

**PART XX. THE NINETEENTH CENTURY
(With Particular Emphasis on Germany)**

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A.WILD ANIMALS

1. Code Napoleon c.564, 711–15 (1804)

(trans. R.S. Richards, London, n.d.)

[2. Of property and the different modifications of property. 2. Of property. 2. Of the right of accession over what is connected and incorporated with any thing. 1. Of the right of accession relatively to things immoveable.]

564. Pigeons, rabbits, and fish passing to another dovecot, warren or pond, belong to the proprietors of the latter, provided they have not been attracted by fraud and artifice.

[3. Of the different modes of acquiring property. General dispositions.]

711. Ownership in goods is acquired and transmitted by succession, by donation between living parties and by the effect of obligations.

712. Ownership is also acquired by accession, by incorporation, and by prescription.

713. Property which has no owner belong to the nation.

714. There are things which belong to no one, and the use whereof is common to all.

The laws of police (*lois de police*) regulate the manner of enjoying such.

715. The right of hunting and fishing is alike regulated by particular laws.

2. Austrian Civil Code c.381–384 (1811)

(trans. J.M. Winiwarter, Vienna, 1866, modified CD)

[2. The law determining rights to things. 1. Of real rights. 3. Of the acquisition of property by occupancy.]

381. For vacant (*freistehenden*) things the title consists in the inborn liberty to take possession of them. The mode of acquisition is occupancy, by which one seizes a vacant thing with the intention to treat it as his own.

382. Vacant things can be acquired by all members of the State by means of occupancy, insofar as this right is not restricted by political laws (*politische Gesetze*), or insofar as some members do not have the privilege (*Vorrecht*) of occupancy.

383. This holds good especially in regard to the catching of animals. It is determined in the political laws, to whom the right of hunting or fishing belongs; how immoderate increase of the game will be checked, and damage caused by game will be compensated; how stealing of honey, which is produced by the bees of another person is to be prevented. The criminal laws determine how poachers are to be punished.

384. Domestic swarms of bees and other animals, which are tame or have been tamed, are not an object of the free catching of animals; on the contrary the proprietor has the right to follow them on the land of another person, but he must make up any damage caused to the proprietor of the land. In case the proprietor of a bee-hive kept for breeding has not followed the swarm within two days; or in case an animal, which has been tamed, has remained away of itself for forty two days, every one can take and keep it on common ground and the proprietor on his land.

3. Italian Civil Code c.462, 710–713 (1865)

(CD trans.)

[In the section concerning the right of accession to immoveables:]

462. Doves, rabbits and fish which go to another's dovecot, warren or fishpond are acquired by the owner of it, when they have not been lured there by guile (*arte*) or fraud.

[3. Of the methods of acquiring and transferring ownership and other rights in things. General law.]

710. Ownership is acquired by occupation.

Ownership and other rights in things are acquired and transferred by succession, by gift and by the effect of agreements.

They can also be acquired by means of prescription.

[*Id.* 1. Of occupation.]

711. Things which are not but which can become the property of someone are acquired by occupation. Such are animals which are the object of hunting or fishing, treasure, and abandoned moveables.

712. The practice of hunting is regulated by particular laws.

It is in no way permitted to go on the land of another to hunt against the prohibition of the possessor.

713. Every owner of swarms of bees has the right to pursue them on the land of another, but he ought to make up the damage caused to the possessor of the land. When the owner does not pursue them in two days or when he has ceased to pursue them for two days, the possessor of the land can take them and keep them.

The same right pertains to the owner of tamed animals, save the disposition of article 462; but the said animals pertain to him who has taken and guarded them, if they are not reclaimed in twenty days.

4. Spanish Civil Code c. 609–613 (1889)

(C.S. Walton trans., Washington DC, 1900)

[3. Different ways of acquiring ownership. Preliminary provision.]

