

owing to the misconception of their agent at Bridgen, delivered them to A. W. Smith & Co. in Toronto. The breach committed by defendants was not, therefore, any breach of the contract to carry the goods to London and deliver them to the order of the Canadian Bank of Commerce there, but of a new contract to carry them from London to Montreal and deliver them to Campbell & Co. : *McGill v. Grand Trunk R. W. Co.*, 19 A. R. 245. Such a contract is not alleged in the statement of claim, but the pleadings can be amended to suit the facts. Under these circumstances, the condition upon which defendants rely cannot be treated as an answer to plaintiff's claim. Even if it could be found as a matter of fact that the new contract to carry from Toronto to Montreal should be treated as having been subject to the terms of the shipping receipt under which the original contract was entered into, it could not be held, in the face of *Vogel v. Grand Trunk R. W. Co.*, 11 S. C. R. 612, that defendants, having received the goods at London as carriers upon a new contract to carry them to Montreal, can protect themselves against the consequences of their own negligence by such a condition as this, for the case comes directly within the express terms of sec. 246 of the Railway Act, 51 Vict. ch. 29 (D.), as interpreted by the Supreme Court in the *Vogel* case.

Appeal dismissed with costs; but the judgment should order the transfer from plaintiff to defendants of plaintiff's right to the goods in question, and to recover the value of them from A. W. Smith & Co.

FALCONBRIDGE, C.J.

NOVEMBER 4TH, 1902.

CHAMBERS.

RE PINKNEY.

*Security for Costs—Petition by Parents for Custody of Infant—Petitioners out of Jurisdiction—Respondents admitting Rights of Petitioners.*

Appeal by William Corbett and Elizabeth Corbett from order of Master in Chambers (ante 694) refusing their application for security for costs of a petition by Thomas Pinkney and Emily Jane Pinkney for the custody of their infant son Leland Pinkney. The petitioners lived out of the jurisdiction. The Master in Chambers was of opinion that, as the respondents were willing to give up the boy to his parents, there was no necessity for the petitioners giving security.

Shirley Denison, for appellants.

W. E. Middleton, for petitioners.