RAPE ON THE *WASHINGTON SOUTHERN*: THE TRAGIC CASE OF *HINES V. GARRETT*

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Rape on the *Washington Southern*: The Tragic Case of *Hines v. Garrett*[1]

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Synopsis

It is February 1919. The United States is emerging as an international power following its belated participation in WWI. The Great War was technically not yet over, and President Woodrow Wilson was extending his stay in Europe while negotiating the Treaty of Versailles. Washington, DC, meanwhile, had just re-segregated its federal government[4] six years earlier under the orders of this unreconstructed racist president.[5]

Just two miles south of the capital city, Julia May Garrett's home in the outskirts of Alexandria was not immune to the area's social and economic transition. Its agricultural past was fast making way for the expansion of the Federal government and the advancement of railroads. Just like neighboring Montgomery County, Maryland, Fairfax had been a rural and largely agricultural (first tobacco, then corn) county whose white population had generally supported the Confederacy during the Civil War.[6] But by 1919 Fairfax agriculture was declining as the county's economy was pulled into the orbit of Washington's growing federal government. Military requirements had helped drain the

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[1] *Hines v. Garrett*, 108 S.E. 690 (Va. 1921).

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[4] Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, Anchor Books 2009, pp. 357-58.

[5] Foner, Eric, "Expert Report Of Eric Foner". *The Compelling Need for Diversity in Higher Education*. University of Michigan. http://www.umich.edu/%7eurel/admissions/legal/expert/foner.html.

[6] Charles V. Mauro, *The Civil War in Fairfax County: Civilians and Soldiers.* Charleston: The History Press, 2006. Get Montgomery county historical citation. Neither Maryland nor Virginia ratified the 14th Amendment.

local white male labor market[7] just as railroads and a network of electric trolleys made it cheaper for remaining workers (including many women) to travel to higher paying jobs in the District of Columbia. Without adequate labor, some Fairfax farmers' fields lay fallow.[8] Wives and daughters such as Julia May Garrett, meanwhile, found it relatively easy to commute by rail to clerical employment in the District of Columbia.

After work one Sunday afternoon on February 2, 1919, 18-year-old Julia May Garrett left her job as "messenger girl" at the Southern Railway's[9] head office near the White House. She had just missed the Southern local, for which she held a free pass, and so she purchased a ticket and boarded Train 29 of her employer's competitor, the Washington Southern Railway [WSR].[10] After departing from Alexandria station, the WSR train missed Garrett's intended station, letting her off approximately one-half mile further down the line. While walking home on the tracks, Garrett was accosted and raped twice, first by a soldier and then by a vagabond. Garrett's attorneys intended to sue the WSR for negligence, but found themselves in court suing the United States Director

[7] Provide source for this and for segregation of forces during WWI.

[8] Provide source for this.

[9] The *Southern Railway* was the product of nearly 150 predecessor lines that were combined, reorganized and recombined beginning in the 1830s, formally becoming the Southern Railway in 1894. In 1982 Southern was placed under control of Norfolk Southern Corporation, along with the *Norfolk and Western Railway* (N&W); it was renamed Norfolk Southern Railway in 1990.

[10] The *Alexandria and Fredericksburg Railway* [A&F] was chartered during the Civil War, but for reasons both financial and logistical (Alexandria was occupied by Union troops throughout the war, while Fredericksburg changed hands several times) could not open until July 2, 1872, when it extended as far as Quantico. There the 1.70-mile long Potomac Railroad, which had opened two months previously, connected the A&F with the Richmond, Fredericksburg and Potomac Railroad [RF&P]. On March 31, 1890, the A&F and RF&P merged to form the *Washington Southern Railway* [WSR]. The merged company was in turn merged into CSX Transportation [Chessie System], the great rival of Norfolk Southern, in 1991. Make sure this is right.

General of Railroads, Walker D. Hines. After a contentious trial in which Hines petitioned in vain for the case to be dismissed, the jury awarded Ms. Garrett $2,500, not much for the pain and suffering (not to mention job-related losses) caused by two acts of rape.[11] The Director General's appeal to the Virginia Supreme Court resulted in a remand to the trial court. But before the remanded case was decided, Ms. Garrett settled for a mere $1000 *less* outstanding court costs, leaving intact a major precedent on proximate causation and assumption of risk cited in most American casebooks[12].

[11] $26,903 in 2009 dollars, according to Tom's inflation calculator (last consulted August 12, 2009): http://www.halfhill.com/inflation.html.

[12] Give enumeration.

1) Just the Facts, Ma'am

Eighteen year old Julia May Garrett worked in the telegraph office of the Southern Railway, a few blocks from the White House. Those who believe that female emancipation is a post-World War II phenomenon may be surprised to learn that Julia had commuted to work in the District of Columbia since she was sixteen. Normally she travelled home on her own employer's train, though occasionally if she missed that free train she would purchase a ticket on an electric streetcar operated by the *Washington-Virginia Railway*.[13] But on Sundays the streetcar schedule was less convenient, so on February 2nd, 1919, when she missed her Southern train Garrett boarded the competing WSR line. Her train departed at 5:00 pm, 30 minutes before sunset.[14] Julia could not find a seat on the crowded train, and so stood with a group of civilian and military passengers in the vestibule of the next to last coach.[15]

[13] Opened in 1892 between Alexandria and Mount Vernon, the *Washington, Alexandria, and Mount Vernon Railway* was extended in 1896 across the Long Bridge to downtown Washington, D.C., terminating at 12th and D Streets, NW, near the present location of Federal Triangle Metro Station. The streetcars ran in Arlington near and along the present routes of Interstate 395 (I-395) and S. Eads Street, travelling largely on the grade of a towpath on the west side of the defunct Alexandria Canal. Near Arlington's southern border, the railroad and its affiliates constructed an amusement park (Luna Park) and a rail yard containing a car barn and power plant. After crossing Four Mile Run into Alexandria, the streetcars ran along the present route of Commonwealth Avenue until reaching the city's Old Town area at King Street. At Mount Vernon, the estate's proprietors insisted that only a modest terminal be constructed next to the trolley turnaround. They were afraid that the dignity of the site would be marred by unrestricted commercial development and persuaded financier Jay Gould to purchase and donate thirty-three acres outside the main gate for protection. By 1906, the railway had transported 1,743,734 passengers along its routes with 92 daily trains. During World War I, the line was extended to Camp Humphreys (now Fort Belvoir). In 1913, the *Washington, Alexandria, and Mount Vernon* Railway merged with the *Washington, Arlington & Falls Church* Railroad to form the *Washington-Virginia Railway*. That company went into receivership in 1923 when buses became the dominant form of local public transportation.

[14] http://www.srrb.noaa.gov/highlights/sunrise/sunrise.html, last consulted November 22, 2009

[15] *Petition of Defendant Walker D. Hines*, Supreme Court of Virginia, Record 653, (1921) at 2.

The electric streetcar, the *Southern* and the WSR routes all proceeded southwest, crossing two different bridges spanning the Potomac River[16] into Northern Virginia's Alexandria County. From the train, Julia Garrett could almost certainly see Robert E. Lee's former plantation *Arlington House*,[17] which had been unconstitutionally seized for disloyalty, then "purchased"[18] and used to bury Union dead (now Arlington National Cemetery). Continuing south from the Custis-Lee farm, the trains and electric cars would have passed through Potomac Yard, then the busiest rail yard in the Washington area. Built in 1906, Potomac Yard was decommissioned following complicated legal and political wrangling in 1989[19] and is now the site of Potomac Yard Shopping center. But it looked quite different back then:

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[16] A railroad-only bridge had opened August 25, 1904, about 150 feet upriver from an older bridge, providing two tracks across the river where today's five-span "14th Street Bridge" complex is located. An additional swing-span bridge called the Highway Bridge, 500 feet (150 m) upriver from the RF&P bridge, opened February 12, 1906 to serve non-railroad traffic including streetcars. The Highway Bridge was replaced by the George Mason Memorial Bridge (one of the spans of the 14th Street Bridge) in 1962.

[17] Arlington House, then called the Custis-Lee House, had been intended as a living memorial to George Washington when it was constructed by the first president's adopted grandson, George Washington Parke Custis, upon an 1,100-acre tract of land which he had inherited. George Washington Parke Custis and his wife, Mary Lee Fitzhugh (whom he had married in 1804) lived in Arlington House for the rest of their lives and were buried together on the property after their deaths in 1857 and 1853, respectively. On June 30, 1831, Custis' only child, Mary Anna, married her childhood friend and distant cousin, West Point graduate Robert E. Lee. Lee was the son of former three-term Virginia Governor Henry ("Light Horse Harry") Lee.

