedman.*[1]

Rarely is a clash between two policies of the law more clearly delineated than where the court in order to uphold a person's right to freedom from the unwarranted confinement refuses to direct a verdict and thus deprives a citizen of the immunity which should attend those who in a reasonable manner attempt to aid in the enforcement of the law.[2]

Since submission to words when they are accompanied by threats of force or asserted authority is sufficient to constitute false imprisonment,[3] the court could not have ruled as a matter of law that there was no confinement. But there is a distinction between cases where a person requests an officer to arrest and cases where a person lays information before an officer who arrests on his own authority.[4] The court might well have excluded the evidence of the action of the officers at the police station as an aggravation of damages.

At common law a citizen was privileged to arrest when a crime had been committed

[17] Galena Ry. Co. v. Jacobs, 20 Ill. 478 (1858).

[18] Baumann v. Hamburg-American Packet Co., 67 N.J. L. 250, 51 Atl. 461 (1902); McDonald v. Metropolitan Street Ry. Co., 167 N.Y. 66, 60 N.E. 282 (1901); Phillips v. Phillips, 93 Iowa 615, 61 N.W. 1071 (1895); however, see note 14 *supra*.

[1] 366 Ill. 232, 8 N.E. (2d) 625 (1937).

[2] Harper, Malicious Prosecution, False Imprisonment and Defamation, 15 Tex. L. Rev. 157, 177 (1937).

[3] Rest., Torts—Intentional Harms §§ 40, 41 (1934); Harper, Law of Torts 49 (1933); Cooley, Torts 435 (4th ed. 1934).

[4] Zinkfein v. W. T. Grant Co., 236 Mass. 228, 232, 128 N.E. 24, (1920); Murray v. Werner, 192 Ill. App. 564, 568 (1915) (*dictum*); Baker v. Coon, 102 Neb. 243, 166 N.W. 555 (1918).