far as it brings into marked relief the fact that a uniform mileage rate without regard to distance is not according to practice in the case of such traffic as that of the pursuers. It would be very surprising indeed if it were.

I arrive without difficulty at the conclusion that we should adhere to the Lord Ordinary's interlocutor, and I move your Lordships accordingly.

The other Judges concurred.

The Court adhered to the Lord Ordinary's interlocutor and dismissed the reclaiming-note as irrelevant.

Counsel for the Appellants—Asher, Q.C. —Wallace—Hunter. Agents — Mackenzie & Black, W.S.

Counsel for the Respondents — D.-F. Balfour, Q.C. — Guthrie. Agents — John Clerk Brodie & Sons, W.S.

Friday, July 3.

FIRST DIVISION.

CHAMBERS AND OTHERS *v.* THE EDINBURGH AND GLASGOW AERATED BREAD COMPANY, LIMITED.

Public Company—Rectification of Register —Misrepresentation—Shares Applied for on Faith that Certain Parties would be Directors.

A company was formed in July 1888, and the memorandum of association bore that the registered office would be in England. The prospectus, which was issued in December 1888, stated that E would be chairman and C one of the directors. In the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office would be in Scotland. The shares were applied for. In consequence of the above discrepancy the company was wound up and a new company was formed and registered in Scotland. A circular was addressed to applicants intimating this, and stating that "as the company will now fall to be managed in Glasgow, Messrs E and C, the two members of Parliament (whose Parliamentary duties will prevent their attendance at the board)," and another, had retired. The circular requested applicants to give their consent to the course followed, and to make new application for shares.

Certain shareholders who had applied after receiving the circular petitioned the Court to remove their names from the register on the ground that they had acted in the belief that E had agreed to be chairman and director, that he had a good opinion of the company, and that he had retired from these offices only because his Parliamentary duties would interfere with his attendance, but that this belief had been induced by the misrepresentation of the promoters and was unfounded in fact.

It appeared on a proof that the directors were justified in advertising E as chairman of the original company, and that he had withdrawn along with C on account of certain differences with the other directors.

The Court *refused* the petition, holding that after receiving the circular the petitioners could not have relied on E and C being directors, and that there was no fraud on the part of the other directors, or such misrepresentation as to entitle the petitioners to have their names removed from the register.

This was an application by certain shareholders of the Edinburgh and Glasgow Aerated Bread Company, Limited, to have their names removed from the register of the company in consequence of their having been induced to take shares by misrepresentation as to the parties who were to form the board of directors. The company was formed in July 1888. The second clause of the memorandum of association bore that the registered office of the company would be situated in England. The prospectus, which was issued in December 1885, stated, *inter alia*, that the following gentlemen were to be the chairman and directors of the said company, viz.—(1) Peter Esslemont, Esq., M.P., Aberdeen (chairman); (2) G. B. Clark, Esq., M.P.; (3) William M'G. Burns, Esq., M.D.; (4) John M. Bryce, Esq., Glasgow; (5) John Crawford, Esq., Glasgow; and (6) James M'Cankie, Esq., Edinburgh. In the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office of the company would be situated in Scotland. The petitioners applied for shares in the company. On the above discrepancy being observed by the solicitors of the company they advised the Glasgow directors of the company that they were not in safety to proceed to allotment, and it was arranged that the company should be wound up and a new company formed, to be registered in Scotland. The English company was accordingly wound up. On 31st December 1888 a circular was issued to the petitioners and others who had applied for shares by Mr Andrew Barr, interim secretary of the said company, stating, *inter alia*, that owing to an error in the memorandum of association to the effect that the registered office of the company would be situated in England, instead of in Scotland, it had been found necessary to register the company in Scotland, and to manage the business in Glasgow, that the company had accordingly been registered in Scotland, and that, "as the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two members of Parliament (whose Parliamentary duties will prevent their attendance at the board), and Mr M'Cankie have retired, but the remaining directors

are pleased to state that Sir Charles Firth (chairman of the Liverpool and Manchester Aerated Bread and Cafe Company, Limited) has joined the new board as chairman. In order to avoid any possible complications in the future it is desirable before the shares are allotted that applicants should give their express consent to the course which has been adopted." The said circular was accompanied by a new prospectus, setting forth, *inter alia*, the names of the directors as Sir Charles Firth, William M'G. Burns, John M. Bryce, and John Crawford, and requested parties who had applied for shares to renew their applications. The company was incorporated under the Companies Acts 1862 to 1886 under the name of The Edinburgh and Glasgow Aerated Bread Company, Limited, and the registered office of the said company is in Glasgow. The petitioners applied for shares in the second company in terms of the new prospectus and the new application form, and received allotment of shares.