[18] When federal Civil War casualties overflowed hospitals and burial grounds near Washington, D.C., Quartermaster General Montgomery C. Meigs proposed in 1864 that 200 acres of the Lee family property at Arlington be taken for a cemetery. After Lee's death Custis Lee, heir to the property, sued the government claiming ownership of the land. The Supreme Court ruled in Lee's favor and Congress returned the land to Lee, who a year later he sold it back to the federal government for $150,000 (over $3 million in today's dollars: see http://www.halfhill.com/inflation.html)

[19] The facility had been declared a toxic waste site in 1987. The *Richmond, Fredericksburg and Potomac Railroad* (RF&P) finally decommissioned it in 1989. Plans for rehabilitation and redevelopment of the land thereafter became a source of intense debate. In 1995 the Environmental Protection Agency approved RF&P's study and cleanup plans for the site, and declared remediation completed by 1998. Various commercial and community interest groups then came into conflict over the future of the land. The City of Alexandria rejected the original mixed use plan in 1992. Jack Kent Cooke, owner of the Washington

Potomac Yards in 1919 

After Potomac Yard, Ms. Garrett would have passed through the scenic back yard of Abingdon Mansion, built by the Alexander family (for which Alexandria was named) and later owned by the Custis family.

Abingdon Mansion 

Redskins, then unsuccessfully pushed for the construction of a new football stadium on the site [the Redskins ultimately moved to Maryland]. Seventy of the 400 acres (1.6 km²) of Potomac Yards were ultimately approved for retail use in 1995; the Potomac Yard Center, a 589,856-square-foot strip mall anchored by "big box" stores deemed unsightly in several other jurisdictions adjoining the District of Columbia, was completed in 1997.

The mansion burned down in 1930, and the grounds' splendid view of the Potomac River was thereafter eliminated by the erection of National Airport's Terminal building[20] in 1938. Julia Garrett, however, could surely have seen across the Potomac River into the Southeast quadrant of Washington D.C., where the United States Army was already building a revolutionary structure, an airfield, today Bolling Air Force Base.

Julia's train would next have entered the City of Alexandria, continuing south on its western border. Before turning further west into Fairfax County, trains and trolleys would have stopped at Alexandria's Union Station, (it still functions under the same name, but is more commonly called Alexandria Station to avoid confusion with Washington's train station). The electric street car service terminated at this station; had Julia Garrett taken the street car as she usually did, she would have needed to walk approximately 1.5 miles west on busy Little River Turnpike[21] to her home. But the WSR continued West, so Ms. Garrett decided to stay on board a few minutes longer. Entering the Falls Church Magisterial District of Fairfax County, both the WSR and the *Southern* ran roughly parallel to Little River Turnpike.

West of Alexandria, at approximately 5:20 PM, Julia Garrett would have passed a switching tower and small rail yard near Telegraph Road. Rail cars containing valuable merchandise were occasionally stored here overnight, if need be, to await interline transfer. Sometimes during car switching, the cars to be stored were pushed a bit farther

[20] The original terminal building is, today, Terminal A.

[21] The Little River Turnpike existed before the Revolutionary War and was a privately owned toll road during the 1700s and 1800s, running from Alexandria to Aldie in Loudoun County. Several sections of the road originated as Indian trails, and a majority of the road traversed rural areas.

down the line, past Ms. Garrett's stop at Seminary Station and closer to Cameron Run Crossing. The area between Seminary Station and Cameron Run was unsettled and wooded, with an uphill grade that slowed trains down so considerably that they were easily boarded by hoboes and other free-riders: the rail employee at the switching tower always carried a gun for self defense. Indeed, when cars were pushed west from Seminary Station toward Cameron Run Crossing, a detective would stay overnight to protect any valuable cargo.

Julia May Garrett intended to disembark at Seminary, which was a tiny station about 500 yards from her home. (Indeed, the relative proximity of this station to her home, as compared with Alexandria Station, arguably explains Julia's choice of train over streetcar.) The station was named after the Protestant Episcopal Theological Seminary in Virginia,[22] the largest accredited Episcopal seminary in the United States. From "Seminary" Julia had planned to climb the short hill[23] north to Little River Turnpike, turn west[24], then walk a few hundred yards to the two-acre farm overlooking the tracks where she lived with her mother Rowena Garrett Frinks and her stepfather Charles Frinks.[25] Though the family resided in Fairfax County, fully 1.5 miles west of the limits of the City of Alexandria, the regional Washington DC telephone book lists a "Mrs. Charles Frinks" in Alexandria on "Duke Street Extended."

[22] Today, Virginia Theological Seminary
[23] Today this hill is called South Quaker Lane
[24] Today this portion of Little River Turnpike is called Duke Street.
[25] Charles was substantially older than his wife Rowena, Julia's mother. Born in 1847, Mr. Frinks had quite possibly participated in the Civil War.

Unfortunately for Julia, the WSR failed to make its scheduled 5:20 stop at Seminary. It continued for roughly one half mile until it stopped at the request of another passenger wishing to disembark at Seminary, one W.L. Garnett, who had enquired of a porter why the train had not stopped. The porter rushed to see the engineer, who then stopped the train as quickly as he could. Garnett descended from the train and walked back along the tracks to Seminary. He would testify at trial that he observed Julia standing beside a soldier on the platform of a car located near the rear of the train as he descended from it to the ground.[26]

Julia, unlike Mr. Garnett, had no desire to walk home. She communicated to the porter her wish that the train back up to Seminary station. Said porter, one Pat Graham, apparently satisfied Julia that this was exactly what would happen, then jumped from the second-last car and walked along the ground until he reached the second car, where he informed conductor I. H. Thompson of Ms. Garrett's request. The train shuddered, but moved forward, not backward. The conductor walked to Julia's car, and saw her still standing near the exit stairs. "I thought you were going to go back", Julia informed Thompson. "We cannot go back; we are afraid of butting into another train", replied Thompson.[27] "You will either have to go through and we will send you back on the next train, or get off here."[28] The train was moving and Julia had but seconds to make up her mind. She then asked the conductor to stop the train a second time, which it did about

[26] Appeals brief of Walker D. Hines, supra note X, at 2.
[27] It was conceded at trial that no train was due on these tracks for another 90 minutes, so the explanation provided to Julia was arguably disingenuous.
[28] Defendant's brief, supra note X, at 3.

one full train's length later, approaching Cameron Run Crossing, where the *Washington and Southern* climbs a slow grade to a bridge crossing south over the Southern Railway tracks and over Cameron Run.

The gentle climb from Seminary to the bridge at Cameron Run Crossing (an increased elevation of seventeen feet) slowed passenger trains; the much heavier freight trains typically almost stalled to a halt at this point. Because of this topographical feature, as well as the availability of water, transients hopped trains and occasionally stole merchandise at businesses near Cameron Crossing. Tramps and vagabonds camped in makeshift structures at this intersection in the woods, a virtual "train station" for the destitute. Rail employees and local residents alike variously called this area Hoboes' Hollow, Tramps' Hollow, or Tramps' Den. The existence of this hollow was almost certainly the reason why armed detectives remained aboard loaded cars that were stored at the switching yard.

The Federal Government had recognized the strategic value of Cameron Run Crossing; during the First World War the Army stationed troops to guard the bridge there. One of the Soldiers, a Marylander named Lieutenant Muntz, took a liking to the area (and particularly to one of its residents[29]) and continued to rent a room nearby at Walter Cockrell's farm even after soldiers had ceased guarding the crossing.

[29] Lt. Muntz ultimately married Walter Cockrell's sister.

The Federal Government also recognized the strategic value of railroads.[30] The nation's railroads were arguably overbuilt and had become subject to populist state regulations from which they sought federal protection. From 1861 to 1890, federal subsidies of more than *$350 million*[31] had been granted to railroads as part of the government's commitment to "internal improvements."[32] Over 130 million acres in federal land grants and approximately 50 million acres granted to individuals by the states encouraged massive rail construction.[33] The ensuing overbuilding of tracks, coupled with the low marginal cost of running a railroad on already-built tracks, led to a substantial decline, perhaps a collapse, in railroad freight rates from 1877 till the turn of the twentieth century.[34]

At the same time, at the state level, local shippers found railroads easy targets for regulation – for railroads, unlike businesses, cannot easily move out of state. One analyst noted that, "[i]n 1913 alone, 42 state legislatures passed 230 railroad laws affecting the railroads in such areas as extra crews, hours of labor, grade crossings, signal blocks, and electric headlights--and many of the laws were expensively contradictory."[35] Between

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[30] *See generally* C. Sciabarra, "Government and the Railroads During World War I: Political Capitalism and the Death of Enterprise", 20 *Historian: The Undergraduate Journal of Research and Scholarship*, New York University (May 1980) 31, available online at http://www.libertarian.co.uk/lapubs/histn/histn045.htm.

[31] Real federal outlays were approximately $10 billion in 1900, (as compared with $1800 billion in 2002). So this subsidy was simply enormous. *See* S. Moore, "The Most Expensive Government in World History", *Policy Report #161*, Institute for Policy Innovation, 2002, Figure 7. Available at http://tinyurl.com/nvqzbg (last consulted August 12, 2009)

[32] Hughes, Jonathan, *The Governmental Habit: Economic Controls from Colonial Times to the Present.* 1971 at 76.

