CHAPTER 546

TRIALS

546.01 ISSUES AND TRIALS. Issues, either of law or of fact, arise upon the pleadings, whenever a fact or conclusion of law is maintained by one party and controverted by the other. A trial is the judicial examination of such issues between the parties.

[*R. L. s. 4162*] *(9286)*

546.02 ISSUES, HOW JOINED. An issue of law arises upon a demurrer to the complaint, answer, or reply. An issue of fact arises:

(1) Upon a material allegation of the complaint, controverted by the answer;

(2) Upon new matter in the answer, controverted by the reply; or

(3) Upon new matter in the reply, except when an issue of law is joined thereon.

Issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action.

[*R. L. s. 4163*] *(9287)*

546.03 ISSUES, HOW TRIED; RIGHT TO JURY TRIAL. Issues of law, unless referred as provided by the statutes relating to referees, shall be tried by the court. In actions for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent, or of the court to order, that the whole issue or any specific question of fact involved therein, be tried by a jury or referred.

[*R. L. s. 4164*] *(9288)*

546.04 CONSOLIDATION; SEPARATE TRIALS; ACTIONS TRIABLE TOGETHER. Two or more actions pending at one time between the same parties and in the same court, upon causes of action which might have been joined, may be consolidated by order of the court. Separate trials between plaintiff and any of several defendants in the same action may be allowed when, in the opinion of the court, justice will be promoted thereby.

[*R. L. s. 4141*] *(9264)*

546.05 NOTICE OF TRIAL; NOTICE OF ISSUE. Issues of facts may be brought to trial by either party, upon notice served eight or more days before the beginning of a general term. At least seven days before the term one of the parties shall file a note of issue, containing the title of the action and the names of the respective attorneys, and stating the time when the last pleading was served

and whether the issue is triable by the court or a jury. The clerk shall thereupon enter the cause on the calendar according to the date of issue, and it shall remain thereon, from term to term, until tried or stricken off by the court. In all districts now or hereafter consisting of one county only, wherein but one term of court is or hereafter shall be held annually, no notice of trial need be served, but the party desiring to place a cause upon the calendar thereof for trial, shall, after issue is joined therein, prepare a note of issue containing the title of the cause, a statement as to whether the issue is an issue of law or an issue of fact, and if an issue of fact, whether triable by court or jury, and the names and addresses of the respective counsel, and shall serve the same on opposing counsel, and file such note of issue, with proof of service, with the clerk of court within ten days after such service; and, thereupon, the clerk shall set such cause for trial, in accordance with such rules as the judges of the court may make, but in no event earlier than 30 days after the filing of such note of issue, and shall notify all counsel in the cause by mail of the date of such setting. The judges of the court may, by order or rule of court, provide for the assigning and setting of cases for trial upon such calendar, and the order in which they shall be heard, and the resetting thereof. All appeals from inferior tribunals, including probate court, justice court, county commissioners, and all boards from the decision of which an appeal lies to such court, shall in like manner be placed upon the calendar for trial. For all purposes, other than those specifically herein provided for, the first Monday in each month of the year, except in the months of July, August and September, shall be deemed the first day of a regular or general term of such district court, held in such county, and all persons committed for trial, or held to appear before such court, shall, unless otherwise provided, appear on such dates. When the first Monday of any such month shall be a legal holiday the following day shall be deemed to be the first day of such general term of such district court.

[*R. L. s. 4165; 1909 c. 221 s. 1; 1917 c. 6 s. 1*] *(9289)*

546.06 ISSUES OF LAW, HOW BROUGHT TO TRIAL. Issues of law may be brought on for argument by either party, upon eight days' notice, at any general or special term of the court or before a judge thereof out of term and within the county; or they may be heard, on like notice, out of term at any time and place within the district which the court shall have fixed therefor. If notice for a general term, a note of issue shall be filed as provided in section 546.05; if for a special term, such note shall be filed at least two days in advance thereof.

[*R. L. s. 4166*] *(9290)*

546.07 ORDER OF TRIAL; ABSENCE OF PARTIES. The issues on the calendar of a general term shall be disposed of in the following order, unless the court shall otherwise direct:

(1) Jury cases;

(2) Issues of fact to be tried by the court;

(3) Issues of law.

