

ALUMNI DEPARTMENT
Contributing Section

A STUDY IN
SPECIAL FINDINGS OF FACTS AND
CONCLUSIONS OF LAW.*

By Francis J. Vurpillat, '91

*These findings of fact and conclusions of law were prepared and filed by the writer as Judge of the Starke Circuit Court of Indiana, in the case of Friebe vs. Elder etl al. A new trial as of right was immediately granted the plaintiff under the statute directing the trial court to grant a new trial without cause, upon the filing of the application and bond by the aggrieved party. A special judge tried the case anew and filed substantially the same findings and conclusions. From the second judgment the case was appealed to the Appellate Court of Indiana and affirmed. The case was then transferred to the Supreme Court of Indiana, where it was again affirmed. Friebe vs. Elder et. al (Ind. App.), 103 N. E. 429 Id., 181 Indiana 597-105 N. E. 151.

State of Indiana, ss :

FIRST

In Starke Circuit Court,
January Term, 1910.

Paulina Friebe, deceased,
original Plaintiff;
Adolph Friebe;
Adolph Friebe, as Executor of
the will of Paulina Friebe,
deceased:
Ida Whipple,
Clara Kaempfe,
Carl Friebe,
substituted Plaintiffs,

That Paulina Friebe, the original plaintiff, and Henry Friebe, now both deceased, were married in the year 1857, and lived together as husband and wife until the 6th day of August, 1901, when they separated; that for thirty years continuously prior to thier separation they were *bona fide* residents of Starke County, Indiana, residing on a farm in North Bend Township; and that they continued to reside in Starke County, Indiana, throughout the year 1901.

vs.

SECOND

Elmer D. Elder, and
Emma G. White, Administratrix
of the estate of
Henry Friebe, deceased.

That at the time of their separation on August 6th, 1901, Henry Friebe was the owner in fee simple and in possession of the following described real estate situated in Starke County, Indiana, to-wit: (H. I.) that said real estate was worth at that time \$4,500 and was incumbered with a school fund mortgage of \$2,000, dated August 25, 1898, in the execution of which Paulina Friebe joined. That Henry Friebe was also the owner of personal property at

SPECIAL FINDING OF FACTS
AND CONCLUSIONS OF
LAW.

The court having been requested to find the facts specially and state thereon conclusions of law, does now find the facts to be as follows, to-wit:

that time which was of the value of \$500, and was indebted in the sum of \$300 in addition to the mortgage indebtedness mentioned. The court finds that in the purchase of said real estate and personal property of Henry Friebe, said Paulina Friebe had invested \$700 of her own money.

THIRD.

That there were born to said Henry and Pauline Friebe seven children, six of whom were living at the time of the separation, namely, Adolph Friebe, Clara Kempfe, Emma G. White, Ida Whipple, Martha Brown and Carl Friebe. That all of said children except Carl Friebe, had long since come of age, married and lived apart from their parents. The parents, Henry and Paulina Friebe, at the time of their separation were living alone with their son Carl Friebe who was then 37 years of age and who has all his life been an imbecil and a care and charge upon his parents.

FOURTH

That for a long time prior to August 6th, 1901, said Paulina Friebe and Henry Friebe, in their old age were dissatisfied and irritable, were completely estranged, had no affection for one another and did not live together in peace and harmony. That on said 6th day of August, 1901, Paulina Friebe left the old homestead and abandoned Henry Friebe with the avowed purpose to never live with him again; and the court finds that said Paulina Friebe from that time till the death of Henry Friebe neither lived nor cohabited with him.

FIFTH

That after such separation Henry Friebe continued to live at the old home with the demented son, Carl Friebe, while Paulina Friebe lived at

the home of her daughter, Emma G. White in the same neighborhood. That sometime thereafter Henry Friebe informed Paulina Friebe that he intended to apply to the Starke Circuit Court for a divorce and proposed to her a financial settlement in view of such divorce; that negotiations to that end were carried on between Henry Friebe, acting through the son, Adolph Friebe, and Paulina Friebe in person. And it was mutually agreed between said Henry Friebe and Paulina Friebe that if said Henry Friebe should be granted a divorce upon his petition he was to pay Paulina Friebe \$1000 in installments of \$50 per year without interest, secured by notes and mortgage, and that said Henry Friebe was to take care of the imbecil son, Carl Friebe. That Paulina Friebe was induced to waive her demand for interest upon the deferred payments by the promise of the son, Adolph Friebe, that he would give her a home with him. That after this agreement was made it was further agreed that they should go to the town of Knox, in Starke County, for the purpose of carrying out their agreement, and that Henry Friebe might make his application for divorce.