[33] Ekirch, Arthur, *The Decline of American Liberalism*, 2nd ed., 1967 New York: Atheneum at 54.

[34] Sciabarra, *supra* note 19 at 32

[35] Kolko, Gabriel, *Railroads and Regulation, 1877-1916. Princeton: Princeton University Press.* At 218

1900 and 1916, an era when state regulations were relatively rare and modest,[36] over 1700 new state regulations and laws increased taxes on the railroads.

Overbuilding and state predation may have been two strikes against railroads; in that case World War I provided the third strike. Mandated transport of men and matériel led to severe congestion on Eastern trunk lines and at terminals. War exports strained car and terminal capacities. Poor geographical mobility and military conscription combined to produce a sever manpower shortage.[37] Coordination among railways to alleviate these problems was hindered by federal regulation: for instance, when pooling of available facilities east of Chicago to deal with wartime capacity was contemplated by railway executives, the Attorney General declared that the anti-pooling clauses of the *Interstate Commerce Act* and the *Sherman Act* would be enforced against them if such pooling occurred.[38] The *Railway Age Gazette* protested against these threats by calling for the immediate "repeal of every law which interferes with . . . efforts to operate as a single national transportation system."[39]

The young Interstate Commerce Commission, tasked with regulating railroads, issued on December 1, 1917 a Special Report that concluded that extant regulations were not up to the task, and that "it has become increasingly clear that unification in the operation of our railroads during the period of conflict is indispensable to their fullest

[36] Gerald W. Scully, "Rent-seeking in U.S. government budgets, 1900-88," 70 *Public Choice* 99 (1991) at 104-106.

[37] Kerr, K. Austin, *American Railroad Politics, 1914-1920: Rates, Wages, and Efficiency*. Pittsburgh: University of Pittsburgh Press, 1968 at 40.

[38] 63 *Railway Age Gazette* (December 7 1917) p1031

[39] *Id* (Nov. 23, 19176), p920

utilization for the national defense and welfare."[40] The ICC made two proposals to Congress: either it should legalize interline cooperation and pooling or it should temporarily nationalize all the nation's railroads.

These proposals, especially the nationalization option, met with a rare confluence of approval among interested lobbies. On the one hand, local shippers favored federal control, which would allow them to lobby their representatives so as to reverse the price increases that had been spurred by wartime demand for rail transport. Railroad workers' brotherhoods seeking to obtain wage increases preferred to deal a monopolistic federal owner playing with others' money rather than with aggressively competing private entities. Finally, the railroads themselves were not averse to nationalization if they could legalize their hoped-for coordination, avoid state predation, and lock in their profits through generous federal purchase prices.

Plans for nationalization were formulated in mid-November 1917 under the direction of Treasury Secretary William G. McAdoo, a former New York railroad executive.[41] On December 18, 1917 President Wilson met with railroad executives to inform them of his decision to proceed with a takeover. Federal pledges to the railroads

[40] *U. S. Senate Hearings: Government Control and Operation of Railroads*. 1918. 65th Congress, 2nd session, CXVII. Committee on Interstate Commerce. Washington, D.C. at 1.

[41] A colorful Tennessean with an illustrious Civil War pedigree, McAdoo had worked on the Wilson campaign in 1912. In May 1914 he married Wilson's daughter, Eleanor. His offer to resign as Treasury Secretary after his marriage was declined by Wilson, and McAdoo was credited for saving the American financial system from by closing all stock markets for *four months* in July 1914. His nomination as first Director General of Railroads (DGR) was surely a recognition of his service. Cf. William L. Silber, *When Washington Shut Down Wall Street: The Great Financial Crisis of 1914 and the Origins of America's Monetary Supremacy,* Princeton University Press, Princeton, N.J., 2007.

guaranteed that profits (estimated at over $940 million per year[42]) from the bumper 1914-17 period would continue. In one fell swoop the rate caps imposed by farmer- and manufacturer-dominated state railroad commissions were superseded, the industry was cartelized and labor was placated with wage increases.[43] In brief, the federal takeover of the railroads was arguably the quintessential "public option" – the result of rent-seeking intervention at both levels of government (federal subsidies encouraging overbuilding, then state populism restricting prices) and of antitrust enforcement that precluded needed coordination. Secretary McAdoo was himself named the first Director General of the nationalized railways. After armistice with Germany (at 11 a.m. on 11 November 1918 — the eleventh hour of the eleventh day of the eleventh month) McAdoo resigned to prepare his run for the Presidency.[44] He was succeeded in early 1919 by his then-deputy DGR, former Cravath partner and Acheson Topeka & Santa Fe CEO Walker D. Hines. Hines remained in his position until federal control ended in May 1920. He would eventually write about the nationalization episode, in his view a boondoggle that cost

[42] This corresponds to fully $18 billion per year in 2009 dollars. http://www.halfhill.com/inflation.html

[43] Sciabarra, *supra* note X, p. 42

[44] After stepping down as DGR, McAdoo ran twice for the Democratic nomination for President, losing to James Cox at the nominating convention in 1920 and again to John Davis in 1924, though on each occasions McAdoo led after the first ballot. A bon vivant, he served as Senator for California from 1933–1938. He and Eleanor Wilson were divorced in 1935: two months later, the 71-year old McAdoo married 26-year-old nurse Doris Isabel Cross.

taxpayers approximately $1.125 Billion 1917 dollars,[45] at a time when total civilian federal expenditures were barely three times that amount.[46]

Walker Hines, Chicago 1919[47]

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At the first emergency stop after missing Seminary station, when Mr. Garnett disembarked, the conductor explained to Ms. Garrett that reversing the train back to

[45] Hines, Walter, *War History of American Railroads*. New Haven: Yale University Press, 1928, at 83-4. The figure is equivalent to $22.2 Billion in 2009. See http://www.halfhill.com/inflation.html

[46] In 1917 federal civilian disbursements totaled $243,000,000. In 1918, due to the War, federal expenditures increased to $1,516,000,000, doubling again to $3,242,000,000 in 1919. *See* M. Slade Kendrick, "Federal Nonarmament Expenditures during the Emergency Period", 214 *Annals of the American Academy of Political and Social Science*, (1941) 14, at 15.
M. Slade KendrickRailroad expenditures were clearly a major federal expenditure.

[47] http://tinyurl.com/mubkdq

Seminary Station was too dangerous (because of the risk of hitting an oncoming train). There was some conflict in the evidence about whether Julia was prevented from leaving the train at this stop (as she claimed), or whether she declined to do so because of the porter's representation that the conductor would surely reverse the train to accommodate a single woman.[48] In any case, after protesting vigorously when the train proceeded forward instead of backwards as she had expected, Julia testified that the conductor told her, "you will either have to go through and we will send you back on the next train, or get off here."[49] This offer to take Garrett "through" was a crucially ambiguous term, as it turned out. Julia testified at trial that she thought that "through" signified that she might have to remain on the train until Richmond, the line's terminus, 100 miles away. In that case Julia's return train would not have deposited her at Seminary until the next day, and she was without resources to secure lodging in that city overnight. The conductor had presumably meant to indicate to Julia that she would be transported "through" to the Franconia station, several miles away -- though it transpired that even from Franconia she could not have gotten a train home for two hours and thirty five minutes, meaning she would have been returned to Seminary well after dark and some 500 yards from home.[50] There is no evidence that Julia had ever taken any railroad south of Seminary, so it is conceivable that she might have believed that the train would make no more stops before

[48] *Hines v. Garrett*, Supreme Court of Appeals of Virginia, Brief in behalf of defendant-in-error (i.e., plaintiff), 312 Records and Briefs, Supreme Court of Appeals at Richmond, #653, at 27.
[49] Transcript of evidence, p. 47
[50] *Hines v. Garrett*, Supreme Court of Appeals of Virginia, Brief in behalf of defendant-in-error (i.e., plaintiff), 312 Records and Briefs, Supreme Court of Appeals at Richmond, #653, at 36

the state's capital. It does seem unlikely that anyone with geographic sense would have believed the next stop to be Richmond – but no evidence on this point was offered by either side at trial. At any rate the train had already started up again immediately after the conductor's ultimatum and before Julia could deliberate, and at trial Julia testified, "I just had a minute to think and I told him, 'let me off'." The conductor then pulled the bell cord and stopped the train a second time at approximately 5:25, at least seven hundred feet past the first stop and perhaps four thousand feet beyond Seminary.[51] Julia disembarked. According to one J. Marshall Fitzhugh, a telegraph operator at Cameron Run who was reading a newspaper in the tower when the train stopped the second time, it was at that time still daylight, "a clear, beautiful evening", and he had not yet turned on the lights.[52]

Once off the train, Ms. Garrett began walking back along the tracks toward Seminary station. Here, from the trial transcript, is Julia's description of events when as they then transpired:[53]

By Mr. Ford, … "Now, talk to these gentlemen and tell them just what occurred, please."