609. Ownership is acquired by occupancy.

Ownership and other rights over property are acquired and transmitted by law, by donation, by succession, either testate or intestate, and by tradition in consequence of certain contracts.

They may also be acquired by prescription.

[1. Occupancy]

610. By occupancy are acquired things appropriable, on account of their nature, which have no owners, as the animals which are objects of hunting and fishing, hidden treasures, and abandoned personal property.

611. The right to hunt and fish is governed by special laws.

612. The owner of a swarm of bees shall have a right to pursue the same on another person's tenement, indemnifying its possessor for the damage caused thereby. Should the tenement be inclosed, he shall need the consent of the owner to enter it.

If the owner has not pursued, or abandons the pursuit of the swarm for two successive days, the possessor of the tenement may occupy or retain the swarm.

The owner of tamed animals may also claim them during the twenty days following their occupation by another. After this term has elapsed, they shall belong to him who has caught and kept them.

613. Pigeons, rabbits, and fish, which from their respective breeding places, should pass to another, belonging to a different owner, shall become the property of the latter, unless they have been enticed away through some trickery or fraud.

5. German Civil Code c. 958, 960–64 (1900)

(W. Loewy trans., Boston, 1909)

[3. Ownership 3. Acquiring and losing ownership of movable things 5. Appropriation]

958. One who takes into his own possession an abandoned movable thing acquires the ownership to the thing.

The ownership is not acquired if the appropriation is forbidden by law, or if by taking possession the right of appropriation of another is violated. ...

960. Wild animals are not the subjects of ownership as long as they are free. This law does not apply to wild animals in zoological gardens and fish in ponds or other closed private waters.

If a captured wild animal obtains its freedom again, the right of the owner is barred, unless he pursues it immediately or if he gives up the pursuit.

Ownership of a tamed animal is lost, if it leaves off the habit to return to the place provided for it.

961. Ownership of a swarm of bees is lost if it migrates, unless the owner pursues it at once or if the owner gives up the pursuit.

962. The owner of the bee-swarm may in pursuit enter the land of others. If the swarm settled in another unoccupied bee hive, the owner of the swarm may for the purpose of capture open the hive and may take or break out the honey combs. He shall make good the damage caused thereby.

963. If migrating bee swarms of several owners join, the owners who pursued their swarms become joint owners of the captured untied swarms; the shares are determined according to the number of the pursued swarms.

964. If a swarm of bees settle in the occupied bee hive of another, the property and other rights to the bees by which the hive was occupied, extend to the immigrating swarm. The ownership and other rights to the immigrating swarm are barred.

6. Swiss Civil Code c. 718–719 (1907)

(trans. R.P. Schick, Boston, 1915)

[4. Real rights. 1. Ownership. 20. Movable property. B. Modes of acquisition. 2. Occupation. 1. Things without an owner (*maitre*).

718. An ownerless thing becomes the property of anyone who takes possession of it with the intention of becoming its owner.

[Id. 2. Escaped animals.]

719. Captive animals become ownerless if they again attain their freedom, and their owner does not at once and uninterruptedly seek for them and is at pains to make them captive again.

Tamed animals become ownerless as soon as they again attain a condition of wildness and no longer return to their master. Swarms of bees do not become ownerless by going upon strange land.

7. Bernhard Windscheid, *Lehrbuch der Pandekten* § 184 (1886)

(CD trans from *Diritto delle pandette* C. Fadda & P.E. Bensa eds. (1925)) [footnotes omitted]

[3. The law of things. 4. Ownership. 4. Acquisition of ownership. 6. Acquisition of ownership of things which have no owner.]

184. For things which have no owner the rule is that they fall into the ownership of him who first takes possession of them; but this rule is not without exception.

1. By means of taking possession ownership is acquired in products of the sea and in islands born in the sea.

2. Likewise in wild things, that is to say over those beasts that are found in their natural liberty. However, this rule of Roman law is still applied only with much restriction, because hunting and fishing through almost all of Germany are the exclusive right either of the State, or of the owner of the land, or of others having the right. When such is the case, the occupant does not become the owner of an animal of which possession is taken but the one who has the right to hunt or fish.

