minutes"; he said that they would pay the tax to their new chief, if the Chiefdom were disamalgamated. There was no evidence as to what was said by the appellant at that conference. The conference did not last long, and did not need long, as its result was merely a repetition of the same intention.

The learned judge seems to have convicted the appellant mainly because he signed the petition and because, having seen him in the witness box, he (the judge) had no doubt that the appellant— "is the strong man directing and wielding influence over his followers. . . . The people are under the dominion of the accused and he influences and directs them. . . ." There was no evidence that that was so, and no evidence that he had incited them not to pay tax, which is what he was charged with.

We do not see fit to take the course suggested by Mr. Donald Macaulay and alter the conviction to one of the other offences under s.18, for the reason that we uphold the submission that there was no case to answer. No one should be so foolish as to take our allowing this appeal as condoning refusal to pay tax. If the appellant (or any one else) carries into effect his declared intention not to pay tax, he is likely to find himself again in the dock, and again in gaol.

Appeal allowed.

ELDER DEMPSTER AGENCIES LIMITED *v.* DECKER

SUPREME COURT (Cole, Ag. C.J.): September 4th, 1964
(Mag. App. No. 27/64)

[1] Civil Procedure—appeals—matters of fact—appellate court must form own opinion on evidence: Although an appellate court is reluctant to set aside findings of fact by a court which has heard and seen the witnesses, it is its duty to form and give effect to its own independent opinion on the evidence, especially when the question turns on the proper deductions to be made from the evidence as a whole rather than on the truthfulness of particular witnesses: (page 118, line 40—page 119, line 5).

[2] Evidence — functions of court — appellate court — matters of fact — appellate court's duty to form independent opinion: See [1] above.

The respondent brought an action in a magistrate's court against the appellants for the delivery of goods and damages for their non-delivery.

The appellants were carriers of goods by sea. They contracted to

carry 10 packages for the respondent. The contract of carriage provided that the appellants' responsibility should cease as soon as the goods had left the ship's deck or tackle, that the goods should be received by the consignee from the ship's tackle as soon as they were ready for delivery, and that if the respondent failed to send a representative the ship's tally should be accepted as final. There was no evidence that the respondent sent a representative. Tally slips showed the total number of packages unloaded from the ship. These were taken into custody by the management of the port. Three days later the respondent went to collect her goods and received nine packages and a tracing slip from the port management. Later the port manager wrote informing the respondent that though there was evidence of landing by tally, the missing package was untraced when a physical check was made while the ship was discharging.

The port manager was originally joined as a defendant but the claim against him was withdrawn when the case came up for hearing. The magistrate found that the missing package was not delivered to the port management and gave judgment against the appellants.

On appeal, the appellants contended that the judgment was against the weight of evidence. Against this, it was submitted that the finding should not be disturbed since the magistrate had made it after careful consideration of the evidence and after having seen the witnesses and observed their demeanour.

Gage for the appellants;
Gelaga-King for the respondent.

COLE, Ag. C.J.:

The respondent in this appeal claimed in the court below against the appellants—"the delivery of one bundle native cloth or its value, damages for detaining the same and damages for breach of bailment." The learned magistrate by his judgment delivered on June 2nd, 1964—"found that the package was not delivered to the Port Management" and therefore held that the appellants were liable and awarded the respondent £100 as the value of the package, £50 for loss of profits and costs assessed at £11. 15s. 9d. It is against this judgment that the appellants have appealed to this court on six grounds of appeal.

The appellants and the Port Manager of the Port Management were originally the two defendants before the court below. When the action came up for hearing on May 19th, 1964, Mr. Gelaga-King,

respondent's counsel, withdrew the claim against the Port Manager and the action proceeded only against the appellants.

It emerged from the evidence in the court below that the appellants were at all times material to the action carriers of goods by sea. According to Exhibit D, the appellants and the respondent on June 20th, 1963, entered into a contract for the carriage by sea from the port of Lagos to that of Freetown of 10 packages on the deck of the ship M.V. "Tamele." One of the conditions of the contract was that relating to the method of delivery. This condition is endorsed at the back of Exhibit D and it reads:

> "8. Methods of Delivery—The Carrier may commence discharge immediately on arrival of the ship and discharge continuously irrespective of weather by day and night Sundays and holidays included all extra expense occasioned by discharging after customary hours and on Sundays and holidays to be for account of the Consignee any custom of the port to the contrary notwithstanding. The Carrier's responsibility shall cease as soon as the goods have left the ship's deck or tackle. The goods shall be received by the Consignee from the ship's tackle as soon as they are ready for delivery. If the Consignee fails to send a representative on board, or to the place of delivery as the case may be, the tally of the ship shall be accepted as final. No claims will be admitted which are ascertained after the goods are delivered. Goods may be put into lighters or surf boats for landing as customary or convenient."

