If so, we are of opinion, that the Acting Judge held rightly that the discharge of the defendant was a bar to a second arrest and imprisonment in execution of the decree.

Appellate Jurisdiction (a)

Regular Appeal No. 62 *of* 1868.

MR. D. W. AUCHTERLONIE..... .....*Appellant.*

MR. CHARLES BILL and another.....*Respondents.*

In the case of covenants in restraint of trade the deed of covenant must show a good consideration. The Courts will not enter into the question of the adequacy of the consideration. A covenant giving appellant the exclusive right to convey passengers to and fro on the road between Ootacamund and Metapolliem, is not a contract in general restraint of trade, and therefore is one which the law will enforce.

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THIS was a Regular Appeal from the decree of R. G. Clarke, the Acting Civil Judge of Ootacamund, in Original Suit No. 4 of 1868.

Handley for the appellant, the plaintiff.

O'Sullivan for the respondents, the defendants.

The Court delivered the following

JUDGMENT :—This is a suit for the breach of a covenant not to carry on the business of carriers on the road between Mettapolliem and Ootacamund. The issues recorded properly raise the two points of the defence set forth in the written statement of the 1st defendant, namely, 1st the illegality of the covenant as being in restraint of trade and therefore opposed to public policy, secondly the want of any consideration for the covenant. No witnesses have been examined by either the plaintiff or the defendants, and neither of the documents marked B and C, nor the deposition taken from the plaintiff so far as the almost illegible writing can be deciphered, bear materially as evidence on either of the points. On the first issue, the Civil Judge has given judgment that the

(a) Present : Scotland, C. J. and Ellis, J.

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covenant being a contract by deed "cannot be invalidated on the plea of want of consideration, no other motive than the will of the party or parties making the contract being in such case necessary to render it binding." On the second issue, he has expressed the opinion that "the contract is contrary to public policy and the fundamental principles of common law which favor free trade" for the reason apparently that its effect was to deprive visitors to the Hills of the cheaper conveyance between Ootacamund and Coimbatore which the defendants' opposition would afford them; and on this latter ground the decree of the Civil Court dismissing the suit rests.

The substantial objections to the decree raised by the grounds of appeal and argued before us are first, that the deed shows a good consideration for the covenant; and secondly, that the stipulation sued upon is not within the rule of law which vitiates contracts in restraint of the right of individuals to carry on the business of a trade or profession. As to the first objection, the decision of the Civil Judge in favor of the appellant has been given up by his Counsel, and there is no doubt that it is quite untenable. The necessity of a good consideration for a covenant of this nature is a point too well established to admit of argument. The law has been so laid down in a series of decisions over a long period of time. *See* the cases in the notes to *Hunlock* v. *Blacklow*, 2 *Wms. Saunders* 5 *Ed.* 155*b*. 1 Smith, L. C. 340. The Civil Judge was correct in his view of English law (by which the rights of the parties in this case must be decided) as respects the validity of a contract under seal although made without a legal consideration. The general common law rule no doubt is so, but it is inapplicable to contracts in restraint of trade for the special reason that every restraint of trade is presumably bad in the eye of the law and the presumption must be rebutted by its being made to appear that the contract is fair and reasonable, and for that purpose a good consideration is essential.

Then does the deed show a sufficient consideration? On behalf of the respondents it has been contended that

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it does not, because it is not an assignment of the good will of the business of carriers but simply of the premises and stock in and with which the business had been carried on. But, we think, this contention is unfounded. The recitals in the deed, as well as the covenant by the 1st defendant and the other assignor to use their endeavours to secure their customers to the plaintiff's company, conclusively show that the money agreed to be paid was the consideration for the good will of the business of carriers as well as the business premises and stock; and the amount is a good deal in excess of the value of the trade stock specified in the deed. How much of this excess may be on account of the land and buildings mentioned in the deed does not appear, but we can have no doubt that the money and the covenant in regard to the security and future conduct of the business were severally a consideration in part, one for the other, and into the extent or adequacy of the consideration it is not for us to inquire. As said in the judgment of the Court in the case of *Hitchcock* v. *Coker* (*in error*) 6 Ad. and Ell. 457, which settled the law on this point "it is enough that there actually is a consideration for the bargain and that such consideration is a legal consideration and of some value" and that appears here.

The determination of the appellant's second objection depends upon the question whether the facts recited in the deed show the stipulation in question to have been fair and reasonable with respect to the covenantors and the public interests. It amounts simply to a contract by the vendors of the property and good will of the business, that they will not carry on the business of carriers at the same place and was the means by which a saleable value was given to the good will of the business. So partial a restraint is not really adverse to the interests of the public at large. The giving validity to such contracts "offers" to use the words of Parke B in *Mallan* v. *May* (11 Mee and Wels. 666) "an encouragement to trade by allowing a party to dispose of all the fruits of his industry" and similar contracts have been upheld. *See Leighton* v. *Wales* (3 Mee and Wels 545.) The effect may be as in this instance to deprive a portion of the public of a present tem-

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porary gain resulting from the covenantors' competition, but contracts of the kind by giving a real marketable value to the goodwill of an established business operate as an additional inducement to individuals to employ their skill and capital in trade, and thus tend to the advantage of the general public interest, provided of course that the limits of the restraint are not in excess of what is reasonable to secure the enjoyment of the good will sold.

Now of the reasonableness of the extent of the stipulation in the present case we have no doubt. The general principle recognised in *Hitchcock* v. *Coker* and *Mallan* v. *May* is that the restraint must not be larger and wider than the protection of the party with whom the contract is made can require. Here it is limited to the road over which the covenantors carried on the business, and the continuation of that road between Mettapolliem and Coimbatore. In effect the stipulation is little more than that the covenantors will not carry on the same kind of business at the same place. Clearly, therefore, the restriction in regard to space is perfectly reasonable. The stipulation's it is true, is not limited to the carrying on of the business by the Indian Carrying Company themselves, nor to any time short of the life of the covenantors. But that is no valid ground of objection when the restraint is in other respects reasonable. For this the cases of *Hitchcock* v. *Coker*, *Pemberton* v. *Vaughan* (10 Q. B. 87) and *Elves* v. *Croft* 10 C. B. 241 (19 L. J. C. P. 385) are express authorities.

For these reasons we are of opinion that the covenant sued on is a valid one. The decree of the Civil Court must therefore be reversed but to enable us to pass final decree it is necessary to remit the case to the Civil Court for a finding on the following issue after hearing all the admissible evidence which may be adduced by either of the parties. What amount of damages had the Indian Carrying Company sustained at the institution of the suit by the breach on the part of the 1st defendant of the stipulation in the covenant ?

As against the 2nd defendant, no liability has been shown and the suit must be dismissed.

Suit remanded.