SIXTH

That on the 10th day of October, 1901, Paulina Friebe and Henry Friebe came to Knox, accompanied by their daughter, Emma G. White, and son-in-law, William White; that there they went to the office of Peters & Peters, lawyers, where Henry Friebe told Charles H. Friebe that he wanted to procure a divorce from his wife Paulina Friebe. That thereupon said attorney Charles H. Peters informed them that he could not act for both of them, that Mrs. Friebe

must employ a lawyer, to which Paulina Friebe replied that they had made a settlement between them and she did not want a lawyer. They then left the office of Peters & Peters and went to the court house where, in the corridor they met the Judge of the Starke Circuit Court. That Paulina Friebe told the Judge that Henry Friebe intended to apply for a divorce, that they had settled their property right, that she did not want to resist the divorce and would not employ a lawyer. Then Paulina Friebe and Henry Friebe, accompanied by their daughter and son-in-law, Emma G. White and William White, and the Judge returned to the office of Peters & Peters, where Charles H. Peters, as attorney for Henry Friebe, reduced to writing the agreement theretofore entered into by Paulina Friebe and Henry Friebe; also drafted the notes and mortgage in accordance with said agreement and also a written appearance and waiver of issue and service of process in the contemplated divorce. That said written contract signed and executed by said Paulina Friebe and Henry Friebe has become lost and cannot be found after diligent search and inquiry therefor; That said contract provided that Henry Friebe should pay to Paulina Friebe \$1000 in settlement of her property rights and as alimony in installments of \$50 cash and \$50 per year thereafter until paid, without interest, to be secured by mortgage on eighty (80) acres of the real estate of Henry Friebe, described in finding No. two, said Henry Friebe to pay for recording said mortgage and to pay the taxes thereafter assessed on said mortgage; and in the event of the death of said Paulina Friebe, the balance of said \$1000 remaining unpaid, should

be paid within a year thereafter to the heirs of Paulina Friebe. It was further stipulated in said contract that Henry Friebe, should take the care and custody of their thirty-seven years old son, Carl Friebe, and that he should pay all the costs of the divorce proceeding should the divorce be granted.

That Henry Friebe then made and executed to Pauline Friebe his nineteen promissory notes for \$50 each, payable at the Farmers' State Bank of Knox, Knox, Indiana, in one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen years after date respectfully and also executed and acknowledged his mortgage to Paulina Friebe upon eighty acres of his said real estate described as follows, to-wit: (H. I.) To secure the payment of said notes, which mortgage also provided that at the death of the mortgagee, Paulina Friebe, the entire unpaid balance of this mortgage should become due and payable, within one year thereafter to the heirs of said Paulina Friebe.

That Paulina Friebe also signed, swore to and acknowledged the following written instrument as a part of the same transaction in which the notes and mortgages were executed, to-wit:

State of Indiana

SS

County of Starke,

In the Starke Circuit Court
to October Term, 1901.

Henry Friebe

vs.

Paulina Friebe

The defendant, Paulina Friebe, hereby enters her appearance to the above entitled cause of action, and

waives issueing of summons and the service thereof, or any other notice herein.

PAULINA FRIEBE.

Witnesses

William J. White

Emma G. White.

Paulina Friebe; being first duly sworn by me, swears that she is the identical Paulina Friebe mentioned in the above and foregoing cause of action as the defendant therein, and that she signed the above waiver of notice.

PAULINA FRIEBE.

Subscribed and sworn to before me, the undersigned notary public in and for the County and State aforesaid, this 10th day of October, 1901.

Charles H. Peters,

(L. S.) Notary Public.

My commission expires Nov. 23, 1904

At the time of the execution of said papers Henry Friebe paid to Paulina Friebe \$30 of the cash to be paid on said contract, and after October 28th, 1901, paid to her \$20 the balance of said first cash payment.