B. FORMATION OF MARRIAGE

[Note: This is fuller for the Napoleonic Code than it is for the others. Don't assume just because a topic is covered in the Napoleonic Code and not covered in the extracts given from the other codes that there are not similar provisions in the other codes.]

1. Code Napoleon c. 63–64, 66–75, 144, 148, 1511–153, 165–166, 168–169, 212–220 (1804)

(trans. R.S. Richards, London, n.d., compared with “a[n anonymous] barrister of Inner Temple, London, 1827)

[1. Of persons. 2. Acts before civil authorities. 3. Of acts of marriage.]

63. Before the celebration of a marriage, the civil officer shall make two publications, with an interval of eight days between them, one being on a Sunday, before the gate of the town hall. These publications, and the act which shall be drawn up relating to them, shall set forth the Christian names, surnames, professions, and domiciles of the parties about to be married, the circumstance of their majority or minority, and the Christian names, surnames, professions, and domiciles of their fathers and mothers. This act shall set forth, moreover, the days, places, and hours at which the publications shall have been made; it shall be inscribed on one single register, which shall be endorsed and marked as directed in article 41, and deposited at the end of every year among the rolls of the court of the *arrondissement*.

64. An extract from the act of publication shall be affixed to the door of the town hall, and remain so during the interval of eight days between the one and the other publication. The marriage shall not be celebrated until the third day exclusive after that of the second publication.

66. Acts of opposition to marriage shall be signed, both original and copy, by the parties opposing or by their attorneys, specially and authentically appointed; they shall be communicated, with a copy of the appointment, to the party, or delivered at the domicile of the parties, and to the civil officer, who shall put his visa on the original.

67. The civil officer shall, without delay, make mention concisely of the oppositions on the register of publications; he shall likewise make mention, on the margin of the copy of the said oppositions, of the judgments or acts of renunciation which shall have been sent to him.

68. Where opposition has been made, the civil officer shall not be at liberty to celebrate a marriage, until he shall have had a renunciation transmitted to him, upon pain of a fine of 300 francs, together with all costs.

69. If there has been no opposition, a memorandum thereof shall be made in the act of marriage; and where publications have been made in several communes, the parties shall transmit a certificate from the civil officer of each commune, certifying that there is no opposition.

70. The civil officer shall cause to be transmitted to him the act of birth of each party about to be married. [Provisions concerning proof of birth of those who cannot produce an “act of birth” are omitted.]

73. The authentic act of the consent of fathers and mothers, or of grandfathers and grandmothers, or in the defect of these, that of the family, shall contain the Christian names, the surnames, the professions and domiciles of the future husband, or wife, and of all those who shall have concurred in the act, together with their degree of relationship.

74. The marriage shall be celebrated in the commune in which one or other of the parties shall be domiciled. This domicile, as regards the marriage, shall be established by six months' continued habitation within the same commune.

75. On the day appointed by the parties after the interval for the publications, the civil officer in the town hall, in the presence of four witnesses, relations, or otherwise, shall read to the parties the before-mentioned documents, relating to their condition and to the formalities of the marriage, and from cap. 6. title “*Of marriage*” “*On the respective rights and duties of married persons.*” He shall receive from each party, in succession, a declaration that they are willing to take each other for husband and wife; he shall pronounce, in the name of the law, that they are united in marriage, and he shall forthwith draw up an act to that effect.

76. In the act of marriage shall be set forth:

1st. The Christian names, surnames, professions, age, place of birth, and domiciles of the married persons;

2nd. If they are of full age, or minors;

3rd. The Christian names, surnames, professions, and domiciles of the fathers and mothers;

4th. The consent of the fathers and mothers, grandfathers and grandmothers, and that of the family, in cases in which they are requisite.

