THE ANTI-SCALPING BILL.

THE so-called Anti-Scalping Bill was passed by the lower house of the last Congress, and it was pending in the Senate when that Congress adjourned. The subject was first formally brought up in the preceding Congress. A bill to prohibit the sale of railroad tickets by any person except the railroad companies was favorably reported to that Congress by the House Committee on Inter-State Commerce, and the Senate Committee agreed to report a bill to the same effect.

This action was the result of months of effort on the part of the railroads. The ablest and most influential men in their employ were present at Washington; magnificent headquarters were opened at one of the leading hotels there; printed matter in great quantities was distributed; and many of the officials of the railroads of the country used all their powers of persuasion on members of Congress in an effort to obtain the desired legislation. The only organized opposition was that of the associations of ticket brokers, whose business the bill would have destroyed. These associations, by their indefatigable efforts, aided by the unfortunate popular prejudice against railroads, which this latest aggression on their part has tended to aggravate, succeeded in staying the strong arm of the Government, which threatened to sweep away their occupation and curtail the liberty of every American citizen. Though both the above-mentioned Congresses adjourned without enacting this legislation, it can hardly be doubted that before long the railroad interests will again besiege Congress in force, and, more determined than before, try to prevail on that body to give them what they have so ardently sought and so earnestly worked for.

That, for the time being, the bill, if enacted, would enormously increase the revenues of railroads, is true. That their officers are so strenuous to have the bill passed; that so much money has been spent to push it; that a most powerful and persuasive lobby has been stationed at Washington — powerful in intelligence, persuasive in standing — is enough of an argument to convince the doubter that

the railroads are after big game. If it should be made a crime to sell a railroad ticket, those owning them would not sell, and the railroads would be practically enabled to get the full three cents — or whatever the legal rate — per mile for almost every journey, and this regardless of any prior contract for a lower rate. No one can object to paying the full legal rate if there be no contract for a lower one; for the rate, if unjust, can be regulated, theoretically, at least, by the States. But the penal feature of the proposed legislation is the danger which seems real; and its imposition is unwarranted. Whether the game above referred to is worth the candle; whether the prize which the railroads are now so earnestly seeking will not prove to be an Apple of Sodom; whether the evils which the railroads now complain of and are seeking to cure by this bill would not be better endured or otherwise remedied — these are questions deserving an inquiry.

That there are evils growing out of the abuse or misuse of the system by which the railroad companies at present collect their revenues is, perhaps, true. There is no doubt that passes are sold and that tickets are forged. But the railroads themselves have it in their power to stop the former evil, and the laws of all the States punish the forgery of railroad tickets as a crime, which, indeed, it is. In addition to this, the laws of most, if not all, the States give to the railroad companies plenary power and full opportunity to protect themselves from frauds and to punish or have punished those guilty of them. If railroad companies do not avail themselves of these powers and opportunities it is their own fault, and they should not be heard to complain. They have many more powers and opportunities of this character than the private citizen or ordinary corporation. Why, then, should they ask the Federal Government to deify them by hedging them about with additional legislation which, for their own exclusive benefit, is calculated to invade the rights of the individual and to stigmatize him with infamy?

Why should Congress make it a crime for me to assign a contract that I have made with a railroad company to carry me a certain distance, when I may freely assign other kinds of contracts? Why should it be a crime for me to assign a contract to carry my person and be perfectly legal and proper for me to assign one for carrying my goods? While it is true that a bill of lading, for instance, represents the goods, and that it is the property therein which passes by the assignment, still the value of the goods is affected by their

location, and the obligation on the carrier to transport them to the agreed point of delivery is an essential and inseparable element of the value assigned.

If it be of any importance to me that goods which I own by virtue of an assignment of a bill of lading be carried by a railroad company to the place designated, may it not be of infinitely more importance that my person be carried, when a contract to carry a person from one place to another has been made, the agreed price paid to the carrier, and the contract assigned to me? There can be no reasonable objection to my substitution in place of my assignor, if the carrier be under the necessity of carrying for me as well as for my assignor, and on like terms. The duty of a carrier to carry for all alike — which no one will deny — makes the terms of the contract of small importance; and the performance of a duty by one already under obligation to perform it will not support a demand for another or further consideration. Within the limits contemplated by the original contracting parties, why should not *my* person be substituted for that of the original purchaser of the ticket? The ticket, which is the evidence of the contract, and upon the surrender of which only will the carrier perform its agreement, is taken up when I undertake to ride; so that the carrier cannot possibly be called upon to perform two services for the price of one. It costs the carrier no more to carry me than to carry John Doe, of whom perhaps I bought the ticket, and who, by the sale thereof to me, intended to assign to me the benefit of a contract he had made and fully executed by paying the agreed price.