SEVENTH

The court finds that Paulina Friebe and Henry Friebe were German people, speaking and writing the German language; that Paulina Friebe was an intelligent and capable woman and that on October 10th, 1901, at the time of the execution of the contract, waiver of service and notes and mortgage described in the last preceding finding she examined and considered said papers; that all of them were translated and explained to her in German by the daughter, son-in-law, and the Judge, and that she approved and executed them with a full knowledge and understanding of their purpose and purport. And it was fur-

ther agreed between said Paulina Friebe and Henry Friebe at the time, that all the papers so prepared and executed should be left at the office of Peters & Peters until the hearing upon the application of Henry Friebe for divorce which, they were then informed, would be heard in the Starke Circuit Court on October 28th, 1901, when they were to be used in said divorce proceedings, and it was also agreed that if a decree of divorce should be granted to said Henry Friebe, then the property rights and alimony should be considered as settled according to the terms of said written contract and the notes and mortgage described should be delivered to said Paulina Friebe.

EIGHTH

That on the 28th day of October, 1901, Henry Friebe, through his attorneys, Peters & Peters, filed his complaint against said Paulina Friebe for a divorce and the custody of their son Carl Friebe in the Starke Circuit Court. That no summons or other process was issued on said complaint or served on said Paulina Friebe, but the written waiver of such summons and service executed by said Paulina Friebe as set out in finding number six was filed and presented in open court and the following minute thereof was made by the trial court upon his bench docket, to-wit:

“Defendant files waiver of summons and service”

The court finds that Paulina Friebe had notice that such complaint would be filed and a hearing had thereon at that time, that on the morning of said day she was informed by William White, her son-in-law, with whom she was making her home at the time, that that was the day upon which the

hearing would be had on Henry Friebe's application for divorce, and she was asked to prepare herself and accompany said White to Knox, for the purpose of appearing at said trial; that she refused to go, stating at the time that it was not necessary for her to be present on the trial. And she then requested and directed said William White to go to Knox and appear upon the trial for her and state to the court that she did not want to resist said Henry Friebe's application for divorce, that they had settled their property rights, and that he, William White, should get the notes and mortgage that had been executed by Henry Friebe for her if the divorce should be granted; that said William White as thus directed by Paulina Friebe went to Knox, and appeared at the trial for her and in her behalf. That upon the filing of said written waiver and appearance executed by the defendant, Paulina Friebe, the court called said defendant; that said William White responded to such call in open court and stated that he had been directed by the defendant to appear and state to the court that she did not want to resist the plaintiff's application for divorce; that they had settled their property rights by agreement and that she wanted to be protected in said agreement. That no other appearance was made by the defendant Paulina Friebe, that no lawyer appeared for her or in her behalf at such proceedings for the reason that she refused to employ one.

That thereupon the Starke Circuit Court assumed jurisdiction of said cause, tried the same and made a finding and pronounced judgment thereon, the record of which appears in

Order Book No. 29, at page 287, and is as follows:

Henry Friebe
vs.
Paulina Friebe

No. 5130

Comes now the plaintiff herein by Peters & Peters, his attorneys, and files the waiver of the defendant of the summons and service, which waiver is in words and figures following, to-wit:

State of Indiana, County of Starke, SS:

In the Starke Circuit Court, to October Term, 1901.

Henry Friebe vs. Paulina Friebe

The defendant, Paulina Friebe, hereby enters her appearance to the above entitled action, and waives issuing of summons and the service thereof, or any notice herein.

PAULINE FRIEBE.

Witnesses

William J. White
Emma G. White.

Paulina Friebe, being first duly sworn by me, swears that she is the identical Paulina Friebe mentioned in the above and foregoing cause of action as the defendant therein, and that she signed the above waiver of notice.

PAULINA FRIEBE.

Subscribed and sworn to before me, the undersigned Notary Public in and for the County and State aforesaid, this 10th day of Oct., 1901.

(Seal) Charles H. Peters,
Notary Public.

My commission expires Nov. 23, 1904.

