than the appellant's previous objection[3] that the by-law gave the Council a discretion which was uncontrolled. Strictly speaking this was said in reference to the argument of counsel, but it would appear that the Court's attitude was in conformity with the "growing disinclination" on the part of courts to interfere with by-laws on the ground of unreasonableness.[4]

3. This was disallowed on the authority of *Fox* v. *Allchurch* (1927) 40 C.L.R. 135; *County Roads Board* v. *Neale Ads Pty. Ltd.* (1930) 43 C.L.R. 126; and *Swan Hill Corporation* v. *Bradbury* (1937) 56 C.L.R. 746, 762.
4. See Gavan Duffy J. in *Proud* v. *City of Box Hill* [1949] Argus L. R. 549, 551.

EVIDENCE

Omnia Praesumuntur Contra Spoliatorem

If a plaintiff, by his own act, fails to furnish a court with important evidence concerning his claim, the court will not hesitate to draw inferences against him. Such was the case in *Saloustis* v. *Nikic*,[1] where the plaintiff sought rescission in equity, or alternatively damages, concerning an agreement in writing whereby the plaintiff had agreed to purchase from the defendants a business known as the "Night Spot Café". The basis of the claim was a fraudulent misrepresentation, alleged to have been made orally by the defendants, as to the profits of the business.

Soon after signing the contract and paying a deposit, the plaintiff destroyed the only copy of the agreement, intending to terminate the contract and dispose of the documentary evidence concerning its provisions. Accordingly, when a dispute arose, no written evidence as to the terms of the contract was available, and the plaintiff failed to call as a witness the person who had drafted the document, or any other person who had seen it.

From the insufficient and conflicting evidence that was given by the parties, it was impossible to decide whether the missing evidence would affect the issue. Hence Mayo J. applied two principles of law and equity against the plaintiff.

First, following *Lawton* v. *Sweeney*,[2] he held that the maxim *omnia praesumuntur contra spoliatorem* applied. His Honour said: "The general principle is that where a person intentionally puts it out of his power to produce something which he could produce, the object or article being of a nature relevant to the claim or defence, the principle . . . will cause an unfavourable inference to be drawn against that person."

A good illustration of the application of this principle can be seen in the famous case of *Armory* v. *Delamirie*.[3] Since the jeweller failed to produce the jewel found by the chimney sweep, the court adopted the presumption that it was of the highest quality and assessed damages accordingly.

In applying this principle, as the court in *Saloustis* v. *Nikic* hastened to point out, one must distinguish between a case of intentional sup-

1. [1961] Law Society Judgment Scheme 11.
2. (1844) 8 Jur. 964.
3. (1772) 1 Stra. 504.

pression of vital evidence, and one where secondary evidence is given and the unknown parts cannot reasonably be thought to have any effect upon the issue.

The second obstacle the plaintiff had to face in seeking rescission in equity was the maxim that he who seeks equity must do equity, or alternatively, the principle that the plaintiff "must come into the court with propriety of conduct, with 'clean hands'." The principle, as Mayo J. well recognised, must "have an immediate and necessary relation to the equity sued for."[4] The plaintiff's own wrongful act had a direct bearing on the claim, and this principle was rightly applied.

There seems to be little difference in effect between the principle of evidence and that of equity applied by the Court. The earliest authority for the application of the former is to be found in 1680, in the court of Chancery, when Lord Nottingham L.C. said in *Lewis* v. *Lewis*[5]: "where the evidence is suppressed by either party, a court of equity will always presume a title against the person suppressing it, until the evidence be produced." From here it has become a rule of evidence in courts of common law and equity,[6] and it may be doubted whether it has any wider application than the principle that a plaintiff must come to equity with clean hands.

4. *Dering* v. *Earl of Minchelsea* (1878) 1 Cox Eq. 318, 319-320.
5. (1680) Cas. temp. Finch 471; 23 E.R. 254 at 255.
6. See *Cookes* v. *Hellier* (1749) 1 Ves. Sen. 234, 235.

NEGLIGENCE

Explosion in Reconditioned Kerosene Refrigerator

In *Godfreys Ltd.* v. *Ryles*[1] the plaintiff sued the defendant company in negligence as the supplier and repairer of a reconditioned kerosene refrigerator which exploded and set his house on fire.

From the moment of installation the refrigerator was unsatisfactory and on several occasions the Company's servants were requested to make certain adjustments to it. Some weeks before the explosion upon which the action was brought, a fire broke out in the kerosene burner which supplied the heat for the vaporisation of the ammonia refrigerant, but no damage occurred because of the prompt action of the plaintiff in putting out the fire. The defective burner was replaced, but further difficulties were experienced and the defendant company made other repairs. For the space of a fortnight its operation was satisfactory until one day there was an explosion in the refrigerator and a fire broke out which gutted the house and destroyed practically all its contents. Mr. L. F. Johnston S.M. found that the explosion originated in the refrigerator. Under *Donoghue* v. *Stevenson*[2] the plaintiff and his wife were people who should have been within the contemplation of the defendant company, and because he found that its negligent supply and repair had caused the explosion, it was in breach of the duty of care which it owed to the plaintiff. The learned Special Magistrate also held that the maxim "*res ipsa loquitur*" applied.

1. Law Soc. J. Scheme at pp. 389-404 (Ross J.) and pp. 778-785 (Full Court).
2. [1932] A.C. 532.