But it is said by the railroad companies that a contract to carry John Doe is not a contract to carry me; that the carrier and John Doe both contracted with reference to each other personally; so that the carriage of my person, by virtue of Doe's contract, is not within the limits contemplated by the original contracting parties. This is not true either in theory or in fact. In theory, a railroad is legally bound to carry, on equal conditions, all who apply for carriage. As a matter of fact, the carrier never has in mind the carriage of the particular person who buys the ticket. As a rule, he is unknown to the carrier; and the undertaking to carry him is not based in any degree on a knowledge of the purchaser's weight, character, or disposition. Unless an intending passenger be insane, drunk, or disorderly, or have an infectious disease, the carrier is bound to transport him. It has no right to discriminate between persons, agree-

ing to carry this one, and refusing to carry that one. It must and, indeed, is glad to carry all who apply.

Had *I* applied, the carrier would have undertaken to carry me for the same price and on the same terms as it agreed to carry John Doe. If *he* cannot go, it is unreasonable to say that the carrier has earned the money paid to him and is under no obligation to carry a person on the ticket Doe holds. At present, the carrier is certainly under no obligation to return Doe's money to him. Must Doe, therefore, lose it? Forfeitures are obnoxious to the law as well as to the moral sense. Why should Doe not sell his interest or property or right or whatever it is in that contract to someone else? It certainly possesses value, for he gave the carrier value for it; and it is a value that is just as important, impersonal, and general as the value attaching to a commodity.

But, it is said, the Anti-Scalping Bill requires the carrier to redeem the unused portion of a ticket, so that, in the above instance, Doe could obtain a return of his money. Could he? Suppose he had bought a coupon or mileage ticket, which is usually sold at a lower rate of fare than a card ticket, and had partly used it, and might still use it, but is prevented. Now, the carrier has solemnly agreed to carry a person a certain distance, or so many miles, and, doubtless, would carry him on the ticket instanced, if the owner were not compelled to abandon his journey. Instead of being permitted to sell his remaining interest in the contract of carriage, he is entitled by the Anti-Scalping Bill to ask the carrier to redeem the unused portion of his ticket. The carrier rebates to him — what? The value of his remaining interest in the contract, or the unearned portion of the price for the ticket. Not at all! It confiscates that; it disregards the contract; and, by the terms of the Anti-Scalping Bill, it makes a new and executed contract and new charges, and retains of the money Doe has paid it, and which the carrier has been using, the full legal rate for every mile the latter has carried him.

"But," it may be said, "there is no injustice in that. Doe would have had to pay that amount had he originally contracted for carriage for the distance he travelled." I maintain, however, that there is an injustice in it; for if it be obligatory on an intending passenger to pay, in advance, every cent the carrier may lawfully ask for carriage for a certain number of miles — and the carrier always insists on the imperativeness of this obligation — it should be equally obligatory on the carrier to carry a person that number of miles, and

the obligation should be equally inviolable. To relieve the carrier by statute of this obligation is an invasion by Government of the sacredness of contract, which violates the spirit if not the letter of the Constitution.

It may be said that the contract with John Doe gives him a mere chose in action, and that choses in action are not assignable at law. It is true that most choses in action *were* not assignable at law; yet "an assignment of a chose in action has always been held a good consideration for a promise."[1] Again: "Thus, the benefit of a contract may be sold, and the assignment of a contract forms a valid consideration for a promise to pay the price, which may be recovered in an action at law."[2] Now, if the thing assigned is of no value, if the benefit of the contract assigned is unobtainable by the assignee merely because he *is* the assignee and not the original contractor, where is the consideration for the promise to pay the price to the assignor? It would be idiocy to say that the mere act of *assigning* was all the promisor wanted done or agreed to pay the price to have done. He certainly was after something more than to have a bare right transferred to him which by the very act of transfer became unenforceable. "Courts of common law recognize the validity of equitable assignments for other purposes than to permit the assignee to sue at law in the name of the assignor."[3]

While at common law choses in action were not assignable, "equity permits the assignment of a chose in action or the rights which accrue under a contract, *whenever the contract is not for exclusively personal services and does not involve personal credit, trust, or confidence*, and a suit in equity might be maintained in the name of the assignee."[4] While the assignee takes the thing assigned subject to all the defenses the person bound to perform might have made, yet if the latter has notice of the assignment, and the assignee has given to the assignor a consideration, the courts hold that the assignee may, in his own name and for his own benefit, sue the party liable to perform. And if this be so, the right to sue must certainly be based upon the right to demand performance in the assignee's own name and for his own benefit.