A "You mean, after I got off the train?

Q. "Yes, after you got off the train."

[51] Defendant's brief, supra note X, at 3.
[52] Defendant's brief, supra note X, at 3. As apparent sunset that evening was to occur in approximately 5 minutes, it is likely that the day was not quite so bright as Mr. Fitzhugh testified to. *Ibid.*
[53] Defendant's brief, supra note X, at 8

A. "Well, I got off the train and started back toward Seminary Station, and when the train started out I happened to glance over my shoulder and saw the soldier[54] coming, and then I walked off real fast, and then he came up and caught me by the arm and wanted to know if he could go home with me, and I told him no."

Q. "Then what happened?"

A. "And then he grabbed me by the arm and dragged me down the bank.[55]"

Q. "How far down the bank did he drag you?"

A. "To the bottom."

Q. "What did he do when you reached the bottom of the bank?"

A. "He twisted my arm."

Q. "How or where?"

A. "He twisted it up on my back."

Q. "And what else did he do?"

A. "And of course he throwed me to the ground. He said some very insulting things that I would not like to repeat."

Q. "Outside of what he said to you, what did he do to you, Ms. May?"

A. "He tore some of my clothes off me."

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[54] This soldier was, according to the victim, *not* the soldier to whom she had been seen talking while on board the train. Defendant's brief, supra note X, at 11.

[55] The railroad's double tracks were placed on a steep embankment, and it was fully thirty feet down on either side. The soldier apparently dragged Julia Garrett down on the side of the embankment away from the tower and the several houses. The spot where the soldier first touched Julia was in plain view of the signal tower occupied by Mr. Fitzhugh, and roughly 1000 feet from the house of Mr. Cockrell and from other residences. Lt. Muntz, sitting on his porch, saw Ms. Garrett walking down the track. Defendant's brief, at 7. However, once down the far side of the embankment Ms. Garrett was apparently not visible from either location.

Q. "What else did he do, if anything?"

A. "He just did as he pleased."

Q. "What do you mean by saying he did as he pleased?"

A. "Well, he just treated me like he wanted to."

Q. "In what way? You will have to tell the jury. I cannot tell them."

A. "Well, I do not know just exactly how to put it, because I do not want to come out in plain words and say it."

Q. "Did he become intimate with you?"

A. "Yes, sir."[56]

After the rape the soldier quickly fled, with Julia still lying at the base of the railway embankment. Up on the track she observed the soldier talking with a civilian, who then rushed down the embankment. Alas, the civilian was not a Samaritan, but likely a transient from Hoboes' Hollow. He pinned Julia back on the ground and, in Julia's words, "repeated the same thing."[57] Neither during the initial assault by the soldier nor during the second aggression by the tramp did Julia cry out in any way.[58]

After this second sexual assault Julia Garrett climbed back up the embankment to the tracks, where she was eventually met by her neighbor Walter Cockrell and Mr. Cockrell's tenant (and future son-in-law) Lt. Muntz. Muntz had seen her disappear from

[56] Defendant's brief, supra note X, at 4-5.
[57] Defendant's brief, supra note X, at 5. Apparently fearful that this testimony was insufficient to indicate lack of consent, Mr. Ford asked the following question on re-direct, "When you answered my questions a little while ago and said that the soldier and the tramp were intimate with you at that time, did you mean that they raped you?" "Yes, sir" was the response.
[58] Transcript of evidence, p. 267

the tracks and fetched his future father-in-law to help him search for her. Cockrell and Muntz brought Julia, whom Cockrell knew but did not recognize when he had seen her disembark from the train, back to her home. Julia's mother thereupon expunged "fluids" from her 18-year-old daughter's body with a syringe, and noted that a man's hand had left a mark on Julia's side. A doctor was sought, and he found no injury to Julia's "private parts."[59]

Though the crimes had taken place in Fairfax County, police from the City of Alexandria were summoned[60] and arrived at the Frinks' home that evening. The following morning, Monday, the Fairfax County sheriff, along with Fairfax Commonwealth attorney C Vernon Ford[61] and his assistant Wilson Farr,[62] began their investigation of the rapes. At the scene of the assault they found Julia's underwear. They attempted to use police dogs brought from the brand-new Lorton Reformatory in

[59] Transcript of evidence, p. 373

[60] Evidently police were less concerned with jurisdictional limitations in 1919 than they are today, as the assaults took place well outside Alexandria city limits. Fairfax county police were fully 12 miles away in Fairfax City.

[61] C. Vernon Ford, (1851–1922), was born in Fairfax City, and practiced law with his cousin, Joseph E. Willard. Ford was appointed commonwealth's attorney for Fairfax County in 1879 and, later elected, served in this capacity until his death.

[62] Wilson M. Farr, son of Richard Farr, arguably Fairfax's most prominent citizen, was elected Mayor of the Town of Fairfax in 1918 at the same time as he was serving as both a private attorney and as an assistant Commonwealth's Attorney under Ford. He was elected Commonwealth Attorney for one term in the 1920's, during which time he distinguished himself as a ferocious enforcer of prohibition laws. *See* David S. Turk, *A Family's Path in America: The Lees and Their Continuing Legacy*. Heritage Books, Westminster, Md., 2007, at 123. In 1958, one year before his death, Farr and his daughter Viola Orr sold to the Town of Fairfax, for $300,000, 150 acres of land just south of town along Route 123, at the very location where his grandfather Richard Ratcliffe Farr had as a teenager attempted to ambush federal troops during the Civil War. This land was then offered by Fairfax to the University of Virginia. Today it is the site of the main campus of George Mason University, where one co-author is employed and the other studies. See Steven C. Stombres, *The Farr Family Residences: Historic Homes of Local Family Enrich Modern Fairfax City*, http://steveforfairfax.com/docs/farr-family-residences-stombres.pdf

Occoquan[63] to track the assailants. While authorities searched for the criminals, Julia May Garrett returned to work, not missing a day and wearing the only suit she owned, the same outfit she was wearing when assaulted. Julia's boss, who had read about the ordeal in that morning's newspaper, remarked on her emotional distress and promptly sent her home to recover.

Over the next months the Fairfax sheriff searched in vain for the two rapists: without access to forensic tools, apparently no serious suspects were ever developed. The competing *Washington Post* and *Alexandria Gazette* dailies covered the attacks and the investigation for a full week. Both newspapers attempted to preserve Ms. Garrett's dignity, describing her injuries by reporting that Julia's attackers had "tried to hug and kiss" her, and that the latter had fought off her attackers with "plucky resolve." For its part, it was not until Friday, February 7th that the weekly *Fairfax Herald* published its first story about the attacks – perhaps corroborating that this Fairfax crime was seen as a big-city (i.e., Alexandria) matter, given the distance to Fairfax city. Coincidentally, in that same Feb. 7 issue, indeed on the same page where the assaults on Julia were described, the paper prominently featured a picture of Walker D. Hines, the newly promoted Director General of Railroads and Julia's soon-to-be adversary.

[63] Lorton Reformatory opened in 1916 as a maximum security institution for offenders from the District of Columbia. The prison also housed Nike nuclear missile site W-64. See http://en.wikipedia.org/wiki/Lorton_Reformatory, last consulted on Nov. 22, 2009. Lorton penitentiary was completed and occupied in 1916. It became infamous for escapes and overcrowding before finally closing in 2002.

The Fairfax Herald, established in 1882 and in operation until 1966, was published in this building in Fairfax City from 1904 on.[64]

Meanwhile, Julia Garrett suffered from crying spells.[65] She claimed that swelling on her neck and between her legs was so painful that she could barely walk. Eventually she sued the railroad for trespass on the case, on the theory that its negligence was a legal cause of her physical injuries, pain and suffering. Her complaint described her damages in the contemporary style, which required one and only one sentence for each element of the suit.:

> "[T]he plaintiff was severely bruised and wounded, her clothes torn and soiled, her nervous system greatly shocked, impaired and severely injured, her person violated and defiled, whereby she became sick, sore, lame and disordered and ruined in body, health, reputation and respectability, with her future forever

[64] The Historical Marker Database, http://www.hmdb.org/marker.asp?marker=6275

[65] This is a classic manifestation of what is now known as the "acute phase" of Rape Trauma Syndrome. See Ann Wolbert Burgess & Lynda Lytle Holmstrom, "Rape Trauma Syndrome," 131 Am. J. Psychiatry 981, 1974) at 982.