5th. The respectful acts, if any have been made;

6th. The publications within the different places of domicile;

7th. The oppositions, if any have been made; the relinquishment of them, or the memorandum that no opposition has been made;

8th. The consent of the contracting parties to take each other as husband and wife, and the declaration of their union by the public officer.

9th. The Christian names, surnames, age, professions, and domiciles of the witnesses, and their declaration whether they are relations or allied to the parties, on which side and in what degree.

[1. Of persons. 5. Of marriage. 1. Of the qualities and conditions required in order to be able to contract marriage.]

144. A man before the age of 18, and a woman before 15 complete, are incapable of contracting marriage.

148. The son who has not attained the full age of 25 years, the daughter who has attained the full age of 21 years, cannot contract marriage without the consent of their father and mother; in the case of disagreement, the consent of the father is sufficient.

151 Where the children of a family have attained the majority fixed by article 148, they are required, previously to contracting marriage, to demand, by a respectful and formal act, the advice of their father and mother, or that of their grandfathers and grandmothers when their father and mother are dead, or under an incapacity of manifesting their will.

152. From the majority fixed by article 148 to the age of 30 years completed for sons, and until the age of 25 years completed for daughters, the respectful act required by the preceding article and on which consent of marriage shall not have been obtained, shall be renewed two several times, from month to month; and one month after the third act it shall be lawful to pass on to the celebration of the marriage.

153. After the age of 30 years, it shall be lawful, in default of consent, upon a respectful act, to pass on, after the expiration of a month, to the celebration of the marriage.

[*Id.* 2. Of the formalities relative to the celebration of marriage.]

165. The marriage shall be celebrated publicly, before the civil officer of the domicile of one of the two parties.

166. The two publications directed by article 63, under the title "*Of the acts of the civil power*" shall be made to the municipality of the place where each of the contracting parties shall have his domicile.

168. If the contracting parties, or one of them, is or are, as regards the marriage, under the power of others, the publications shall besides be made to the municipality of the domicile of those, under whose power they are found to be.

169. The government, or those to whom it shall give charge to this effect, shall be at liberty, on weighty reasons, to dispense with the second publication.

[*Id.* 6. Of the respective rights and duties of married persons.]

212. Married persons owe to each other fidelity, succor, assistance.

213. The husband owes protection to his wife, the wife obedience to her husband.

214. The wife is obliged to live with her husband, and to follow him to every place where he may judge it convenient to reside: the husband is obliged to receive her, and to furnish her with every thing necessary for the wants of life, according to his means and station.

215. The wife cannot plead in her own name, without the authority of her husband, even though she should be a public trader, or non-communicant, or separate in property.

216. The authority of the husband is not necessary when the wife is prosecuted in a criminal matter, or relating to police.

217. A wife, although non-communicant or separate in property, cannot give, alienate, pledge, or acquire by free or chargeable title, without the concurrence of her husband in the act or his consent in writing.

218. If the husband refuse to authorize his wife to plead in her own name, the judge may give her authority.

219. If the husband refuse to authorize his wife to pass an act, the wife may cause her husband to be cited directly before the court of first instance of the *arrondissement* of their common domicile, which may give or refuse its authority, after the husband shall have been heard, or duly summoned before the chamber of the council.

220. The wife if she is a public trader may without the authority of her husband bind herself for that which concerns her trade; and in the said case she binds also her husband if there be a community between them.

She is not reputed a public trader, if she merely retail goods in her husband's trade, but only when she carries on a separate business.

226. The wife may make a will without the authority of her husband.

2. Austrian Civil Code c. 49, 69–75 (1811)

(trans. J.M. Winiwarter, Vienna, 1866, modified CD)

[1. Of the rights of persons. 2. Of the law of marriage.]

49. Minors [defined in c.21 as those under 25], as well as persons, who have attained their majority, but who for whatever reason, are not able alone to conclude a valid obligation, are likewise incapable of marrying without the consent of their legitimate father. If the father is no longer alive, or incapable of representing his children, besides the declaration of the proper representative, the consent of the tribunal is required for the validity of the marriage.