In most of the States statutes have been enacted changing the

[1] Leake on Contracts, 605.
[2] Price vs. Seaman, 4 Barnwell & Cresswell, 525.
[3] Clark on Contracts, 529.
[4] Clark on Contracts, 529.

common law rule in relation to choses in action. It may be said, generally, that the effect of these statutes is to put an assignment of a chose in action on the same footing at law as in equity.[1] Therefore, the *legal* contract for carriage may be assigned, and performance thereof legally demanded by the assignee. The carrier may refuse to perform the contract assigned for the same reasons that it might refuse to perform it before assignment, *but for no other reasons* — certainly not for the reason that it has been assigned and that performance is demanded by the assignee. For the contract is not for exclusively personal services, and does not involve personal credit, trust, or confidence; that is to say, it is not based upon the peculiar individual character or reputation of either party.

The carrier, as has been said before, seldom or never regards the character or reputation of an intending passenger; and if it did it would have no right to discriminate on that account. And the intending passenger ordinarily does not have the option of selecting more than one carrier to take him to his point of destination. If he does, and he selects one of two carriers on account of its superior character or reputation, the selection cannot be said to be mutual, but is made for the passenger's own benefit, and he may waive it or pass it along by the assignment to the assignee.

If, therefore, a contract to carry may be assigned, why should the national legislature make it a crime to do with reference to such a contract what is innocent enough in reference to other contracts? Why should I not be permitted to sell my interest in a contract for carriage of my person just as I might sell my interest in any other contract? If there is any legal reason why the party with whom I contracted should not perform the contract, he is at liberty to set up that reason against my assignee, and to insist upon it in a suit by the latter to compel performance. But he could not invoke the criminal law to prevent me from assigning the contract or to punish me for having done so.

Now, why should a criminal law be enacted to enable a railroad company, and none other, to do this? Why, in addition to all the statutes already existing and intended for the protection of railroad companies against the frauds to which they are peculiarly liable, and in addition to the laws and machinery of the courts calculated to secure to railroad companies the full measure of their rights the same

[1] Clark on Contracts, 538, 539.

as other persons, should the Government inhibit the assignment of contracts made with railroad companies, while allowing full liberty for the assignment of other contracts? Why should railroad companies be enabled to invoke the strong arm of the penal law as a defense against the performance of their contracts, while every other citizen is left to the remedies of the civil law? If a certain act affecting two individuals is innocent, and a similar act where a railroad is concerned is to be made a crime, it were better far to plod along in an ox-cart and be free than to ride in a palace car to the penitentiary.

This article was not written in defense of the business of "ticket scalping." Doubtless there are many dishonest "scalpers"; but the fine scorn and deep denunciation of them by some railroad men unconsciously suggests the old saw concerning the dispute between the pot and the kettle. It is really amusing to see, as I have seen in the newspapers, the general passenger agent of a great railroad corporation denounce the "scalpers" as a set of thieves who defy all the laws of morality and fair dealing and insolently declare their intention to disregard any law inimical to their business that Congress may enact, while, within a few days of this phillipic, the erstwhile president of that corporation, commenting on the effect of the decision of the Supreme Court of the United States in the Joint Traffic Association case, declares that the railway companies, though ostensibly submitting to that decision, would really maintain an association for the same purpose as the one just declared illegal, in effect reiterating the sentiment concerning the public said to have been expressed by the great originator of the corporation referred to.

But it has been said that "ticket scalping" has grown to such proportions as to impair the legitimate sale of tickets by the companies themselves; that the "scalper" defrauds the railway by negotiating the sale of tickets which their owners cannot use, thereby supplying intending passengers who otherwise would be compelled to buy new tickets from the railway companies. To stigmatize a business as criminal because its effect is to compel one to perform contracts already made and to earn money already obtained on the promise that it would be earned is a strange argument indeed. If this be the last argument of the railroads, then it might be dismissed with the simple statement that the Government ought not to be called in to settle a mere business dispute, by enacting a special penal law whose purpose and effect shall be to wipe out one of the disputants and safeguard the other, merely because the latter would thereby be

enabled to make more money. And especially ought not the Government to do this when, by doing it, the freedom of every citizen is invaded and curtailed. If what is to be inhibited were *malum in se* it might be different, but it is not.