It should be noted that it was part of this condition that the appellants' responsibility for the 10 packages ceased as soon as the goods had left the ship's deck or tackle. Furthermore, if the respondent failed to send a representative on board, or to the place of delivery as the case might be, the tally of the ship was to be accepted as final. The M.V. Tamele discharged her cargo in Freetown on June 25th, 1963, as is shown by the tally slips put in evidence in the court below. There is no evidence to show that the respondent sent a representative. In all, 154 packages were unloaded. These packages were taken into custody by the Port Management, Freetown, and an officer of the Port Management signed for them. Exhibit B shows that on June 28th, 1963, the respondent went to the Port Management in Freetown to collect her goods. She received only nine packages instead of 10. On that same date a tracing slip, Exhibit C, was handed to the respondent by the Port Management. It would appear that when she could not receive her missing package she

wrote a letter dated July 15th, 1963, to the appellants to which Exhibit A is a reply. Exhibit A reads:

"Dear Madam,

We are in receipt of your letter dated July 15th, 1963 and wish to inform you that according to records in our possession, your full manifested quantity of ten packages was discharged from the vessel at this port and into the custody of the Port Management to which organisation we suggest you refer your claim."

On February 7th, 1964, the Port Manager issued the respondent with Exhibit F which states, *inter alia*:

"One bundle native cloth short delivered. Although evidence of landing by tally, package untraced when physical stock check was made at time vessel was discharging."

The "tally" referred to in this exhibit is no doubt the tally slips showing the taking of delivery by the Port Management of 154 packages unloaded from the M.V. "Tamele." There was no clear evidence on this point but it is reasonable to assume that to be the case. In effect, the Port Management was on February 7th, 1964, telling the respondent in clear and unmistakeable terms that although they received her missing package from on board the M.V. "Tamele," they were unable afterwards to trace it. It should be noted that the Port Manager is, according to s.5 of the Port of Freetown Act (*cap.* 140), the officer appointed by the Governor (now the Governor-General) to manage and operate the Port of Freetown. Condition 8 endorsed on Exhibit D is to be read subject to the Port of Freetown Act. In other words, when the appellants have tallied goods to the Port Management of Freetown, their responsibility for those goods ceases.

I now turn to the grounds of appeal. I shall deal with ground (a) which complains that the judgment and order of the court below are contrary to law and against the weight of evidence led in the case. In this connection the magistrate found on the evidence that the package, the subject-matter of the action, was not delivered to the Port Management and so held that the appellants were liable. Mr. Gelaga-King in the course of his argument against this ground of appeal quite rightly pointed out that the magistrate made this finding after careful consideration of the evidence and after having seen the witnesses and having observed their demeanour. He submitted that in the circumstances the finding should not be disturbed. An appeal court is naturally reluctant to reverse on this ground the findings of a magistrate who has had the advantage of seeing and

hearing the witnesses. At the same time it is the duty of this court to form and give effect to its own independent opinion upon the evidence, more especially when, as here, the question turns not so much upon the truthfulness of particular witnesses as upon the proper deductions to be made from the evidence as a whole. In my view the proper deductions to be drawn from the evidence as a whole, and in particular condition 8 on Exhibit D read in the light of the Port of Freetown Act (*cap.* 140), the tally slips and Exhibit F were:

(i) that the respondent had no representative on board the ship M.V. "Tamele" or at the place of delivery of the goods;

(ii) that of the 154 packages unloaded from M.V. "Tamele," 10 belonged to the respondent;

(iii) that the Port Management received the 154 packages tallied to them by the appellants;

(iv) that the Port Management delivered to the respondent nine of the packages which belonged to her; and

(v) that the Port Management has not traced the remaining one, the subject-matter of the action.

In these circumstances the responsibility of the appellants for the package in question had ceased in accordance with the terms of the contract between them and the respondent. For these reasons I am of the opinion that the finding in favour of the respondent that the package was not delivered to the Port Management by the appellants is against the weight of the evidence. I am of the view that the action should have been dismissed by the court below. I find substance in this ground and therefore consideration of the other grounds of appeal becomes unnecessary.

This appeal is therefore allowed. The judgment of the court below is hereby reversed. If the judgment of the court below has already been satisfied, all sums paid by the appellants thereunder should be refunded. The appellants are to have the costs of this appeal and the costs of the action in the court below.

Appeal allowed.