If a party be absent, unless the court for good cause shall otherwise order, the adverse party may proceed with his case and take a dismissal of the action or a verdict or judgment as the case may require. If neither be present, the cause shall be stricken from the calendar.

[*R. L. s. 4167*] *(9291)*

546.08 CONTINUANCE. A motion to postpone a trial for the absence of evidence can only be made upon affidavit, stating the evidence expected to be obtained, the reasons for its absence, and for expecting that it can be procured, and showing its materiality and that due diligence has been used to procure it; and if the adverse party thereupon admits that such evidence would be given and that it be considered as actually given on the trial, or offered and rejected as improper, the trial shall not be postponed.

[*R. L. s. 4168*] *(9292)*

546.09 JURY, HOW IMPANELED; BALLOTS; RULES OF COURT; EXAMINATION; CHALLENGES. When a jury issue is to be tried the clerk shall draw from the jury box ballots containing the names of jurors until the jury is completed or the ballots are exhausted. If exhausted, the court shall direct the sheriff to summon from the bystanders, or the body of the county, qualified persons to complete the jury. The ballots containing the names of jurors sworn to try the case shall not be returned to the box until the jury is discharged. All others so drawn shall be returned as soon as the jury is completed. The judge or judges of any

district court may provide by rule that in selecting a jury the clerk shall draw 12 names, together with sufficient additional names to cover the requirements of the provisions of sections 546.10 and 546.095. These jurors shall then be examined as to their qualifications to sit as jurors in the action and if any juror be excused for any reason, another shall be immediately called in his place.

[*R. L. s. 4169; 1909 c. 417 s. 1; 1943 c. 228 s. 1*] *(9293)*

546.095 ALTERNATE JURORS. When in the opinion of the trial judge in any case pending in the district court the trial is likely to be a protracted one the court may cause an entry to that effect to be made on the minutes of the court and, immediately after the jury is impaneled and sworn, may direct the calling of not more than two additional jurors, to be known as alternate jurors.

Such jurors must be drawn and have the same qualifications as the jurors already sworn and be subject to the same examinations and challenges; except, the prosecution or plaintiff shall be entitled to one peremptory challenge and the defendant to two.

Alternate jurors shall be seated near, with equal facilities for seeing and hearing the proceedings, and take the same oath as the jurors already selected. They must attend at all times upon the trial of the cause in company, and be admonished and kept in custody with the other jurors.

Alternate jurors shall be discharged upon the final submission of the case to the jury, unless, before the final submission of the case, a juror dies or becomes ill so as to be unable to perform his duty, the court may order such a juror to be discharged and draw the name of an alternate, who shall then take his place in the jury box and become a member of the jury as though he had been selected as one of the original jurors.

[*1941 c. 256*]

546.10 CHALLENGES. Either party may challenge the panel, or individual jurors thereon, for the same causes and in the same manner as in criminal trials, except that the number of peremptory challenges to be allowed on either side shall be as provided in this section. Before challenging a juror, either party may examine him in reference to his qualifications to sit as a juror in the cause. A sufficient number of jurors shall be called in the action so that 12 shall remain after the exercise of the peremptory challenges, as provided in this section and section 546.09, and to provide alternate jurors when ordered by the court under the provisions of section 546.095. Each party shall be entitled to three peremptory challenges, which shall be made alternately beginning with the defendant. The parties to the action shall be deemed two, all plaintiffs being one party, and all defendants being the other party, except, in case two or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, may allow the defendant or defendants on each side of the adverse interests not to exceed three peremptory challenges. When the peremptory challenges have been exhausted or declined, the first 12 of the remaining jurors shall constitute the jury.

[*R. L. s. 4170; 1913 c. 217 s. 1; 1927 c. 281; 1943 c. 228 s. 2*] *(9294)*

546.11 ORDER OF TRIAL. When the jury is completed and sworn, the trial shall proceed in the following order, unless for special reasons the court shall otherwise direct:

(1) The plaintiff, after stating the issue, shall produce the evidence on his part;

(2) The defendant may then open his defense, and produce his evidence in support thereof;

(3) The parties may then respectively offer rebutting evidence only, unless the court, in furtherance of justice, shall permit either to introduce evidence upon his original case;

(4) When the evidence is concluded, unless the case be submitted by one side or both without argument, the defendant shall open and the plaintiff close the argument to the jury; provided, that if the defendant have the affirmative of the issue to be tried the foregoing order of trial shall be reversed;

(5) If several defendants, having separate defenses, appear by different counsel, the court shall determine their relative order in respect to both evidence and argument;

(6) When the argument is closed the court may charge the jury.