And said defendant now failing to appear and plead further is three times audibly called in open court, comes not but herein wholly makes default. And the cause being now at issue, and a jury being waived, is submitted to the court for trial, finding and decree; and after hearing all of

the evidence and being fully advised in the premises the court does find in favor of the plaintiff, that the allegations of his complaint are true, and that he is entitled to a decree of divorce from the defendant on the grounds alleged in his complaint; and also finds that all of the property rights of the plaintiff and the defendant have been amicably settled between them. And the court further finds that the plaintiff is a fit person to have the care and custody of their infant child, Carl Friebe, and that said plaintiff is entitled to the care and custody of such child till the further order of this court.

It is therefore ordered, adjudged and decreed by the court that the bonds of matrimony existing between the plaintiff and the defendant be dissolved and the plaintiff be granted a divorce from the defendant; that the plaintiff have the care and custody of Carl Friebe until the further order of this court. And it is also ordered that the plaintiff pay all costs of this action, taxed at \$——.

NINTH

The court finds that on said 28th day of October, 1901, after the rendition of said decree of divorce, Henry Friebe delivered to William White for Paulina Friebe, the notes and mortgages described in finding number sixth and that said William White on that same day delivered said notes and mortgage to said Paulina Friebe in person and informed her of the proceedings had in court and of the decree of divorce granted by the court to Henry Friebe; and that from that time until the death of said Henry Friebe she lived separate and apart from him, characterized herself, and held herself out to the world by her statements and her con-

duct, as the divorced wife of Henry Friebe. And that at no time from the rendition of said decree of divorce until the institution of the present suit did she ever question the validity of said decree or take any steps to vacate the same, but on the contrary she recognized said decree and every year collected from Henry Friebe the notes held by her by reason of said divorce proceedings and caused the mortgage securing the same to be recorded in the Recorder's Office of Starke County, Indiana, which notes and mortgage, the court finds, constituted a part of the consideration for the settlement of all property rights of the plaintiff and the defendant that said decree of divorce refers to as having been made by them. That Henry Friebe complied with all the terms and conditions of the contract between him and Paulina Friebe described in finding sixth, to be complied with on his part from the time of the rendition of said decree; he had the care and custody of said imbecil son, Carl Friebe, with whom he lived until his death; that he paid to Pauline Friebe every year the installment notes as they fell due and paid the taxes on the mortgage held by Paulina Friebe together with the fee for recording same.

TENTH

The court finds that Henry Friebe continued to own the real estate described in finding number two and lived thereon until the 8th day of August, 1907, when he sold and conveyed the same to the defendant Elmer D. Elder; that on said day Henry Friebe executed and delivered to said Elmer D. Elder three deeds of conveyance for said real estate, in each of which deeds he described himself and acknowledged himself to be a

widower, and warranted the title to the real estate therein described by general covenants of warranty; that Paulina Friebe did not join in any of said conveyances. That one of said deeds conveyed the following tract of land, to-wit: (H. I.) to Elmer D. Elder as grantee; that another of said deeds conveyed the following described tract, to-wit: (H. I.) to Bessie R. Elder, a daughter of the defendant Elmer D. Elder, said Elmer D. Elder paying all the consideration therefor, and taking title to himself in his daughter's name; that another of said deeds conveyed the following described tract, to-wit: (H. I.) to Vina B. Elder, another daughter of the defendant Elmer D. Elder, said Elmer D. Elder paying all the consideration therefor, and taking title to himself in said daughter's name. That all of said deeds of conveyances were delivered by said Henry Friebe to the defendant Elmer D. Elder, who immediately took possession of all the lands therein as the owner, and he has ever since occupied and claimed title to all of said lands by virtue of said conveyance, and by no other or different source of title, except that afterwards in October, 1907, said Bessie R. Elder and Vina B. Elder, his daughters both unmarried, executed and delivered to him their deeds of conveyance for said real estate. That all of said deeds herein mentioned were duly recorded in the Office of the Recorder of Starke County, Indiana.

And the court further finds that said Elmer D. Elder paid as consideration for said real estate \$30 per acre, and that as a part of said consideration he assumed and agreed to pay the notes and mortgage held by Paulina Friebe against eighty acres

of said land, as described in finding sixth; that he also executed and delivered to said Henry Friebe a mortgage in the sum of \$850 to secure the balance of the purchase money for said real estate, which mortgage is upon the following described tract, to-wit: (H. I.)

