
Annotated Statutes of the State of Iowa

Iowa Iowa

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Iowa. Laws, statutes, etc. Code
MCCCLAIN'S

ANNOTATED STATUTES

OF THE

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STATE OF IOWA,

SHOWING THE

GENERAL STATUTES IN FORCE JULY 4, 1880,

EMBRACING

THE CODE OF 1873 AS AMENDED, AND ALL PERMANENT, GENERAL AND
PUBLIC ACTS OF THE FIFTEENTH, SIXTEENTH, SEVENTEENTH
AND EIGHTEENTH GENERAL ASSEMBLIES. WITH A BRIEF
DIGEST UNDER EACH SECTION, OF THE DECISIONS
RELATING THERETO.

By EMLIN McCCLAIN, Esq.,

OF THE DES MOINES BAR.

VOLUME II.

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PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

PRELIMINARY PROVISIONS.

SECTION 2504. Remedies in civil cases in the courts of this state are divided into actions and special proceedings.

Remedies
classified.
R. § 2605.

SEC. 2505. A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for a recovery of penalty or forfeiture.

Civil action
defined.
R. §§ 2606, 2609.

Civil actions include everything except those cases which come under the criminal jurisdiction of the court: *Tomlinson v. Hammond*, 8-40.

Where a note provided for an attorney's fee, in case action was brought thereon, *held*, that filing the note as a claim against the estate, the claim being resisted, was sufficient *bringing of action* to entitle plaintiff to the attorney's fee: *Davidson v. Ver.e.*, 2-384.

SEC. 2506. Every other remedy in a civil case is a special proceeding.

Special pro-
ceedings.
R. § 2607.

Proceedings to disbar an attorney are special proceedings: *The State v. Clark*, 46-155. As to method of trying issues in special proceedings, see note to § 2737.

<p>Form of actions. R. § 2608, 2610.</p>	<p>SEC. 2507. All forms of action are abolished in this state; but the proceedings in a civil action may be of two kinds, ordinary or equitable.</p>	<p>The legislature has no power to abolish the distinction between law and equity. Such distinction is defined and recognized by the Constitution. (See art. 5, §§ 4 and 6): <i>Claussen v. Lafrenz</i>, 4 Gr. 224.</p> <p>Although forms of proceedings are abolished, yet pleas in abatement, such as to the jurisdiction, or of another action pending, are still proper and legitimate: <i>Rawson v. Guiberson</i>, 6--07.</p> <p>By the Code of 1851 it was intended</p>	<p>to assimilate and make uniform the procedure in all law and equity cases. The changes introduced were to be applied equally to both. (Prior cases in which this fact was overlooked, cited and criticised): <i>Shepard v. Ford</i>, 10-502.</p> <p>The term civil action includes proceedings in equity as well as ordinary proceedings: <i>Kramer v. Rebman</i>, 9-114.</p> <p>For somewhat similar provision, see § 2644.</p>
<p>Equitable proceedings. R. § 2611.</p>	<p>SEC. 2508. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction; and must so proceed in all cases where jurisdiction was exclusive.</p>	<p>SEC. 2509. The action on a note, together with a mortgage or deed of trust, for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings.</p>	<p>The provision that an action to foreclose a mortgage shall be by equitable proceedings, is not in conflict with the Constitution art. 1, § 9, guaranteeing the right of trial by jury. Such right was never recog-</p>
<p>Foreclosure of mortgage: action on note. R. § 4179.</p>	<p>SEC. 2510. The action for mechanics' lien shall be prosecuted by equitable proceedings, and therewith shall no other cause of action be joined.</p>	<p>All persons interested must be made parties to the proceedings before they can be affected by the decree: <i>Jones v. Hartsock</i>, 42-147, 153.</p> <p><i>Held</i>, that an action at law might, by consent of parties, be tried in connection with equitable actions to enforce mechanics' liens against the same defendant, and one judgment rendered therein adjusting all claims between them: <i>Hines v. Whitebread C. & M. Co.</i>, 48-296.</p> <p>Under Rev. § 4183, by which an</p>	<p>nized in equity suits: <i>The State v. Orwig</i>, 25-230; <i>Clough v. Scay</i>, 49-111.</p> <p>As to effect of bringing separate suits on the note and mortgage, see § 3320.</p>
<p>Mechanic's lien. R. § 4183. C. 51, § 985.</p>	<p>SEC. 2511. An action for a divorce shall be prosecuted by equitable proceedings, and no cause of action, save for alimony, shall be joined therewith.</p>	<p>An action for divorce being equitable, the right to a trial by jury does not exist, and the parties are entitled</p>	<p>action for a mechanic's lien was to be prosecuted as an ordinary proceeding. <i>held</i>, that subsequent incumbrancers need not be made parties, and that even though not made parties they could not bring action to redeem, and that in such cases there was no equity of redemption as in case of a mortgage: <i>The State v. Eads</i>, 15-114; assented to by two members of the court in <i>Shields v. Keys</i>, 24-298, 308, the other two members expressing no opinion.</p>
<p>Divorce. R. § 4184.</p>	<p>SEC. 2512. Actions by sureties, and by occupying claimants, and on a lost note or bond, may be by ordinary proceedings.</p>	<p>to a trial <i>de novo</i> in the supreme court: <i>Sherwood v. Sherwood</i>, 44-192.</p>	<p>Sureties: occupying claimants. R. § 4185.</p>