[*R. L. s. 4171*] *(9295)*

546.12 VIEW OF PREMISES; PROCEDURE. When the court deems it proper that the jury should view real property which is the subject of litigation, or the place where a material fact occurred, it may order them to be taken, in a body and in the custody of proper officers, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose; and while the jurors are thus absent, no one other than the judge or person so appointed shall speak to them on any subject connected with the trial.

[*R. L. s. 4172*] *(9296)*

546.13 SICKNESS OF JUROR; FOOD AND LODGING. If a juror becomes sick or otherwise unable to perform his duty, the court may discharge him. In that case, unless the parties consent to accept the verdict of the remaining jurors, another may be sworn in his place and the trial begun anew, or the jury may be discharged and another then or afterward impaneled. If the court, while a jury is kept together, shall order that they be provided with food and lodging, the sheriff shall furnish the same at the expense of the county.

[*R. L. s. 4173*] *(9297)*

546.14 REQUESTED INSTRUCTIONS. Before the argument begins either party may submit to the court written instructions to the jury, opposite each of which the judge shall write the words, "Given," "Given as modified," or "Refused;" and the court, in its discretion, may hear arguments before acting on such requests. The court of its own motion may, and, upon request of either party, shall, lay before the parties before the commencement of the argument any instructions which it will give in its charge, and all such instructions may be read to the jury by either party as a part of his argument. At the close of the argument the court may give, with the instructions so approved, such other instructions as may be necessary fully to present the law of the case.

[*R. L. s. 4174*] *(9298)*

546.15 WHAT PAPERS JURORS MAY TAKE. On retiring for deliberation, the jury may take with them all papers received in evidence except depositions; but the court may direct that copies be made for their use of such records and documents as ought not, in its judgment, to be taken from those entitled to their possession. The jurors may also take with them notes of the testimony and proceedings made by themselves, but none others. All such papers, except the notes aforesaid, shall be returned to the clerk before the jurors are discharged.

[*R. L. s. 4175*] *(9299)*

546.16 VERDICT, WHEN RECEIVED; CORRECTING SAME; POLLING JURY. While the jury are absent the court may adjourn from time to time, in respect to other business, but it shall be considered open, for all purposes connected with the cause submitted, until a verdict is rendered or the jury discharged. A final adjournment shall discharge the jury. Before the verdict is recorded either party may require the jury to be polled, whereupon the clerk shall ask each juror if it be his verdict. If any answer in the negative, the jury shall be sent out for further deliberation. If the verdict be defective in form or insufficient, it may be corrected under the advice of the court, or the jury may be again sent out.

[*R. L. s. 4176*] *(9300)*

546.17 FIVE-SIXTHS OF JURY MAY RENDER VERDICT. In all civil actions or proceedings in any court of record of this state, after 12 hours' deliberation, the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and the clerk shall enter such time in his records.

[*1913 c. 63 s. 1*] *(9301)*

546.18 VERDICT; HOW SIGNED. Where the verdict is agreed to by the full membership of the jury the foreman only shall sign the verdict, when less than the full number agree on the verdict the same shall be signed by all the jurors who concur therein, and the clerk of court shall enter on his minutes the number of jurors concurring in the verdict.

[*1913 c. 63 s. 2*] *(9302)*

546.19 VERDICT, GENERAL AND SPECIAL. A general verdict is one by which the jury find generally upon all the issues in favor of the plaintiff or

defendant. A special verdict is one by which they find the facts only, and it shall so present the conclusions of fact as established by the evidence that nothing remains to the court but to draw from them conclusions of law.

[*R. L. s. 4177*] *(9303)*

546.20 INTERROGATORIES; SPECIAL FINDINGS. In every action for the recovery of money only or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to make a written finding upon any particular question of fact submitted to them in writing. Where the special finding of facts is inconsistent with the general verdict the former shall control the latter, and the court shall give judgment accordingly.

[*R. L. s. 4178*] *(9304)*

546.21 FELLOW SERVANT, WHEN NAMED IN VERDICT. In actions for damages resulting from the negligence of a fellow servant or coemployee of the person injured, if either party shall so request before the case is submitted to the jury, the court shall direct the jury, if they find for the plaintiff, to name or otherwise designate, in their verdict such fellow servant or coemployee. If the name be not disclosed by the evidence, he shall be described by the designation of his employment or by such other identification as the case will permit. This section shall not apply to cases where the name or description is not so disclosed.