69. For the validity of the marriage the publication of the banns and the solemn declaration of the consent is required.

70. The publication of the banns consists in an announcement of the intended marriage, mentioning the christian-name, family-name, place of birth, station and domicile of both persons betrothed, with the remark, that everyone, who knows any impediment to the marriage should give notice of the same. The notice must be given directly, or by means of the guardian of souls (*curator animarum*), who has published the banns, to the guardian of souls who is competent to celebrate the marriage.

71. The publication of the banns must take place on three sundays or holidays before the usual congregation of the parish, and when each of the persons intending to marry live in another parish, before the usual congregations of both parishes. For marriages between non-catholic Christians, the publication of the banns must take place not only in their meetings for the celebration of divine service, but also in those catholic parish-churches, in the district of which they live; and for marriages between Catholic and non-Catholic Christians, both in the parish-church of the Catholic, and in the prayerhouse of the non-catholic party, as well as in the catholic parish-church in the district, in which the latter lives.

74. To constitute the validity of the publication of the banns and the validity of the marriage depending upon it, it is sufficient, it is true, that the names of the persons intending to marry and their imminent marriage should be announced at least once, both in the parish-district of the bridegroom, as well as of the bride, and any insufficiency in the form or number of publications, which has occurred, does not make the marriage invalid; but both the parties intending to marry or their representatives and the guardians of souls are, under the threat of suitable punishment, bound to take care, that all the publications prescribed here, be carried out in proper form.

75. The solemn declaration of consent must take place before the proper guardian of souls of one of the persons intending to marry, whether his denomination, according to the difference of the religion, be parson, pastor or otherwise, or before their representatives, in the presence of two witnesses.

3. Italian Civil Code c. 63, 70, 78, 93-94 (1865)

(CD trans.)

[1. Of persons. 5. Of marriage. 1. Of the promise of marriage and of the necessary conditions for contracting it. 2. Of the conditions necessary for contracting it.]

63. A son who has not reached his twenty-fifth year, a daughter who has not reached her twenty-first year cannot contract marriage without the consent of their father and mother. If father and mother disagree, the consent of the father suffices. ...

[Id. 2. Of the formalities preliminary to marriage.]

70. Celebration of marriage ought to be preceded by two publications made by the officer of civil state. ...

78. The king or authorities delegated for that purpose can, for grave reasons, dispense with one of the publications. In this case mention of the dispensation shall be made in the one publication.

Dispensation even from both publications can be granted for very grave reasons, by making use of a notarial act in which five persons, relatives or otherwise of the future spouses, declare under oath before the pretor of the district of one of them that they well know the said future spouses, indicating exactly their Christian names, surnames, professions and residences and that they are prepared to assure on their consciences that none of the impediments in articles 56, 57, 58, 59, 60, 61, and 62 stand in the way of their marriage.

The pretor should read the said articles before the notarial act is done and should solemnly warn the declarants of the importance of their testimony and the gravity of the consequences which can result from it.

[Id. 4. Of the celebration of marriage.]

93. The marriage ought to be celebrated in the town hall and publicly, before the officer of civil state of the commune where one of the future spouses has his domicile or residence.

94. On the day indicated by the parties, the officer of civil state, in the presence of two witnesses, relatives of the spouses or not, will read to the spouses articles 130, 131, and 132 of the present title, he will receive from each of the parties, in person, one after the other, the declaration that they wish to take each other for man and wife respectively, and then he will pronounce in the name of the law that they are united in marriage.

The act of marriage will be drawn up immediately after the celebration.

4. Spanish Civil Code c. 42, 45-47, 50, 75-77 (1889)

(C.S. Walton trans., Washington DC, 1900)

[1. Persons. 4. Marriage. 1. General. 1. Forms of marriage.]