The petitioners alleged—"In acquiring shares in the said company as aforesaid the whole of the petitioners acted in the belief that Mr Esslemont had agreed to act as chairman and director of the said company, as set forth in the original prospectus, that he had a good opinion of the company, and that he had retired from the offices of chairman and director only because his Parliamentary duties would interfere with his attendance at the meetings of the board in Glasgow, and this belief on the part of the petitioners was induced by the statements and representations made in the said prospectus and circular as before mentioned. Mr Esslemont has a very high reputation as a man of business and a financier, and this was well known to the petitioners, and the statements and representations with regard to him made in the prospectus and circular as before set forth were the means of inducing the petitioners to acquire shares, or at least they very materially influenced the petitioners in their decision in the matter. The petitioners have recently learned, and now aver, that as matter of fact Mr Esslemont never agreed to act as chairman and director of the company, never gave authority for his name being advertised in the said prospectus as chairman or director, and never authorised the statement in the said circular that he had retired from the board in consequence of inability to attend the meetings of the directors in Glasgow. The change to Glasgow was no part of Mr Esslemont's reason for withdrawing. The promoters and directors of the company (other than Messrs Esslemont, Clark, and M'Cankie) were responsible for the said prospectus and circular, and they knew when the prospectus was issued that Mr Esslemont had not consented to act as chairman and director, and had not authorised them to use his name in the prospectus. At the time when they issued the said circular they knew that Mr Esslemont had repudiated all connection with the company, and that he had done so because he did not approve of the way in which the company had been promoted, the amount paid in promotion money, and the payment for the directors of qualifying shares, and also because he did not believe that the company would be a financial success. He stated these objections to the said promoters and directors, both verbally and in writing, in or about the month of December 1888. The prospectus and circular referred to were fraudulently conceived and issued in the terms above mentioned expressly for the purpose of misleading and deceiving applicants for shares, by inducing them to believe that Mr Esslemont had faith in the company, and was willing to lend his name to it and put money into it, and as matter of fact the petitioners were so misled and deceived, and in consequence applied for shares."

The company lodged answers, in which they averred that the statements in the circular and relative prospectus were made *bona fide* and were true, and that the petitioners were aware at the time when they applied for shares that Mr Esslemont was not to be a director.

On a proof before Lord M'Laren it appeared that when first invited to join the board Mr Esslemont hesitated for some time before his final decision. His impressions of the company were at first favourable although he subsequently altered his opinion. On 16th December 1888 he received a letter from Mr Turner, one of the promoters, announcing his understanding that Mr Esslemont had definitely assented to take the chairmanship of the company, and his intention to have the prospectus printed. Mr Esslemont did not reply to this letter. The prospectus was printed in the newspapers. Mr Esslemont attended a meeting of directors in Glasgow on the 27th December. He refused an invitation to take the chair, and explained that his name had been advertised without his consent, and that he was not satisfied with the position of the company, or as to its prospects or conditions. He drew up a series of conditions on which alone he would consent to act. These were not accepted, and he withdrew. He deponed that the circular did not state the true reason for his retiral.

Mr Clark deponed that he approved of the conditions submitted by Mr Esslemont, but the meeting would not accept them, and there were angry words between Mr Esslemont and one of the directors on the subject. Mr Clark had informed the directors from the beginning that his acting as director depended entirely on Mr Esslemont being chairman. He retired along with him, and not for the reason stated in the circular.