[*R. L. s. 4179*] *(9305)*

546.22 JURY TO ASSESS RECOVERY. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counter-claim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall assess the amount of the recovery.

[*R. L. s. 4180*] *(9306)*

546.23 VERDICT IN REPLEVIN. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff and the jury find that he is entitled to its recovery, or if the property is not in the possession of the defendant, and by his answer he claims a return thereof, and the verdict is in his favor, the jury shall assess the value of the property and the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding, of such property. When the verdict is in favor of the party having possession of the property its value shall not be found.

[*R. L. s. 4181*] *(9307)*

546.24 RECEIVING VERDICT. When the verdict is given, and is such as the court may receive, the clerk shall immediately file said verdict in open court, and read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case. The clerk shall forthwith record such verdict in full in the court minutes.

[*R L s 4182; 1949 c 126 s 1*] *(9308)*

546.25 ENTRIES ON RECEIVING VERDICT; RESERVING CASE; STAY. Upon receiving the verdict an entry shall be made in the minutes, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and any order of the court made in reference to the case. The court may reserve the case for argument and further consideration, or, in its discretion and upon the proper terms, may stay the entry of judgment and further proceedings under the verdict until the hearing and determination of a motion for a new trial, in arrest of judgment, for judgment notwithstanding the verdict, to set the verdict aside or to dismiss the action.

[*R. L. s. 4183*] *(9309)*

546.26 TRIAL BY JURY, HOW WAIVED. In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial in the manner following:

(1) By failing to appear at the trial;

(2) By written consent, by the party or his attorney, filed with the clerk;

(3) By oral consent in open court, entered in the minutes.

[*R. L. s. 4184*] *(9310)*

546.27 TRIAL BY THE COURT; DECISION, HOW AND WHEN MADE. When an issue of fact has been tried by the court, the decision shall be in writing, the facts found and the conclusions of law shall be separately stated, and judgment shall be entered accordingly. All questions of fact and law, and all motions and matters submitted to a judge for his decision, shall be disposed of and his decision filed with the clerk within five months after such submission, unless sickness or casualty shall prevent, or the time be extended by written consent of the parties. No part of the salary of any judge shall be paid unless the voucher therefor be accompanied by a certificate of the judge that he has fully complied with the requirements of this section.

[R. L. s. 4185] (9311)

546.28 ASSESSMENT OF DAMAGES WITHOUT ANSWER. A defendant, without answering, may appear in the action and demand in writing an assessment of the amount which the plaintiff is entitled to recover; and thereupon the court, upon application of either party, shall direct the manner of such assessment. When the amount is thus ascertained, the clerk shall enter judgment therefor as in other cases.

[R. L. s. 4122] (9245)

546.29 PROCEEDINGS ON DECISION OF ISSUE OF LAW. On the trial of an issue of law, the plaintiff, if the decision be in his favor, may proceed as in the case of the defendant's failure to answer after being personally served with the summons. If in such case the decision be in favor of the defendant, and the taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered.

[R. L. s. 4186] (9312)

546.30 COURT ALWAYS OPEN; DECISIONS OUT OF TERM. The court shall always be open for the transaction of business, for the entries of judgments and orders, and for the hearing and determination of all matters brought before it, except the trial of issues of fact. When any matter is heard, a decision may be made out of term, and such decision may be an order or a direction that an order or judgment be entered, and upon filing the same with the clerk of the county where the action or proceeding is pending an order or judgment, as the case may require, shall be entered by him in conformity therewith. When an order or decision is filed, the clerk shall forthwith mail notice thereof to the attorneys of record in such case, but such notice shall not limit the time for taking an appeal or other proceeding on such order or decision.

[R. L. s. 4187] (9313)

546.31 TRIAL UNFINISHED AT END OF TERM. When the trial of any action or proceeding, or of an indictment, is not concluded at the expiration of the term in which it was begun, it may be concluded; and all proceedings may be had in the case in the same manner and with like effect as if it had been concluded within such term.

