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.

Ross J. upheld an appeal by the defendant company against this decision. He found that the fire originated from a weakness or defect in one of the tubes of the refrigerator, and not from a weakness or defect in the kerosene burner which had been replaced. Since the defendant company was not the manufacturer of the appliance, the weakness or defect in the tube was something for which it should not have to answer. His Honour decided on the evidence that the explosion was equally attributable to defects or weaknesses in the construction of the refrigerator itself or to carelessness in the fitting and lighting of the burner by the plaintiff's wife, or to negligence by the appellant or its servants in repairing or adjusting the refrigerator.

The inapplicability of the maxim *"res ipsa loquitur"* was demonstrated by Chamberlain J. in the full Court.[3] The learned S.M. had sought to treat what is at most a procedural rule designed to prevent the injustices of an over-severe burden of proof, as a doctrine of substantive law. Some support for this approach might be gained from the decision of the English Court of Appeal in *Cassidy* v. *Minister of Health*[4] but it was now accepted in Australia as inaccurate. The cases of *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.*[5] and *Mummery* v. *Irvings Ltd.*[6] establish that in some cases a *prima facie* presumption of negligence is raised by the facts themselves in order to avoid the disadvantages flowing from, or paucity of evidence on, the precise cause of an accident, and this presumption will suffice to establish negligence if the defendant is not able to offer an adequate explanation of the cause of the accident.

It is perhaps a matter for some regret that the Court did not take this opportunity to elucidate the question of the duty and responsibility of reconditioners as opposed to manufacturers and repairers.

3. Law Soc. J. Scheme pp. 782-784.
4. [1951] 2 K.B. 343.
5. (1935) 54 C.L.R. 200.
6. (1956) 96 C.L.R. 99.

IMPERIAL LEGISLATION

Repugnancy with Commonwealth Legislation — Merchant Shipping Act, 1894

In *Bice* v. *Cunningham*[1] the question arose as to the extent of operation of s. 221(a) of the Imperial Merchant Shipping Act, 1894, in South Australia in the light of s. 62 of the Commonwealth Navigation Act, 1958, and more specifically whether a prosecution under the Imperial provision was still possible.

The defendant Cunningham was originally charged before a Special Magistrate with the offence of desertion under s. 221(a) of the old Act. Notwithstanding his plea of guilty, the learned Special Magistrate dismissed the complaint, holding that s. 221(a) no longer had any operation in South Australia since the Commonwealth Parliament by s. 62 of the Navigation Act had shown an intention to "cover the field" concerning the offence of desertion

1. [1961] S.A.S.R. 207.