SEC. 2513. In all other cases, except in this code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings.

Ordinary proceedings.
R. § 2612.

Action for writ of *habeas corpus* is therefore to be tried as an ordinary action at law: *Ex rel. Shaw v. Nacht-*

wey, 43-653; *Drumb v. Keene*, 47-435.

SEC. 2514. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket.

Error: effect of.
R. § 2613.

An action erroneously brought at law may be changed to an action in equity without leaving the court: *Holmes v. Clark*, 10-423, 427.

changed into the proper proceeding as here contemplated: *Savery v. Browning*, 18-246; *Traer v. Lytle*, 20-301; *Gray v. Coan*, 23-344; *Gibbs v. McFadden*, 39-371.

An error in commencing an action in equity instead of at law, or vice versa, should be corrected as here provided. It is not a ground of demurrer: *Conyugham v. Smith*, 16-471; *Brown v. Mallory*, 26-469; *Wright v. McCormick*, 22-545.

Where an answer to a petition at law set up both legal and equitable defenses and no separation of the legal and equitable issues was had on the trial, held, on a plea, that it would be treated as an equitable action: *VanOrman v. Merrill*, 27-476.

That plaintiff has a full, speedy and complete remedy at law is not proper ground for demurrer. The remedy is by motion to have the action

See, also, notes to § § 2517 and 2519.

SEC. 2515. Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards, on motion in court.

How corrected by plaintiff.
R. § 2614.

SEC. 2516. The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provisions of this code the wrong proceedings have been adopted.

By defendant.
R. § § 2615, 2616.

The motion here contemplated cannot be made after filing an answer, nor at the time of filing an answer to an amended petition, when the fact of error in the proceedings was appa-

rent, but not taken advantage of, at the time of filing an answer to the original petition: *Moore v. Dist. Tp. of Union*, 28-425

SEC. 2517. Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such as were heretofore cognizable in equity, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings.

Ordinary changed into equitable.
R. § 2617.

The issue must be made before the transfer to the chancery docket can be ordered by the court. The discretion of the court is a legal one and is reviewable: *McHenry v. Sypher*, 12-585.

able proceedings: *Byers v. Rodabaugh*, 17-53.

A case properly commenced by ordinary proceedings is not to be transferred to the equity docket on filing an answer setting up equitable defenses but either party may have such equitable issue tried by equi-

The equitable issues which either party elects to have tried by equitable proceedings may be, and under ordinary circumstances should be, first tried and settled: *Hackett v. High*, 28-539; and after the equitable issues are thus tried, any legal issues remaining are to be disposed of in the manner provided for the disposal of such issues: *Rosierz v. Van Dam*,