Argued for the petitioners—The statement in the circular issued to the shareholders was false, and it was a material statement. It was not incumbent on the directors to assign any reason for Mr Esslemont declining to be a director, but they assigned a reason which was calculated to deceive and did deceive the public. It was not necessary for the petitioners to prove fraud, but the present clearly re-

sembled it. The names on a directorate influenced the public, and Mr Esslemont's name in particular, from his position and known abilities, induced the petitioners to subscribe. They thought from the statements in the circular that he had a good opinion of the company. In the circumstances they were entitled to be removed from the register—*Smith* v. *Chadwick*, L.R., 20 Ch. Div. 27; *Smith's* case, L.R., 2 Ch. App. 604; *Henderson* v. *Lacon*, L.R., 5 Eq. 249.

Argued for respondents—The petitioners had failed to show any good ground for removal of the names from the register. There had been no representation that was false in fact, nor had there been any material misrepresentation. Even if there had been misrepresentation the petitioners had failed to show that they had in any way acted upon that misrepresentation—Buckley on Companies Acts (last ed.), 112, sec. 35; Lindley on Company Law, 73. The petitioners were made aware before they took shares in the new company that Mr Esslemont was not to be a director, and they could not now be heard to say that they relied on his name. With reference to certain of the petitioners there was undue delay in challenging the register.

At advising—

LORD PRESIDENT—This is an application under section 35 of the Companies Act of 1862 to have the petitioners' names removed from the register of the Edinburgh and Glasgow Aerated Bread Company, Limited. The substance of the complaint on account of which it is sought to have the register rectified is somewhat difficult to find.

It appears that in July 1888 a company was formed under the name of the Edinburgh and Glasgow Aerated Bread Company, Limited. The second clause of the memorandum of association bore that the registered offices of the company would be situated in England. The prospectus of the company was issued to the public in December 1888, and in the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office of the company would be situated in Scotland. When this discrepancy was observed by the solicitors of the company they advised the Glasgow directors that they were not in safety to proceed to allotment, and it was arranged that the first company should be wound up and a new company formed to be registered in Scotland.

The present company may be termed the Scottish company, and it is from the register that the petitioners desire that their names should be deleted. At the time when it was understood that the registered office of the company was to be in London, the prospectus bore that Mr Esslemont was to be chairman, and Mr Clark was to be one of the directors, but when the second company was formed a difficulty arose with reference to these gentlemen being directors in consequence of their Parliamentary duties, which rendered it impossible for them to attend meetings in Scotland.

Now, the petitioners allege that the reason why they took shares in this company was in consequence of the confidence which they had in the administrative and financial abilities of these gentlemen. If this application had been made during the existence of the first company it would have been somewhat easier to understand, but by the formation of the Scottish company matters were entirely changed. It may not have been convenient for Messrs Clark and Esslemont to attend meetings in Glasgow, and this may have induced them to withdraw their names from the list of directors, or they may have had other and private reasons which they were not bound to disclose. But the important matter for the present decision is, that the petitioners cannot say that they relied on Messrs Esslemont and Clark becoming directors of the new company, because the circular of 31st December 1888 was in their hands prior to their application for shares in the new company. Now, this circular, after narrating the circumstances which had necessitated the winding-up of the first company and the incorporation of the new company, stated that the offices of the company would in future be in Glasgow, and that in consequence of this Messrs Esslemont and Clark (whose Parliamentary duties would prevent their attendance at the board) and another original director had retired. The circular also stated that to avoid any complications it was desirable before shares were allotted that applicants should give their express consent to the course which had been adopted.

Now, it appears to me that the terms of this circular are conclusive of the whole matter against the petitioners. It put the new state of matters most clearly and distinctly before them, and it was after having received this circular that they applied for shares and became members of this company. In these circumstances I think the petitioners have failed to show any sufficient reason why their names should be removed from the register of shareholders.

LORD M'LAREN—I agree that there is no substance in the reasons which have been assigned by the petitioners for having their names removed from the register of shareholders of this company.

What the petitioners relied on was that the circular did not, as they allege, disclose the true reason why Messrs Esslemont and Clark declined to be directors in the new company. Now, it seems to me to be rather hard that a company is to be liable for every inference which may, however extravagantly, be drawn from its circulars. I think it is sufficient if it is held liable for the facts therein set forth. No doubt Mr Esslemont hesitated a good deal before he actually decided not to join the board of directors, and when he was asked he did not actually say "No," and so I think the directors were entitled to conclude that he would ultimately be persuaded to join

them. He even attended the first meeting of the directors of the company, and only left it for personal reasons, and on account of some little unpleasantness which occurred.