> recked [sic] and ruined, all of which will continue for a long space of time, to-wit, thence, hitherto, and plaintiff suffered great physical and mental pain, anguish and horrors, was unable to sleep for a long space of time and has been prevented from transacting and attending to her necessary affairs and business as an employee in the office of the Southern Railway Company … and was deprived of divers great gains and profits which she might and otherwise would have derived and acquired by reason of her right and authority to collect her own wages and out of the desire to pay her expenses, and thereby the plaintiff was also obliged to expend, and did pay and expend, divers sums of money, to-wit, the sum of $25.00, in and about endeavoring to be cured of the said bruises, wounds, hurts and injuries so received as aforesaid. To the damage of the plaintiff of $50,000.00"[66]

The Trial

C Vernon Ford and Wilson Farr, the same (part-time) Fairfax County Commonwealth attorneys who had interviewed Julia and unsuccessfully investigated her rape, evidently used their position to gain advance knowledge of potential clients. They recruited Ms. Garrett as their client and in her name filed suit in Fairfax County Circuit Court. They initially sued the Washington Southern Railway. However, the defendant invoked the congressional statute and executive order that had nationalized the railroads in 1917. This statute held the Director General of Railroads liable when otherwise a railroad would have been liable. The court nonsuited Julia for this reason, and her attorneys re-filed, conserving *Washington Southern* as a defendant while adding Walker D. Hines as co-defendant.[67] The court dismissed this second suit as similarly barred by the statute. The third time, in November 1919, was a charm: the Plaintiff dropped

[66] Garrett v. Hines, complaint, unnumbered page. The amount of the suit is the equivalent of $538,066.62 in 2009 dollars. FIND OUT HOW MUCH RAPE CASES ARE "WORTH" TODAY

[67] Following the end of World War I, Hines worked and traveled extensively in Europe. A Southerner and an acquaintance of Woodrow Wilson as was his more illustrious predecessor, Hines travelled extensively in Europe after his tenure as Director General of Railroads ended. In 1925 he authored the *Report on Danube Navigation for the League of Nations.*

Washington and Southern and filed against Hines alone, apparently the first lawsuit filed against the DGR in Virginia.[68]

Julia's attorneys intended to put her on the stand as their first witness, to tell her terrifying story and detail her horrible injuries. Julia's physician would also testify about the extent of her injury. However the court agreed with defendant that the plaintiff first needed to "link things up." [Today we would say, "establish a foundation" for the admissibility as against Hines of the evidence of the damages caused by the rapists.] Testimony about Julia's damages were therefore postponed until Julia presented evidence that the railroad had breached its duty toward her – for only if negligence was proven would any proximately caused damages be payable. Ford's and Farr's theory was that the railroad was negligent in two ways: first, when it missed her stop; and second, when it refused to reverse and presented her with an ultimatum that caused her to disembark between stops near Hoboes' Hollow. The first act was acknowledged to be negligent by the defendant, who offered that that negligence did not cause any rape to occur.

A factual dispute did however involve the second alleged negligent act. The dispute was whether the railroad knew or should have known that the area where Julia disembarked was dangerous. The general reputation of the area was, it was dubiously held by the trial judge, legally insufficient to give the railroad notice of dangerous conditions. Rather, the court held, plaintiff had to show that defendant or his agents (the railroad employees) knew or should have known of actual criminal events or

[68] Plaintiff's confusion was doubtless caused by the relatively recent advent of the United States Railroad Administration (USRA), whose organization was announced February 9, 1918.

circumstances that had taken place before the attack on Julia. Before the trial, the judge had ruled *in limine* that public knowledge of an escape from the maximum security reformatory in Lorton, approximately seven miles from the site of the attack on Julia Garrett, was too remote to be relevant to the plaintiff's case. During trial, the court amazingly extended this ruling and prevented the plaintiff from producing evidence of any knowledge of crimes in Hoboes' Hollow that occurred before the Federal Government nationalized the railroad.[69] The court reasoned that the Director General could not have had any legal notice of events prior to nationalization, and that all such prior events were therefore barred from evidence. The court's logic was deeply flawed, since the Director General clearly assumed both the assets and the liabilities of the railroads he came to own. The court reasoned as if the Hines himself was the legally negligent party, and of course Walker D. Hines certainly did not know much about criminal activity near Cameron Crossing. However the Director General was vicariously liable in cases where an employee had negligently caused injury. Knowledge of criminality at or near Cameron Crossing by WSR employees was therefore relevant – and except for one porter, the railroad's employees had all worked on the rail line for several years, the conductor for several decades. Under the court's devastating ruling, the conductor's state of mind was wiped clean as a matter of law on the day the government nationalized the railroads, as if the corporation had been liquidated and reconstituted. Instead, of course, the prior business had been continued.

[69] Transcript, page X

At first, plaintiff and court took the word of the defendant that the first Director General, William McAdoo, took control in March 1918, leaving the plaintiff only 11 months' time during which to establish precise events that would lead the DGR to know that the area was dangerous. However, on the second day of the four-day trial plaintiff challenged the date that the Government took control of the railroad. The court compelled the defense to produce precise documentation, which showed that the director general had actually taken *de facto* control four months earlier, in December 1917, before the law actually took effect. The extra four months didn't help the plaintiff, though. Evidence of crime reports and police calls at Hoboes' Hollow, including reports that food had been stolen from the track foreman's home, that merchandise had been stolen from rail cars, and that the railroad had employed armed detectives whenever it left merchandise in a car overnight near Cameron Crossing, all pre-dated railroad nationalization.

Left without access to the most damning evidence of criminality, plaintiff's witnesses offered observations concerning the general character of people seen after the nationalization alongside the tracks and living in the nearby woods. When one plaintiff's witness asserted that criminals lived in the woods, the defendant would ask, "compared to a hobo, what does a criminal look like?" When the plaintiff's witness said the area was dangerous, the defense would challenge "do you know of any specific crimes occurring in the area?" Since the relevant time period had been limited by the judge to the period of DGR Hines' appointment, no witness could answer this question in the affirmative.

Without the barred evidence, plaintiff had no facts to impute knowledge of criminal conditions at Cameron Crossing. However, some post-nationalization evidence pointed to dangerous conditions further from Hoboes' Hollow and closer to Garrett's home. At trial a shop owner, one Staunton, testified that tramps would come to his store and that Staunton would feed them to make them go away. The track foreman (an employee of the defendant) admitted that he too had fed tramps who approached his house at Cameron's Crossing, though he then dubiously denied that his family ever felt threatened by them. However, the track foreman made one crucial admission: when he was away from his house, both before and after the nationalization, the shop owner's wife would leave to stay with the foreman's extended family, or the foreman's family would move in with the wife temporarily. Proof that the track foreman's wife would not stay home alone undercut the claim that the vagrants were not perceived as dangerous. Defendant claimed this was irrelevant proof of "general reputation" while plaintiff maintained that this was a "specific fact." The trial judge, perhaps cognizant of the unintelligibility of the distinction he had created, allowed the evidence in.

The plaintiff used hand-drawn maps and two photographs taken by her attorneys to show the series of the events leading to the rapes. The defense, much better endowed, used a surveyed plat and called on a professional photographer. The photographer had taken panoramic 360 degree photographs showing all angles from the place of the rape. The pictures were taken at 5:00 pm, February 2nd, 1920, exactly one year to the hour after

the rape.[70] The defense used the pictures to show that the area didn't look dangerous and was still lit by ample sunlight at that hour.

Despite adverse rulings and a low budget, plaintiff's counsel was able to get evidence, including barred evidence, of negligence to the jury. As each plaintiff's witness took the stand and was questioned about dangerous happenings at Cameron's Crossing, counsel would "forget" to limit the time period to that following the nomination of the Director General. Defense counsel would immediately object, but not before the jury had heard the witness's answer. At first, plaintiff's counsel possibly appeared forgetful, but after several witnesses repeated the same performance it became clear that counsel wanted the witnesses to relate prior criminal acts before the defense could object. For whatever reason (perhaps they recognized that the judge's decision to limit evidence to the period of the DGR's tenure was egregiously erroneous), defense counsel did not move for a mistrial.[71]

Unlike plaintiff's witnesses, who testified that the area was a den of thieves, defendant's witnesses, railroad employees, virtually all testified that the area was peaceful. But plaintiff's counsel took advantage of this discrepancy by challenging the defense witnesses' credibility and exposing the jury to evidence barred by the judge's erroneous ruling. For example, the railroad foreman testified to never knowing about any

[70] Crucially, though, the rapes had occurred around 5:30, apparent sunset. Thirty minutes earlier there must have been much more light. This discrepancy was never commented on by Ford and Farr.

[71] Relate to occasional efforts to get defendant in tort suit to admit he has liability insurance – even if there is an objection the evidence will have been heard. Indeed the objection will solidify the knowledge of this fact. Cite Chicago study on this, see Henderson book. 75A Am Jur 2d Trial, §§ 618-620. Mistrial is typically granted because of this psychological effect. See, e.g., Snowhite v. State, 243 Md. 291 (1963).

crime in the area at any time. To impeach the foreman's credibility, plaintiff questioned the foreman about food had been stolen from the foreman's own house, even though it had been stolen before the Director General took control of the Railroad. Because it was offered on cross-examination the question was allowed.

Plaintiff's counsel also produced evidence of crimes occurring *after* the attack on the plaintiff. For instance, the summer after the attack, therefore well before trial, Fairfax's sheriff had deputized Walter Cockrell to police that area of track. Cockrell testified about numerous crimes, and on each occasion the defense objected. Of course subsequent crimes are irrelevant to what railroad employees knew or didn't know at the time of the rapes. By a curious irony, the defendant's insistence that pre-nationalization events were *hors-combat* seems to have so confused the trial judge that he appeared unwilling to exclude post-nationalization crimes, even if they occurred after the rapes.

Even if the railroad knew the area was dangerous, however, several other factual considerations intervened. The plaintiff testified that the conductor intended to "carry her on through," for the next train back, and that she thought the conductor meant she would travel to far-away Richmond. However, defense witnesses testified that the conductor said he would take Julia "through to Franconia station."[72] The porter testified that the conductor had explained when the next train would bring her back from Franconia (not for over two and one-half hours). Additionally, the defense observed that Ms. Garrett was

[72] This station at the crest of Franconia Hill (near present-day Franconia Road, and the Franconia Springfield Metro station) was four miles from Seminary Station. It was torn down in 1952. The Franconia station boasted the highest elevation above sea-level on the *RF&P*.

an experienced train passenger who had been riding trains for two years and who lived in sight of 60 trains passing each day on the track below her house. That she would believe Richmond was the next stop after Seminary strained credulity, perhaps, but this fact was arguably for the jury.

Another disputed issue concerned the very existence of the duty the railroad owed Julia Garrett. If Ms. Garrett (who couldn't produce her ticket) wasn't a paying passenger on the train, she was a trespasser to whom no tort duty was owed.[73] The defense therefore presented evidence that plaintiff was not a paying passenger. For the defense, a young woman commuter testified that the WSR conductor had improperly extended a professional courtesy by accepting Ms. Garrett's *Southern Railroad* employee pass. By analogy to the guest statute rule for automobiles, Julia would only have recourse for intentional tort against a host who had invited her on board. Plaintiff countered by producing both a policeman who claimed he had watched Ms. Garrett buy her ticket[74] and the plaintiff's sister, who somehow was allowed by the judge to testify that WSR conductors would never accept a *Southern Railroad* pass.

The defense also tried to show that Ms. Garrett knew the area well, so that the jury might conclude that Ms. Garrett intended to leave the track to take a safe shortcut trail through Mr. Cockrell's farm.[75] This might establish that Julia's choice of return

[73] cite to contemporary cases.

[74] The defense objected that this witness had confused the date of the rape with another date. This of course was for the jury.

[75] Charles A. Mills' *Love and Marriage in the Civil War* [Alexandria, VA, Apple Cheeks Press, 1994] has this to say (at 37) about the Cockrell farm: "Bloom's Hill Plantation (twenty slaves), in Virginia was owned by the Cockrell's. This farm had a reputation for treating slaves well. Cockrell bought a sixteen year old girl

route created new risks for her. But the plaintiff showed that the trail through the Cockrell farm was too marshy and that Ms. Garrett would have had to crouch under a fence, likely ruining her one and only suit and making it extremely improbable that she had intended to take this route. Additionally, Ms. Garrett testified to being unfamiliar with any land past the Seminary station.[76]

The defense also submitted that Ms. Garrett was talking to a soldier on the train. Presumably, the jurists were supposed to insinuate that Ms. Garrett had somehow invited the attack, or in fact that the sexual relations were consensual (the lack of vaginal bruising was mentioned in the defense appellate brief, though not so much before the jury, presumably out of a fear of appearing insensitive). The plaintiff, however, countered that although she did talk to one man in uniform on the train, he was wearing a Marines uniform, easily distinguished from the rapist Army garb.[77]

After four days of trial, the jury received ten rather verbose instructions after intense debate between the parties about what those instructions should be. Deliberations

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from a nearby plantation and brought her to Bloom's Hill to cook. The girl had four children by Cockrell…."

[76] The Cockrell family knew Julia, and this might appear to weaken her claim to being unfamiliar with points south of Seminary. However, the site of the Garrett farm today is the corner of Duke St. and Cockrell St. in Alexandria. It is quite possible that a different branch of the Cockrell family was neighbors with the Garretts, and that the two families had made acquaintance at or near the Garrett home, not near the Cameron Crossing.

[77] One co-author, whose son is a Lieutenant in the United States Marine Corps, notes this testimony with particular satisfaction.

took only a few hours, after which the jury awarded Ms. Garrett $2,500.[78] At least theoretically, the jury had apparently found every question of fact in favor of the plaintiff.

The Appeal.

The defendant appealed to the Virginia Supreme Court. He submitted two assignments of error (grounds for appeal):[79]

1. Proximate Cause

   Whether the defendant's admitted negligence in missing plaintiff's station was in all cases as a matter of law not the proximate cause of the assaults on the plaintiff,[80] which should therefore never have been admitted into evidence (without which evidence plaintiff of course would have been entitled to only nominal damages for the loss of time occasioned by missing her station); alternatively, whether the plaintiff's free decision to disembark from the train constituted an assumption of the risk that such an assault might occur.

2. No duty toward plaintiff

   a. That plaintiff did not allege she was a paying customer, and was therefore never owed any common carrier duty of care by defendant, and therefore that defendant's demurrer motion should have been granted; alternatively,

[78] Approximately $33,000 in 2009 dollars. Cite to an inflation calculator. Give examples of "value" of wrongful rape awards today.

[79] Hines v Garrett, Petition for Writ of Error, Record 653, at 9-11

[80] "There is bit a case reported in the books where the courts have not either sustained a demurrer to the declaration or directed a verdict for the defendant, where between the negligence complained of and the injury inflicted there intervened the criminal act of a third party who was under no control of or relation to the defendant…" Hines v Garrett, Petition for Writ of Error, Record 653, at 28.

that her free decision to depart from the train put an end to any common carrier duty of care toward her.

The proximate cause argument [1 a]

Strikingly, and in what surely constitutes a rather radical departure from prior common law, the Virginia Supreme Court dismissed defendant's ground 1 a (that a subsequent criminal action by an unknown third party breaks the chain of proximate causation created by defendant's negligence as a matter of law) rather summarily. Defendant's argument had been both ingenious and (despite the fact that the victim, the soldier and the tramp were all Caucasian) racially inflammatory, but this ground for the defendant's appeal was also supported by solid case law.

Director Hines argued[81] that the existence of hoboes and tramps in the environs of the station was in fact irrelevant, since the tramp who raped the plaintiff would never have reached her had she not been previously caught and raped by the soldier who had jumped from the train, which had been stopped at plaintiff's own request.[82] In other words, defendant argued that the true precipitating harm (the rape by the soldier) was not within the foreseeable risk (possible attack by hoboes) allegedly negligently created by the disembarkation of the plaintiff at this location.[83] If the plaintiff wished damages solely for the second rape, which *had been* committed by a tramp, those damages too

[81] Note that this argument impliedly abandoned defendant's successful claim at trial that only specific criminal acts (committed after the nomination of defendant as DGR) were admissible in evidence.
[82] Petition for Writ of Error, p. 12.
[83] *Vosburg v Putney,* my article in green bag about this case, etc. long footnote here.

should be disallowed, according to the defendant, because the second rapist was white, and violent rape by a Caucasian is unforeseeable as a matter of law:

> "Thanks to our civilization, crimes like these are rare and usually confined to a race not long out of the jungles of Africa…"[84]

The defendant's race-baiting aside, some case law supported this proximate cause claim:

- in *Fowlkes v Southern Railway*,[85] plaintiff had purchased from Southern Railway a ticket from Richmond through to Skinquarter, a station which was on the Farmville & Powhatan Railroad, onto which plaintiff was to transfer after disembarking from the Southern train at Moseley Junction, 25 miles south of Richmond. Plaintiff had been assured by the Southern agent that her train would connect at Mosely Junction with an F&P train, but upon disembarking she found that no F&P train would leave for Skinquarter that day. The tragic dénouement was described this way by the court:

> > It seems that she was pregnant; that day was hot and sultry, and a storm was brewing, when she got off of the train. The Southern road had no depot there, and she failed to see a small ticket office of the Farmville & Powhatan Railroad, which had been recently constructed. She walked 300 or 400 yards from the place where the train stopped to a store, where she received such accommodations as it afforded. The Southern Railway having made no provision for getting her to her destination, she endeavored to find the means of private conveyance. After waiting in the store for about four hours, and suffering great anxiety, she succeeded in hiring a team, and set out for her father's home. It was raining at the time, but the owner of the team would not let it wait, and, as it was getting late,

[84] Petition for Writ of Error, 12. "Hoboes Hollow" had been frequented by both black and white tramps, according to the trial testimony, but the aggressor in question was white.
[85] *Fowlkes v Southern Railway*, 96 Va 742, 32 S.E. 464 (1899).

> she thought it best to start. The road was very rough, and she was greatly jolted. Several hard showers came up during the drive, and she was wet through, and her baggage was also damaged. She was perfectly well when she got on the train at Richmond and when she got off at Moseley Junction. When she got to her father's house, she was suffering with abdominal pains and hemorrhage, from the womb. These pains continued till August 23, 1896, when she suffered a miscarriage. Since that time she has been in bad health and has had another miscarriage.[86]

The question on appeal was whether plaintiff's evidence, summarized above, was admissible. The Virginia Supreme Court held that it was not, because defendant's negligence was in any case not the proximate cause of the damages of which she complained. In the words of the court,

> The negligent act proved in this case was committed at the time the ticket was purchased, and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences which supervened. It might reasonably have been anticipated that a failure to make the connection at Moseley Junction would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and, in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result.[87]

By analogy, claimed Director Hines, at the moment of the negligent missing of plaintiff's station the two rapes could not have been foreseen. The defendant's argument from *Fowlkes* was crucially weakened, however, by plaintiff's claim that the WSR decision to disembark plaintiff near Cameron's Crossing was a second negligent action from which a sexual attack on plaintiff was quite

[86] Ibid at 464.
[87] Ibid, 465-66.

foreseeable.[88] Defendant's rather weak rejoinder, as we have seen, was that even if the offer to disembark between stations in an area frequented by tramps was negligent, the attack by a fellow passenger was unforeseeable, and the second rape would not have occurred absent the first and was in any case committed by a Caucasian and was therefore unforeseeable…

- In *Winfree v Jones*,[89] a residential tenant abandoned his rented house, allegedly leaving the door unlocked. The house was subsequently entered by a trespasser who eventually burned it down. The court rejected the claim that the arson was proximately caused by the tenant's allegedly negligent behavior:

> [I]t would seem to be manifest that the alleged negligence and the damage complained of are not sufficiently conjoined to support the plaintiff's action. To the credit of the civilization in which we live, it cannot be maintained that the natural and expected result of leaving the upstairs door of an empty house unlocked is that some one who has no legal right there will enter the house and burn it, even though the house be located in a negro community. The house was entered and burned by someone unknown to the plaintiff three weeks after it was vacated-a result which cannot be said to have followed the act of alleged negligence, in the usual, ordinary, and experienced course of events. On the contrary, such a result could not reasonably have been anticipated or expected.[90]

Note that this precedent seems to make unnecessary the defendant's race-baiting effort to exclude damages from Julia Garrett's second rape, as the court asserts that all criminal behavior is unforeseeable (regardless of the race of the culprit). On the other hand, *Winfree* is arguably distinguishable because of the nearly-

[88] Reply on behalf of the defendant in error, pp. 18-19
[89] *Winfree v Jones*, 104 Va 39, 51 S.E. 153 (1905)
[90] ibid at 154

three-week lag between the defendant's negligent action and the subsequent intentional tort, and because the location of the rented building, unlike the location of plaintiff Garrett's disembarkation, was not a dangerous one.

- In *Connell v Chesapeake and Ohio RR*,[91] a passenger asleep in his sleeping car was accosted by a robber who had entered his unlocked door. The passenger refused to relinquish his property to the robber, who shot and killed him. In the wrongful death suit that followed, the court held that robbery is foreseeable and can be proximately caused by the railroad's negligent failure to secure cars and cabins, but that murder or other physical harm was too horrid to be foreseeable:

> There is no causal connection between the negligence pleaded and the injury sustained. In a peaceful community, in a law-abiding and Christian land, a car of the defendant company is invaded in the nighttime by an assassin, and an innocent man falls a victim to his murderous assault. Can it be said that, in leaving a door ajar, in permitting a stranger or passenger to enter, the defendants were guilty of negligence, when to hold them negligent would be to say that they should have expected the tragedy which gave rise to this action? To do so would be to require of them more than human foresight as to the minds and motives of men, and make them, indeed, insurers of the safety of passengers, while under their care, against all dangers, however remotely connected with their acts of omission or commission. This view does not seem to have prevailed in those cases in which injuries to the person, and not to the property, of passengers, have been the subject of investigation.[92]

The potential relevance of this case is clear (plaintiff was attacked, not merely robbed); on the other hand, if Julia Garrett's disembarkation from the train between stations, alone and just before dusk was a second act of negligence, the

[91] *Connell v Chesapeake and Ohio RR*, 93 Va 44, 24 S.E. 467 (1896)
[92] Ibid at 469

> main reason it was negligent was likely that it exposed a young woman to the personal predations of miscreants off the train, not merely to robbery on the train. Indeed, as plaintiff pointed out in her appellate brief, the *Connell* court noted particularly that there was no reason for the railroad to have anticipated any particular danger to the plaintiff in that instance.[93]

In addition to these Virginia cases, defendant Hines cited cases from out of state in support of his appeal:

- In *Henderson v Dade Coal*,[94] it was held,

> > [t]hat a "felony" convict, about 37 years old, who had been continuously in the penitentiary for about 12 years, and who had five times escaped therefrom, was "a man in robust and vigorous health, immoral, brutish, devilish, of vicious habits, of violent passions, prone to desire for sexual intercourse," and a person "not restrained by any convictions of right and wrong, or governed by any principles of morality," and that "all of these conditions and things" concerning him "were well known, and were understood" by his custodians, "or ought to have been, because of what they knew of his said person, history, character, and surroundings," did not, without more, afford such cause for apprehending that he would, when an opportunity occurred, commit the crime of rape upon an unprotected woman, as to subject his custodians to liability in damages for the perpetration by him of this offense at a time when, because of their fault, he was at large, and in the unrestrained control of his own movements.[95]

This precedent, if followed *and applied to railroads in Virginia*, seemed to strongly favor the defendant. The *Henderson* court went so far as to say that there would be

[93] Reply on behalf of the defendant in error, pp. 19 (citing *Connell* at 44)
[94] *Henderson v Dade Coal*, 100 Ga. 568, 28 S.E. 251 (1897)
[95] Ibid at 251-52

liability only "where it appears that the custodians of the convict were in some way connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed…", such reasonable grounds apparently requiring more than a knowledge of the personality and morals of their convict. On the other hand, railroads as common carriers have the highest duty of care toward their passengers, a much higher duty than do prisons toward strangers.[96] If the claim in *Henderson* was that no duty was owed to the plaintiff, that case is inapposite to Julia Garrett unless of course it is found that her departure from the train made her a stranger thereto.

- Defendant Hines was quite ill-advised to invoke *Bowers v Southern Railway*.[97] In *Bowers* a railroad fireman was killed when a trespasser threw a switch and caused the wreck of a train that was allegedly running too quickly. The court held that the act of the trespasser (who was convicted of murder) was an intervening cause precluding the railroad's liability to its worker. Hines obviously wished to analogize the *Bowers* trespasser to Garrett's rapists, a dubious proposition considering these statements from the *Bowers* court:

> *As to one to whom the railroad company does not owe a higher degree of care than the standard of ordinary care and diligence imposes, and owes no affirmative duty of protection such as it owes passengers,* the negligence of the railroad company in leaving a switch unlocked is not to be regarded as the proximate cause of an injury which ensues because a willful and conscious trespasser by a criminal act turns the switch, whereby the train is wrecked and a person is injured. The intervening

[96] *Connell v Chesapeake and Ohio RR*, 93 Va 44, 24 S.E. 467 (1896) at 468
[97] *Bowers v Southern Railway*, 10 Ga. App. 367, 73 S.E. 677 (1912).

> independent act of the trespasser renders remote the negligence of the railroad company in leaving the switch unlocked.[98]
>
> As to persons to whom the railroad company owes the duty of extraordinary care and diligence or the duty of affirmative protection (such as passengers) it may be and probably is true that a railroad company could be held liable for leaving a switch unlocked whereby a trespasser as able to throw a switch and wreck a train."[99]

Plaintiff's caselaw

Plaintiff Garrett's appellate brief both disputed the relevance of defendant's cases and raised its own case-law to rebut the defendant's claim that a subsequent illegal intentional tort precludes proximate causation from a prior negligent action.[100] Plaintiff disputed the relevance of the following cases invoked by defendant to support this proposition:

- *Laidlaw v Sage*, where defendant was held not liable for endangering an employee injured by an anarchist terrorist's carpet bomb, was distinguishable because of the "lesser" strength of the duty toward one's employee, and because the case involved nonfeasance, not misfeasance.[101]
- *Alexander v. Town of New Castle*[102] [holding that a town is not liable to one injured by falling into an excavation in the street, when the fall was wholly

[98] Ibid at 678. Emphasis added.
[99] Reply on behalf of the defendant in error, pp. 21, citing *Bowers* at ??
[100] *Supra,* note 78 (Plaintiff's writ of error at 28).
[101] Give citation [do a long history of the case here]. Reply on behalf of the defendant in error, pp. 23
[102] *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N.E. 200 (Ind. 1888) [holding that a town is not liable to one injured by falling into an excavation in the street, when the fall was wholly occasioned by the act of

occasioned by the act of another, who willfully seized plaintiff and threw him into the pit; the negligence of the town, if any, not being the proximate cause of the injury] was distinguishable because the intentional tort was not foreseeable.