But let us see if the "scalper" is really engaged in a nefarious business. What does he do? Does he sell tickets for which the railroads have not received their money? No. If he does he must have stolen or forged them; and, like any other criminal, the laws pronounce a penalty against him for that. He simply sells tickets he has bought at a low price from others who have paid the railroads what they asked for them. For the railroads to cry "Thief" at him for this, when, but for it, they would be called upon to carry out contracts they have made and already enjoy the benefit of, smacks of dishonesty to say the least.

But the railroads insist that the "scalper" is an accomplice of the "dishonest" ticket purchaser, who, having gotten a mileage book, for instance, on condition that he will not assign it, goes straightway and does assign it, so that any one desiring to travel a short distance can do so at a lower rate than he otherwise could. This is an ingenious argument, because it appeals to the average American's innate sense of justice. But it is specious — specious because predicated on false premises; for it is based on the right of the railroad companies to discriminate, and carry A at a lower rate than B. Absolute equality is the ultimate rule whereby the legality of a railroad company's treatment of the public should be tested. And if the railroad companies desire to sell a large quantity, as it were, of transportation at a lower rate than a small quantity, they may do so, of course; but they should justify the sale on its true grounds, namely, the wholesale quantity purchased, not on the ground that the purchaser's personality is any part of the consideration.

But is this action of the railroads in seeking to obtain the passage of the Anti-Scalping Bill wise or far-seeing? Doubtless, the immediate effect of the passage of the bill would be to increase receipts by enforcing a forfeiture of contracts. It is, practically, nothing but a scheme to enable the railroad companies to maintain full legal tariff rates under all circumstances. This act, operating on the public instead of the railroad companies, would be far more effective to the same end than a law permitting pooling by railroad companies, which, because it absolutely eliminates competition, has been long desired by them. With this act a law, the pooling ques-

tion, so far as passenger traffic is concerned, will be settled in favor of the railroad companies, and settled far more emphatically than the most ardent supporters of the pooling privilege ever hoped for.

While the act would operate to the immediate financial benefit of railroad companies, enabling them to benefit by "forfeitures," and also enabling them to exact full legal rates, upon pain of fine or imprisonment, yet the fact that railroad companies are thus further privileged, that their privileges so far exceed those of other businesses, and that this Anti-Scalping Bill invades the freedom of every person, will certainly be obnoxious to the American sense of equality and justice. It will arouse the deep resentment of the people; and the railroads will, beyond question, find that they have courted an attack on their interests that will be costly to them and certainly effective. This will be based not alone on a desire for cheaper transportation. That desire might not reach fruition in the face of a proper showing. But it will be also based on a sense of injury — from rights invaded by special legislation to subserve the private ends of a favorite — which will demand reprisal. And the reprisal will certainly come in the shape of a reduction of fares, and, perhaps, of rates also. While this might not immediately follow, it would be sure to come; and, in staving it off, the railroads would find that they had lost more than the gain would be by reason of the success of the Anti-Scalping Bill, "and the last state of that man is worse than the first."

Hugh T. Mathers.

THE NEGRO AND EDUCATION.

At a time when the universal craze for expansion is rendering long-established beliefs uncouth and inadequate, it becomes necessary to reëxamine the foundations of our faith in the light of the new gospel. The national opinion concerning the negro is formed and re-formed with such startling rapidity that only the process of instantaneous photography can preserve its shifting phases. We have seen innumerable remedies prescribed for the ills of this race with the cock-sureness of a patent nostrum. The frequency with which the remedy is changed, however, justifies the suspicion that the physician is ignorant of the nature of the malady which he undertakes to treat. There has been a blind and fanatical reliance upon the potency of education as a universal solvent. The Bible, the spelling book, the college curriculum, and the industrial workshop have been prescribed, each in rapid succession, as the panacea of all ills. And yet the progress of the disease is in no wise checked, nor has its malignity been one whit abated.

The race problem should be viewed under a twofold aspect:

1. The development of a backward race.
2. The adjustment of two races of widely divergent ethnic types.

In this case these factors are antagonistic to each other. The more backward and undeveloped the negro, the easier becomes his adjustment to the white race. The good old negro servant, loyal and faithful, is ever acceptable to his white lord and master; but his more ambitious son, with a Harvard diploma in his knapsack, is a *persona non grata*. The bond of adjustment which slavery established between the races was quickly burst asunder when the negro was made a free man and clothed with full civil and political privileges. The frictional aspect of the race problem grows out of the technical abolition of the negro's inferior status.

Can these two races be adjusted on terms of equality? This is but a fragment of the larger ethnological problem whose solution devolves upon the twentieth century. The harmonization of such