ELEVENTH

The court finds that prior to the purchase of the lands of Henry Friebe by the defendant Elmer D. Elder, as found in the last preceding finding, said defendant Elder had occasion to examine the abstract of title to said real estate and had knowledge of the decree of divorce rendered in the Starke Circuit Court in favor of said Henry Friebe against said Paulina Friebe, as set out in finding number eight, and that he also had knowledge of the mortgage and notes executed by said Henry Friebe to said Paulin Friebe covering eighty acres of said real estate as mentioned in finding number sixth, which mortgage and notes he afterwards assumed and agreed to pay to said Paulina Friebe as part of the purchase money for said real estate. That the defendant Elder also had the opinion of an attorney-at-law, who examined said abstract for him, that the title to said real estate was then in said Henry Friebe, as the divorced husband of said Paulina Friebe.

And the court further finds that before the purchase of said real estate said defendant Elder went to the lands for the purpose of inspecting the same and with the view to negotiating for their purchase, and that on his way to said lands he called at the home of William White, which was also the home of said Paulina Friebe, because he had been informed by said William White that said Friebe

lands were for sale. That at the time he called at the William White home he saw and met Paulina Friebe, and that at the time he believed her to be the divorced wife of Henry Friebe, living separate and apart from him because of such decree of divorce, and that said Paulina Friebe was then and there informed by the daughter, Emma G. White, and her son-in-law, William White, that the defendant, Elmer D. Elder, was the man who was to purchase said lands, and that said Elder was then going to the lands and the home of said Henry Friebe in company with her son-in-law, William White, to negotiate for their purchase.

And the court finds that said Paulina Friebe then and there remained silent and made no protest against said purchase and said nothing and asserted no claim that she was the wife of Henry Friebe, although, as the court finds, she had sometime prior thereto been advised that the decree of divorce rendered six years before in favor of said Henry Friebe was defective and invalid. That said defendant, Elmer D. Elder, in company with said William White then went to the home of Henry Friebe on the lands described and there negotiated the purchase of said real estate from said Henry Friebe, as detailed in finding number ten; and immediately thereafter said William White returned to his home and informed Paulina Friebe that said defendant Elmer D. Elder had purchased the real estate of said Henry Friebe, and that he had agreed to pay the notes and mortgage held by her.

And the court further finds that after said Elder had purchased and taken possession of said real estate

that said Paulina Friebe knew that said defendant was claiming to be the owner of all said real estate by virtue of the deeds of conveyance to him from Henry Friebe as widower and free from any claims she might assert as his wife; and that said Elder made lasting improvements on said real estate with the knowledge of Pauline Friebe, and without any assertion by her of any right, title or interest in said real estate as the wife of said Henry Friebe, and without calling in question the validity of said decree of divorce; but that from the time of said purchase of the real estate by the defendant Elmer D. Elder said Paulina Friebe continued to live separate and apart from said Henry Friebe.

And the court further finds that said defendant Elmer D. Elder has paid two of the annual installments notes falling due since the purchase of said real estate; that the first of said notes so falling due he paid to Paulina Friebe, in person, at her home, during the life time of Henry Friebe, and she accepted such payment and delivered up to said Elder said note in person, and that the second of said notes due and payable to said Paulina Friebe said defendant Elmer D. Elder paid at the Farmers' State Bank of Knox, in Knox, Indiana, where said notes were made payable, and that said note was then and there delivered to said defendant Elder and had indorsed thereon at the time of such payment the name "Paulina Friebe," which note the court finds had been so indorsed by said Paulina Friebe, and that said Paulina Friebe received the money in payment for such note, and that this second note paid by the defendant Elmer D. Elder was paid, and the money therefor re-

ceived by said Pauline Friebe, after the institution of this suit by her.

And the court further finds that said Paulina Friebe continued to hold said notes so payable to her and secured by said mortgage until after the institution of this suit and until the time of her death; and that said notes remaining unpaid at the time of her death are now held by her estate.

And the court further finds that at no time prior to the commencement of this action or since, did Paulina Friebe or the substituted plaintiffs surrender or offer to surrender to any one the notes and mortgage held by said Pauline Friebe in settlement of her property rights under the decree of divorce as heretofore found.