[R. L. s. 4188] (9314)

546.32 TRIAL IN VACATION BY CONSENT. With consent of parties the court may try and decide issues of law or fact in vacation, and thereupon judgment may be rendered at any time with the same effect as upon issues tried in term time.

[R. L. s. 4189] (9315)

546.33 TRIAL BY REFEREES; REFERENCE BY CONSENT; FEES WHEN PAID BY THE COUNTY. By consent of the parties to any civil action or proceeding, the court may appoint one or more referees, not exceeding three in number:

(1) To try any or all of the issues therein, whether of law or of fact, except in an action for divorce, and to report judgment thereon;

(2) To ascertain and report any fact involved therein;

(3) To take and report the evidence therein.

When, in such cases, the court shall state in the order of appointment that the reference is made necessary by press of business, the fees of the referee, as taxed and allowed by the court, shall be paid out of the county treasury, as the salaries of county officers are paid.

[R. L. s. 4190; 1921 c. 279 s. 2] (9316)

546.34 COMPULSORY REFERENCE, WHEN. In like actions and proceedings the court may also direct a reference, without the consent of parties:

(1) When the trial of an issue of fact, in a case of equitable nature, involves the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved;

(2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

(3) When a question of fact, other than those raised by the pleadings, arises upon motion or otherwise in any stage of the case;

(4) In a special proceeding of a civil nature, when it is necessary for the information of the court.

[R. L. s. 4191] (9317)

546.35 SELECTION OF REFEREES; MAJORITY MAY ACT. If the parties do not agree upon the persons to be appointed, the selection shall be made by the court from the resident electors of the state. If two be appointed, they shall meet and act together; if three, all shall meet, but two may do any act which might be done by all.

[R. L. s. 4192] (9318)

546.36 TRIAL AND REPORT; POWERS; EFFECT OF REPORT. Trials by referee shall be conducted in the same manner and upon like notice as trials by the court. Referees shall have all the powers of the court to preserve order, amend the pleadings, grant adjournments, and enforce the attendance of witnesses. Their rulings and decisions may be reviewed in the same manner, and not otherwise, and they may settle a case or bill of exceptions, but they shall not entertain a motion for a new trial. The report of referees to try and determine the whole issue shall state the facts and conclusions of law separately, and stand as the decision of the court, upon which judgment may be entered in the same manner. If the reference be to report facts, the report shall have the effect of a special verdict. When the report is set aside or a new trial is granted, the case shall stand as though no reference had been ordered.

[R. L. s. 4193] (9319)

546.37 MINORS MAY BE EXCLUDED, WHEN. When a cause of a scandalous or obscene nature is to be tried, the court or referee may exclude from the courtroom all minors whose presence is not necessary as parties or witnesses.

[R. L. s. 4194] (9320)

546.38 DISMISSAL FOR DELAY. Any district court may dismiss, upon its own or upon the motion of either party, after such notice as the court shall in each case prescribe, any and all actions or proceedings pending therein in which issue shall have been joined and which shall not be brought to trial within five years from and after the commencement of each action or proceeding.

[1919 c. 56 s. 1] (9321)

546.39 DISMISSAL OF ACTION. An action may be dismissed, without a final determination of its merits, in the following cases:

(1) By the plaintiff at any time before the trial begins, if a provisional remedy has not been allowed, or a counter-claim made or other affirmative relief demanded in the answer; provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown;

(2) By either party, with the written consent of the other, or by the court upon the application of either party after notice to the other and sufficient cause shown, at any time before trial;

(3) By the court where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover;

(4) By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

(5) By the court on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

All other modes of dismissing an action are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and notice to the adverse party. In all cases other than those mentioned in this section, the judgment shall be rendered on the merits.

[*R. L. s. 4195*] *(9322)*

546.40 OFFER OF JUDGMENT; COSTS. At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor.

[*R. L. s. 4196*] *(9323)*

546.41 TENDER OF MONEY IN LIEU OF JUDGMENT. If the action be for the recovery of damages for a tort, instead of the offer of judgment provided for in section 546.40, the defendant may tender a sum of money as damages or compensation, together with costs then accrued. If such tender be not accepted, the plaintiff shall have no costs unless he recover more than the sum tendered; and the defendant's costs shall be deducted from the recovery, or, if they exceed the recovery, he shall have judgment for the excess. The fact of such tender having been made shall not be pleaded or given in evidence.

[*R. L. s. 4197*] *(9324)*