42. The law recognizes two forms of marriage, the canonical which all who profess the Catholic religion should contract, and the civil, which shall be celebrated in the manner provided in this Code.

[Id. 2. Provisions common to both forms of marriage.]

45. Marriage is forbidden:

1. To the minor [defined in c.320 as one under 23] who has not obtained consent and to a person of age who has not asked the advice of the persons to whom it pertains to authorize one or the other, in the cases provided for by law. ...

46. The consent, referred to in No. 1 of the preceding article, ought to be granted to the legitimate children by the father; in his default, or where he is impeded, the power to grant it devolves, in this order, upon the mother, the paternal and maternal grandparents, and, in default of all of them, upon the family council. ...

47. Children of age are obliged to ask the advice of the father, and, in his default, of the mother. If they should not have obtained it, or it should be unfavorable, the marriage cannot be celebrated until three months after the petition is made.

50. When, notwithstanding the prohibition of article 45, the persons comprehended within it get married, their marriage shall be valid; but the contracting parties, without prejudice to the provisions of the Penal Code, shall remain subject to the following rules:

1. The marriage shall be understood as contracted with the absolute separation of property, and each consort shall retain the dominion and administration of that which belongs to him or her, making as his or her own all the fruits, although with the obligation of proportionally contributing to the support of the marriage charges.

2. Neither one of the consorts shall receive from the other anything by donation or by will. ...

3. When one of the consorts is a minor, not emancipated, he shall not receive the administration of his property until he attains majority.

In the meantime, he shall only have a right to support which shall not exceed the net income from his property. ...

[Id. 2. Canonical marriage.]

75. The requisites, form, and solemnities for the celebration of canonical marriages shall be governed by the provisions of the Catholic Church and of the Holy Council of Trent, accepted as laws of the Kingdom.

76. Canonical marriage shall produce all the civil effects in respect to the persons and property of the consorts and their descendants.

77. A municipal judge or other state official shall be present at the act of celebration of the canonical marriage with the sole object of verifying the immediate inscription of it in the Civil Registry. ...

[Id. 3. Civil marriage.]

[Corresponds to the French and Italian provisions with differences in detail.]

5. German Civil Code c. 1305, 1308, 1316–1319 (1900)

(W. Loewy trans., Boston, 1909)

[4. Family law. 1. Civil marriage. 2. Consummation of marriage.]

1305. A legitimate child requires, up to the completion of his or her twenty-first year, the father's consent to the marriage; an illegitimate child requires, up to the same age the consent of the mother. ...

1308. If the parental consent is refused to a child of the age of majority [21], it can upon its application be conferred by the Court of Guardianship. The Court of Guardianship shall confer the consent, if it is refused without essential reason. ...

1316. Banns shall precede the marriage. The banns lose their validity, if the marriage is not contracted within six months after the completion of the banns.

Banns may be dispensed with, if the dangerous sickness of one of the betrothed does not admit of the postponement of the marriage.

Dispensation from the banns may be granted.

1317. Marriage is contracted by the contemporaneous declaration of the betrothed personally before an official of the Civil Status that they will take each other in marriage. The said official must be ready to receive the declarations. ...

1318. The official of the Civil Status shall at the contract of marriage in the presence of two witnesses ask the betrothed singly and successively the question whether they will marry one another, and shall after the betrothed have answered the question in the affirmative, pronounce, that by virtue of this law they are now lawfully joined as husband and wife. ...

The official of the Civil Status shall enter the marriage contract in the Register of Marriages.

1319. One who not being an official of the Civil Status publicly exercises the office of such official is, for the purpose of the marriage, an official within the provisions of § 1317, unless the betrothed at the time of the contract of marriage knew of the want of legal competency.

6. Swiss Civil Code c. 98 (1907)

(trans. R.P. Schick, Boston, 1915)

[2. Family law. 1. The law of marriage. 3. The contract of marriage. 2. Marital capacity and impediments.]