TWELFTH

And the court also finds that after the sale of his said real estate to the defendant, Elmer D. Elder, as heretofore found, said Henry Friebe informed Paulina Friebe of his intention to divide his estate and distribute the proceeds of said real estate among their children, and that Paulina Friebe at the time expressed her approval of said purpose; and that thereafter said Henry Friebe did distribute the proceeds of the sale of said real estate among his said children as follows:

To Adolph Friebe, \$ 800.00
 To Clara Kempfe, \$1000.00
 To Ida Whipple, \$ 50.00

And that he retained the note for \$875.00 secured by mortgage on his real estate, being the mortgage that the defendant Elmer D. Elder gave to secure the unpaid purchase money as heretofore described in the findings, for the future care and support of the imbecil son, Carl Friebe; that

Henry Friebe also gave to Emma G. White, another daughter, \$50.00.

The court finds that at the time of said distribution all of said distributees, children of said Henry and Paulina Friebe, knew that the money so distributed was a part of the proceeds of the sale of the Henry Friebe lands, and knew said Henry Friebe had sold all of said real estate, had warranted the title thereto by general covenants of warranty in the conveyance made by him, as the divorced husband of their mother, Paulina Friebe, and that they also knew of the rendition of the decree of divorce between their said parents, and that since is rendition said Paulina Friebe and Henry Friebe lived separate and apart as divorced. That from the time of the rendition of said decree of divorce said Pauline Friebe made her home with her said children and expressed her satisfaction with that such decree of divorce had been granted and that she was living separate and apart from said Henry Friebe.

THIRTEENTH

That Henry Friebe died inestate in Starke County, Indiana, on October 28th, 1907, leaving surviving him said Paulina Friebe and his children named in finding number two; that on or about the 2nd day of December, 1907, the defendant, Emma G. White, was duly appointed administratrix of the estate of said Henry Friebe, deceased, and she qualified and gave bond as such administratrix and is now acting as such.

And the court finds that said administratrix has in her possession among the assets of said estate the note of the defendant Elmer D. Elder for \$850.00 secured by mortgage on the land described in the forgoing

findings, to-wit: (H. I.) which were given for the balance of the purchase money for said real estate as heretofore found as described in plaintiff's complaint in this action.

FOURTEENTH

That on the 21st day of August, 1909, and during the pendency of her action, said Paulina Friebe died testate in Starke County, Indiana, and her last will and testament was fully probated in the Starke Circuit Court on the — day of —, 1909, and duly recorded in the office of the clerk of the Starke Circuit Court; that by the provisions of her said will Adolph Friebe was named as the sole executor thereof, and that said Adolph Friebe on the — day of —, 1909, duly qualified and gave bond and entered upon the duties of his said trust and is now acting in that capacity, and as such executor is one of the substituted plaintiffs in this action. That by the provisions of said will, Adolph Friebe, Clara Kempfe, Ida Whipple and Carl Friebe are made and constituted the only devisees and legatees of said Paulina Friebe, and to them her estate is given, devised and bequeathed share and share alike; and that all of said devisees and legatees are substituted plaintiffs in this action.

CONCLUSIONS OF LAW

WHEREFORE upon the foregoing facts the court concludes the law to
FIRST:—

That the original plaintiff, Paulina Friebe, at the time of the death of

Henry Friebe and at the time of the filing of her complaint herein, was estopped to deny the validity of the decree of divorce rendered by the Starke Circuit Court of Indiana in the case of Henry Friebe against Paulina Friebe as set out in the foregoing findings, and that she was estopped at such time from asserting any claim of right, title or interest in or to the real estate conveyed by Henry Friebe to defendant Elmer D. Elder as the surviving wife of said Henry Friebe.

SECOND:—

That the substituted plaintiffs and each of them at the time of the death of their mother Paulina Friebe were estopped to deny the validity of the decree of divorce rendered by the Starke Circuit Court of Indiana, in the case of Henry Friebe against Paulina Friebe as set out in the foregoing findings, and that they and each of them are estopped to assert any claim of right, title or interest in or to the real estate conveyed by Henry Friebe to the defendant, Elmer D. Elder, in right of their mother, Paulina Friebe, as original plaintiff through her last will and testament as devisees and legatees of said will.

THIRD:—

That the plaintiffs take nothing by this action either as original or substituted plaintiffs and that the defendants and each of them recover from plaintiffs their costs in this action laid out and expended and taxed at — dollars.