"subject to acceptance in five days, delivery within six months." On 5th Oct. the company wrote and mailed a letter in reply, as follows: "We would now inform you that we will accept your offer on timothy hay, as per your letter to us on the 2nd inst. Please ship as soon as possible the orders you have already in hand, and also get off the seven cars as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was registered, and by reason of the registration was not received by O. within the five days. Had it not been registered O. would have received it in the ordinary course of post within the five days. As a fact it was not received until the following day. On 12th Oct., O.'s agent wrote the company, acknowledging the letter, and saying that O. regretted to inform the company that the acceptance of the offer arrived too late, and he was, therefore, not able to furnish the hay.

On 6th Nov. the company wrote O. in reply, insisting on delivery of hay, as contracted for by the 15th of that month, and notifying him that in case of default, they would replace the order, charging him with any extra cost and expenses.

Prior to the expiration of the six months, mentioned in O.'s letter, the company, in defence to an action by him against them, counterclaimed for damages claimed on account of his alleged breach of contract for delivery of the thirty-seven car loads of hay.

Held, that as the six months limited for making delivery had not expired, the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature. Appeal allowed with costs.

Aylesworth, K.C., and *Lennie*, for appellant. *Taylor*, K.C., for respondents.

B.C.] McKELVEY *v.* LE ROI MINING CO. [NOV. 17, 1902.

Practice—New points on appeal—Negligence—Findings of fact—Machinery in mine—Defective construction—Proximate cause of injury—Fault of fellow-workman—Defective ways, works and machinery—Disturbing verdict on appeal.

Questions of law appearing upon the record, but not raised in the Court below, may be relied upon for the first time on an appeal to the Supreme Court of Canada.

An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth.