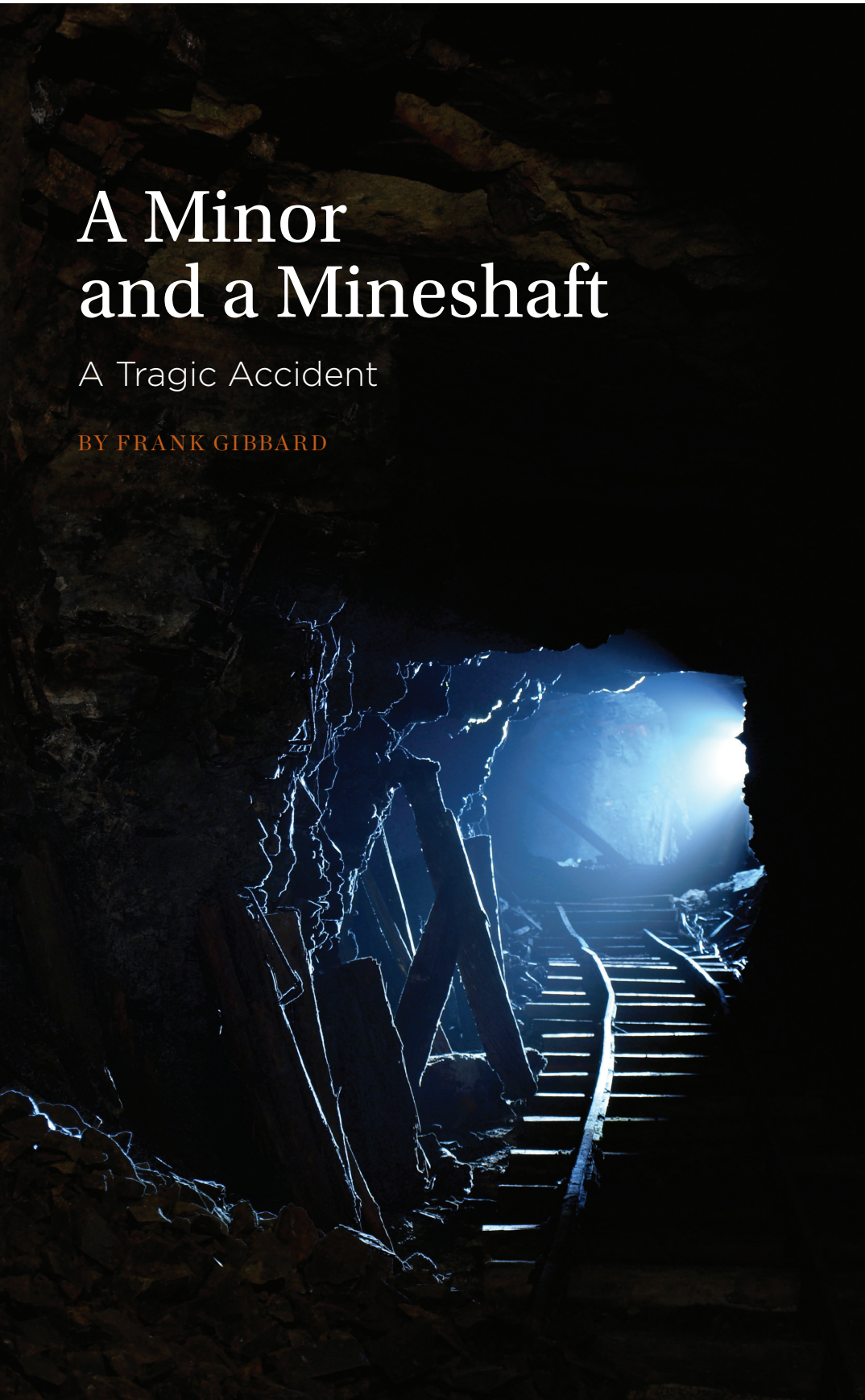


A Minor and a Mineshaft

A Tragic Accident

BY FRANK GIBBARD



The El Paso Consolidated Gold Mining Company (El Paso) was organized in 1894 with an original capital outlay of \$900,000.¹ El Paso owned mining claims on Beacon Hill, in the Cripple Creek mining district. By the end of 1903 it had extracted ore from its claims with a gross value of over \$1.6 million.² In 1904 alone, it extracted an additional \$1.3 million from the claims.³ During this period the company paid sizeable dividends to its shareholders.

Sometime before 1902, El Paso found it necessary to abandon one of its original mine shafts on Beacon Hill, in a claim known as the Australia lode.⁴ The shaft was 200 feet deep and posed an obvious hazard to anyone who might fall into it. The company securely covered the old shaft with wooden planks.

Around that time, the company permitted Allen T. Richardson and his family to build a house on its property, just 110 feet from the abandoned shaft.⁵ If a home next to an old mineshaft on a property full of mine tailings does not seem like prime real estate, at least the price was right: the company did not charge the Richardsons anything to build on its property.

The Richardson home wasn't the only property nearby. Within 400 feet of the abandoned mineshaft, about 15 or 16 families, including around 20 children, lived in the new "Beacon Hill" neighborhood.⁶ The younger Beacon Hill residents, like most children, were prone to exploration, and they often treated the mine tailings dumped on the property as their playground.

Meanwhile, over the years, the boards placed over the abandoned shaft deteriorated. In 1904, an El Paso employee laid some boards crosswise over the old boards, but he did not examine the old boards to see whether they were securely fastened and he did not put in any new stringers to help secure the boards in place.⁷ Two years later, another employee found the shaft "practically uncovered" and put in some new boards to replace those that were missing.⁸ But again, he did not inspect the remaining boards or put in new stringers. The slipshod maintenance of the mine cover, and the presence of children nearby, created the conditions for a tragic accident.

The Accident

One of the children who lived on the El Paso property was Allen Richardson Jr. On July 2, 1907, his mother told 9-year-old Allen to go empty some chicken feed into a hole near the abandoned shaft. At the same time, she gave his brother William another chore to do. The boys left the house together. William walked around a greenhouse, while Allen headed downhill to the hole to dump the chicken feed.

Allen wound up near the abandoned shaft. Its allure proved irresistible. William saw Allen bending over the boards covering the shaft and placing his hands on one of the boards. Other witnesses saw Allen walking on the boards and stomping on them. Then, the inevitable happened: one of the boards upended or broke and began to slip into the hole. Allen tried to jump off the board, but he tripped. He yelled “Mamma!” and then he fell into the hole, headfirst.⁹ The fall proved fatal.

The Lawsuit

Allen’s parents sued El Paso in Teller County District Court for negligence resulting in their son’s death. They supported their suit with a Colorado statute, originally passed in 1903, requiring that “all abandoned mine shafts, pits or other excavations endangering the life of man or beast shall be securely covered or fenced.”¹⁰ After the parties presented their evidence, El Paso moved for a directed verdict, arguing that both the pleadings and the evidence were insufficient to support a verdict in favor of the parents. The district court granted El Paso’s motion, and the parents appealed to the Colorado Supreme Court.

The Appeal

El Paso raised a gauntlet of defenses to the parents’ appeal. Some involved traditional issues of statutory interpretation, while others concerned issues surrounding responsibility for the costs of protecting the public from abandoned or decommissioned structures that pose an ongoing hazard.

The company first argued that the abandoned mineshaft statute applied only to metalliferous mines and claimed that the Richardsons’ complaint failed to affirmatively

allege the Australia mine fell within that category. The Court rejected this argument, holding it could easily be inferred from the complaint that the Australia lode was metalliferous. First, El Paso’s very name indicated it mined for gold (a metal). Second, the complaint alleged that El Paso owned “the Australia Lode Mining Claim,” and “lode claims” are “well understood” to refer to “mining claim[s] containing a vein of metallic ore.”¹¹

El Paso next argued that the Colorado statute was unconstitutional, because requiring a mine owner to keep its property “safe for intruders” amounted to “taking property for the use of another without compensation.”¹² The Court

that led to Allen’s death. Therefore, El Paso was plainly the responsible party under the statute.

El Paso then argued that the statute was not designed to protect people like Allen, “because it was only intended to protect persons engaged in operating mines.”¹⁶ The Court held that the statute could not be construed so narrowly; “it was designed to afford protection to the public generally.”¹⁷

El Paso also contended that the Richardsons had failed to show that the mineshaft was “abandoned,” in the sense that El Paso had stopped using it and never intended to use it again in the future. The Court applied the rules of statutory construction and determined that

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rejected this argument, holding that rather than a taking of private property, the statute was an exercise of the legislature’s police power, “within reasonable limits, to prescribe regulations for the safety of the public.”¹³ The Court noted that “an open, unprotected shaft is a menace to life and limb,” and poses particular dangers to children.¹⁴

El Paso contended that the statute was vague and thus unenforceable because it did not clearly identify the person responsible for covering or fencing an abandoned mineshaft. The Court acknowledged that “[t]he different relations of parties to the property upon which a shaft is located might be necessary to consider in determining the person upon whom such duty is imposed.”¹⁵ But in this case, that question was easy: El Paso was both the owner of the Australia claim and had excavated the shaft

the legislative intent was to protect the public regardless of whether a dormant mineshaft had been permanently “abandoned.”

El Paso argued that the statute only applied to shafts abandoned after the statute’s effective date. But the Court found no indication in the statute that it was intended to operate in such a limited way.

El Paso also argued that the Richardsons were mere licensees on its property and that Allen was a trespasser when he played at the mine tailing dump or approached the mineshaft. The Court found this premises liability argument entirely misplaced. The Richardsons were not attempting to hold El Paso liable as the owner of the land surrounding the mineshaft; rather, they sought to hold El Paso liable for its negligence in failing to comply with a statute designed to protect the public.

Having disposed of El Paso’s miscellaneous arguments, the Court proceeded to resolve what it viewed as the main issues in the case: whether El Paso was negligent, and whether either Allen or his parents’ own negligence precluded their recovery. The Court stated that “to the extent these questions depended on resolving conflicting facts or inferences to be drawn from them, that resolution should be left to a jury.

The Court began by noting that to the extent El Paso failed to perform its statutory duty, it could be held liable for negligence per se. Its duty to comply with the statutory requirements was one of reasonable care. Thus, the question was whether El Paso had exercised reasonable care to securely cover or fence the mineshaft and to keep it securely covered or fenced.

The evidence showed that at around the time of Allen’s death, “some of the boards were loose; that some were dry-rotted and warped; that none were sound except one, and that although the boards may have been originally nailed, the nails had pulled loose; that the stringers supporting them were so decayed that they would not hold the nails, and that it only required a slight jar to loosen the boards.”¹⁸ The mine superintendent was aware that the children played in the vicinity of the abandoned shaft. The superintendent also testified that he had neither asked the employee who repaired the covering in 1906 specifically to cover the shaft nor had he inspected the work after the employee repaired the covering. Instead, he just assumed that the employees had done whatever was required to cover the shaft. The Court found this evidence sufficient to permit the question of El Paso’s negligence to be submitted to the jury unless Allen’s or his parents’ negligence would bar their recovery.

The Court turned next to Allen’s “negligent” behavior. He had pulled on the boards covering the mineshaft and had stepped or stomped on them. Had he been an adult, this contributory negligence might have barred recovery. But, the Court said, “persons of tender years are not held to the same degree of care that a mature and experienced person is required to exercise.”¹⁹ Instead, a minor is only required to exercise the care to avoid dangers that might reasonably


be expected from a person of his age. Here, the factual question of whether Allen had acted with a sufficient degree of care for a 9-year-old should have been submitted to the jury.

Finally, the Court considered the parents’ own contributory negligence. The Court stated that “[i]t was not negligence to take up their abode in a mining camp, and upon a mining claim.”²⁰ They were only responsible for exercising reasonable care to protect Allen from known dangers, or those they could have known existed in the vicinity of their residence. Allen’s mother had not sent him to the mineshaft, and she had been prepared to testify (though her testimony was refused on this point after El Paso objected) that she had warned Allen not to walk on the covering of the shaft.

There was also testimony that in 1906, the parents had sent their older son to repair the covering himself. He had nailed a loose board back on but told the parents that the stringers were not in good condition. Mr. Richardson then inspected the covering and thought it looked secure. All this happened before El Paso made the 1906 repairs to the covering, and there was no evidence that the parents should have known the covering was defective after that time. On these facts, the Court stated, the contributory negligence issue should have been submitted to a jury. The Court therefore reversed the district court’s judgment and remanded for a new trial.

Aftermath

It is unclear what happened to the Richardsons’ suit on remand. The language of the 1903 statute requiring abandoned mineshafts to be covered (now modified to refer to “abandoned mines” rather than just mineshafts) remains part of the Colorado statutes to this day.²¹ Over the years, the legislature has imposed additional requirements such as posting “No Trespassing” signs at abandoned mine sites.²² The current statute also prohibits trespassing in abandoned mines.²³

The Colorado Division of Reclamation, Mining and Safety, which maintains an inactive mine reclamation program, estimates that there are 23,000 abandoned and inactive mines in Colorado.²⁴ The Division describes the dangers to trespassers, including encountering snakes or explosives, “deadly odorless gases,” falling into “holes that open[] under their weight,” drowning “in near-freezing pools of water at the bottom of shafts,” and being “buried in unpredictable cave-ins.”²⁵ The Division’s website provides links to safe inactive mines that are open to public tours. 



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NOTES

1. Lindgren and Ransome, *Geology & Gold Deposits of the Cripple Creek District, Colorado* 349 (US Gov’t Printing Office 1906).

2. *Id.*

3. *Id.*

4. *See id.* at 349–50.

5. *See Richardson v. El Paso Consol. Gold Mining Co.*, 118 P. 982, 986 (Colo. 1911).

6. *Id.*

7. *See id.* “Stringers” are horizontal boards used to secure flooring (in this case, the platform that covered the mineshaft).

8. *Id.*

9. *Id.* at 987.

10. CRS § 4297 (1908). *See also* Colo. L. p. 364, § 18 (1903).

11. *Richardson*, 118 P. at 985 (internal quotation marks omitted).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 986.

19. *Id.*

20. *Id.* at 988.

21. CRS § 34-24-110(1).

22. *See id.*

23. CRS § 34-24-110(3).

24. <https://drms.colorado.gov/programs/inactive-mine-reclamation-program/stay-out-stay-alive>.

25. *Id.*