- *The Lusitania*[103], [holding that a steamship line had been held not liable for the wrongful death of passengers killed when the ship was sunk by Germany in an illegal act of war] is distinguishable both because passengers had been warned of the precise risk and because it could not be presumed that a civilized nation would resort to such illegal action.[104]
- *Atkinson v Pacific Railway*[105], [holding that a railroad that missed a station and disembarked its passenger at a subsequent station was not liable for his subsequent robbery] is distinguishable because the court found that defendant had no way of knowing of dangers at the subsequent station, which was presumably under police protection, unlike the unsettled and unprotected area where plaintiff Garrett was disembarked.[106]

Plaintiff also produced her own list of case law to rebut the defendant's claim that subsequent criminal acts "break the causal chain":

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another, who willfully seized plaintiff and threw him into the pit; the negligence of the town, if any, not being the proximate cause of the injury]. Reply on behalf of the defendant in error, pp. 23

[103] *The Lusitania*, 251 F. 715, D.C.N.Y. 1918

[104] It was presumably to make the *Lusitania* case more relevant that defendant Hines emphasized that both rapes had been committed by Caucasians, allegedly members of a civilized race from which such behavior could not be anticipated….

[105] *Atkinson v. Pacific Ry. Co.,* 90 Mo.App. 489, (Mo.App. 1901).

[106] Reply on behalf of the defendant in error, pp. 24-25

- *Chicago & A.R. Co. v. Pillsbury*[107] held that where a train carrying non-unionized workers was boarded by irate strikers one of whom shot the plaintiff, a passenger, the railroad arguably violated a duty to that passenger to exercise utmost care, skill and vigilance to carry plaintiff safely; and that the foreseeability of this subsequent intentional tort was for the jury to determine, thereby upholding a verdict for the plaintiff. Plaintiff Garrett noted that liability in *Pillsbury* was for non-feasance (failure to take precautions to prevent boarding of the train by the mob of strikers) while plaintiff Garrett complained of misfeasance (missing Garrett's stop and disembarking her in a dangerous location)[108];
- *Valdosta St. Ry. Co. v. Fenn*[109], holding that a "street railway company may be held liable for an injury due to the failure of its motorman to exercise extraordinary care in protecting a passenger from injury"; and that a jury may be authorized to find that a motorman who left his car, which was operated by electricity, in such condition that the car could be easily started or set in motion by a child trespasser, was the proximate cause of injury to passengers who were permitted to remain in the car, while awaiting the arrival of a connecting car of the same street car company on which they were to proceed to their destination.

[107] *Chicago & A.R. Co. v. Pillsbury,* 123 Ill. 9, 14 N.E. 22 Ill. 1887

[108] Reply on behalf of the defendant in error, pp. 25-27.

[109] *Valdosta St. Ry. Co. v. Fenn*, 75 S.E., 984 (Ga.App. 1912)

- *Lane v Atlantic Works*[110], in which the original negligence of a defendant in loading a truck was held to be a proximate cause of injury to plaintiff when child climbed onto the truck and dislodged the improperly loaded charge, the court holding that "The act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrong-doer if such act ought to have been foreseen."[111]
- *Houston & Texas Central Rwy v. McKenzie*,[112] in which a woman with a young child was disembarked from a train in an unsettled area 300 yards past her station, after which she secured the help of a man to accompany her to the station, then sued for the fright and nightmares she allegedly subsequently suffered; holding that "it was a question for the jury to determine whether or not Mrs. McKenzie's fright, if any was a proximate result of having to leave the train at that point."[113]
- *Bragg's Adm'x v. Norfolk & W. Ry. Co.*[114], citing approvingly *Hutchinson on Carriers*, which in discussing the subject of the right of a common carrier to eject females, or sick or intoxicated passengers, says: "Female passengers and passengers who are sick or suffering from some mental or physical infirmity

[110] *Lane v. Atlantic Works,* 111 Mass. 136
[111] *Lane v. Atlantic Works,* 111 Mass. 136, at 139-140 [cited to in Reply on behalf of the defendant in error, pp. 31-32
[112] 41 S.W. 831 (Tex. Civ. App. 1897)
[113] 41 S.W. 831 (Tex. Civ. App. 1897) at 832
[114] *Bragg's Adm'x v. Norfolk & W. Ry. Co.*, 110 Va. 867, 67 S.E. 593 (Va. 1910)

necessarily cannot be ejected at times and places where the carrier should know that their sex or condition would especially expose them to insult or injury."[115]

The assumption of risk argument [1 b]

As for argument, while never using the words "assumption of risk," the court discussed the doctrine in terms of the railroad's duty. The court held that the railroad's duty extended until the passenger safely arrived at her destination station. However, a passenger could release the carrier's duty by voluntarily disembarking from the train at another location. Certainly Julia May Garrett stepped off the train under her own power – she was not pushed. But did she really have a free choice to do so? The court saw two possibilities in the evidence: either Ms. Garrett had no real choice whether to get off the train because she was forced into making a rash decision, or she knew exactly what she was doing and thus voluntarily released the railroad from its duty. Therefore, the court remanded the case solely to determine whether Julia May Garrett voluntarily left the train.

After discussing the assumption of risk question, the court discussed the chain of causation. The court said that intentional torts of third parties are ordinarily intervening causes. However, in this case, the court found an exception: if the railroad was negligent precisely because it exposed the unwilling plaintiff to dangerous criminals, then the acts of these very same dangerous criminals were not intervening causes. Thus, if the railroad

[115] *Hutchinson on Carriers* (3d Ed.) § 1083 ON THE LAW OF CARRIERS AS ADMINISTERED IN THE COURTS OF THE UNITED STATES CANADA AND ENGLAND BY ROBERT HUTCHINSON THIRD EDITION BY J SCOTT MATTHEWS AND WILLIAM F DICKINSON MEMBERS OF THE CHICAGO BAR A TREATISE

had been negligent by exposing the plaintiff to a slippery or rocky path, the acts of third party rapists would have been intervening factors. In this case however, the harm was within the risk. [I will add tons here]

Aftermath.

After the case was remanded to the Fairfax Court, it sat on the docket for several years. In 1923, the plaintiff and the defendant settled for $1000, from which sum the plaintiff paying outstanding court fees of $679.09. Thus, Julia essentially abandoned her suit for a payment of barely more than $300.

That same year, Julia May Garrett's stepfather passed away. By 1923 stepfather Charles Frinks was no longer farming, but was working as a janitor at the West End School in Alexandria. He died at the school.

In 1928 the state ordered a section of Fairfax County annexed into the City of Alexandria. By 1930, when the annexation was complete, Alexandria Stretched from Old Town Alexandria west all the way to Quaker lane, just a few hundred yards from Julia May Garrett's home. At the same time, Alexandria absorbed the town of Potomac, Virginia, a part of Arlington County adjacent to Potomac Yards. That town (now the Del Ray and St. Elmo, Mt. Ida, and Hume sections of Alexandria) had been laid out in the late 19th century and incorporated in 1908. The residents of the town of Potomac

protested, burning all of their town records.[116] In 1954, Alexandria expanded a second time, all of the way west to interstate 395, also known as Shirley Highway.

In 1930 the Frinks family was still listed in the Census for Fairfax County. Ms. Rowena Frinks, Julia's mother, was listed, along with Julia's younger brother John Garrett and John's wife and child. Julia Eustace, presumably Ms. Garrett's married name, is listed as living there with two boys with good southern names, Robert 5, and Lee, 7. There is no Mr. Eustace listed. The obituary index of the *Alexandria Gazette* indicates that an Ellis Eustace, possibly Julia's husband, died in September 1926.

Cameron Crossing is still a railroad crossing in Cameron Run Park, home of a mini golf course and a water park and water slide. A bicycle trail passes under the railroad bridge and heads north through a marsh. As of late 2009, however, CSX proposes to replace the bridge Ms. Garrett's train was approaching, claiming that "the 100-year old bridge has reached the end of its functional life... [and is] safe for one track but not two."[117]

Julia May Garrett's neighborhood on Little River Turnpike (now Alexandria's Duke St.) is now home to a skateboard park, a Wendy's restaurant, and a Sunrise assisted Living facility. Seminary station is now a white metal radio shack at the base of South Quaker Lane.

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[116] The United States Postal Service still recognizes "Potomac, VA" as an "acceptable" alternate address for ZIP code 22301 in Alexandria, although "Alexandria, VA" is "preferred."

[117] http://alexandriava.gov/uploadedFiles/News/AlexBridgeReplacementPresentation05Nov09.pdf, last consulted Nov. 30, 2009

Wilson Farr, one of Ms. Garrett's attorneys, later became the mayor of Fairfax. Before he died, Mr. Farr sold his farm to the Commonwealth of Virginia for use as a university. This farm is now the main campus of George Mason University.