I cannot see in this case anything of the nature of fraud in the actings of the directors or officials, nor such misrepresentation as would entitle the petitioners to have their names removed from the register. The reason assigned by Mr Esslemont and Mr Clark was just one of that class of conventional excuses which might or might not disclose their true feelings on the matter. They were not in any way bound to assign reasons for declining to be directors; the important fact is, that prior to the petitioners applying for shares they were made aware that Mr Esslemont and Mr Clark had refused to join the board, and so they cannot be held to have relied upon them as directors.

LORD KINNEAR—If the petitioners had been induced to take shares on the representation that Mr Esslemont was to be the chairman and a director of the company, and if they had become shareholders on a belief founded on personal knowledge that Mr Esslemont would not give his name to any concern in which he had not confidence, then no doubt the petitioners, if they subsequently discovered that these representations were false, would be entitled to get their names removed from the register.

But although the prospectus of the first company did hold out Mr Esslemont as a director, that circumstance cannot assist the petitioners much, as that company was wound up.

As regards Mr Esslemont, he was quite entitled to withdraw from the directorate, as he had not bound himself by any final agreement to be a director of this company. Nor can I see that there was anything of the nature of fraud in issuing a prospectus which held out Mr Esslemont as a probable director. If, however, we keep in mind the terms of the circular to which your Lordship referred, it is difficult to see how the petitioners could in any way have relied on Mr Esslemont's name.

I agree with Lord M'Laren that the reason assigned by Mr Esslemont and Mr Clark for not being directors in the second company may have been one of those conventional excuses with which we are familiar.

With regard to the reason assigned in the circular, it was not meant to imply—and did not imply—that these gentlemen (although they were unable to join the board) had unbounded confidence in this concern, and were ready to put their money into it. I do not think that the prospectus implies any such thing. All that the circular did was to warn intending shareholders that Mr Esslemont and Mr Clark were unable to be directors of the company.

I think therefore that the petitioners have failed to show any reason for having their names removed from the register.

LORD ADAM was absent on Circuit.

The Court refused the petition.

Counsel for the Petitioners—Lorimer—Johnston. Agents—Somerville & Watson, S.S.C.

Counsel for the Respondents—M'Kechnie—Dickson. Agents—Carmichael & Millar, W.S.

Tuesday, July 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CRABBE *v.* WHYTE.

Judicial Factor—Curator Bonis—Investment of Ward's Funds — Speculative Security—Culpa—Repetition.

A *curator bonis* lent a portion of his ward's funds on the security of a tenement of houses and shops in a new street which was then in the course of formation in Dundee.

In May 1878, when the money was advanced, the houses and shops were finished, and were for the most part let, but some workshops, of which the tenement also consisted, were unlet and unoccupied, and had since been only partially let.

The loan was made on an estimated rental made up from plans, and on a valuation proceeding on that rental obtained by the borrower and furnished by his agent to the curator. The valuation was made by an architect of professional standing in Dundee, but the buildings themselves were not examined except that they were visited by the valuator when in course of erection, and also by the curator's partner in business, who took charge of the transaction. The security proved wholly inadequate.

In an action by the executor of the ward, *held* that the curator was bound to replace the sum lent.

This was an action by David Milne Crabbe, Southend, Essex, executor of the late Mrs Isabella Milne or Allan, who died in Sunnyside Asylum, Montrose, on 15th April 1888, against Robert Whyte, solicitor, Forfar, her *curator bonis*, to have it found that he was not entitled to take credit in his accounts for a sum of £2700, which the pursuer alleged that the defender had invested on insufficient security.

The defender denied that he had been guilty of any negligence in the investment of the money, or that the pursuer had in any way suffered by his actings.

The facts established by the proof which was allowed by the Lord Ordinary are summarised in the following passage in his Lordship's opinion:—"The defender was *curator bonis* to the late Mrs Allan. At Whitsunday 1878 he lent £2700 of his ward's funds to Messrs Kinnes, builders in Dundee. The security was a tenement of houses,