98. Minors [under 21; art.14] can enter into a marriage only with the consent of their father and mother or guardian. If at the time of the publication only one of the parents has the parental power, the consent of that one suffices.

[Id. 3. Publication and marriage.]

[These sections largely parallel the French ones with differences in detail.]

7. Bernhard Windscheid, *Lehrbuch der Pandekten* § 489 (1886)

(CD trans from *Diritto delle pandette* C. Fadda & P.E. Bensa eds. (1925)) [footnotes omitted]

[5. Family law. 1. Marriage 1. Its concept. How it is constituted and how it has its end.]

Marriage is the union of man and woman for undivided community of life. This concept of marriage was already recognized in all its purity in Roman law.

The means by which marriage is constituted and ended is not governed today according to the common law of principles of Roman law, but by those of the law of the Empire of 1875 and by the canon law.

Likewise the more particular exposition of the theory of the promise of marriage (*sponsalia*, *Verlöbnisse*) which sometimes precedes marriage ought to be referred to the discipline of canon law.

C. WITNESSES

1. French Civil Procedure Code c. 268, 283–284, 291 (1806)

(CD trans.)

[1. Tribunals. 2. Inferior tribunals. 12. Inquests.]

268. No one can be assigned as a witness, if he is related by blood or marriage in the direct line to one or another of the parties or his spouse even if divorced.

283. [The following witnesses] can be reproached: relatives by blood or marriage of one or the other party up to german cousin inclusive; relatives by blood or marriage or their spouses up to the above-stated degree if the spouse is living, or if the party or the witness had of the spouse living children; if the spouse has died and not left descendants, relatives by blood or marriage in the direct line, brothers and brothers-in-law, sisters and sisters-in-law can be reproached.

[The following] can also be reproached: the witness who is heir presumptive or donee, he who has eaten or drunk with the party at his expense after the pronouncement of the judgment that ordered the inquest, he who has given certificates about the facts relative to the process, servants and domestics, a witness who has

been accused, he who has been condemned to a punitive or infamous penalty, or even to a correctional penalty for theft.

284. The witness who has been reproached will be heard in his deposition.

291. If the reproaches are admitted, the deposition of the witness will not be read.

2. Spanish Code of Civil Procedure (1855), c. 659–660

[The following is taken from the 1885 version of the Code because we don't seem to have the earlier version; there is reason to believe, however that the earlier provisions were not substantially different. Trans. U.S. War Department (Washington, D.C. 1901).]

[2. Contentious jurisdiction. 2. Declaratory actions. 2. Declaratory actions of greater import. 5. Means of proof. 7. Evidence of witnesses.]

659. Judges and courts shall weigh the force of the declarations of the witnesses according to rules of sound judgment, taking into consideration the reasons upon which they are based and the circumstances connected therewith.

Nevertheless, when the law determines the number or the qualifications of witnesses as a formality or special circumstance of the act to which they refer, the provisions for said case shall be observed.

[Id. 8. Challenge of witnesses.]

660. Each party may challenge the witnesses of the opposite party for any of the following reasons:

1. Relationship of the witness to the party for whom he appears by consanguinity or affinity within the fourth degree.

2. That the witness at the time of giving his testimony is a partner, employee, or servant of the party for whom he appears.

For the purposes of this provision, a servant or employee shall be considered the person who lives in the house of the litigant and performs therein mechanical services for a fixed salary; and an employee, a person who habitually renders for the litigant remunerated services, although not living in his house.

3. That the witness has a direct or indirect interest in the action or in another similar action.

4. That the witness has been condemned for giving false testimony.

5. That the witness is an intimate friend or an open enemy of one of the litigants.

3. Italian Code of Civil Procedure c.236–237 (1865)

(CD trans.)

[1. On the order and form of judgment. 4. On process. 4. On proof. 3. On examination of witnesses.]

236. There cannot be heard as witnesses the blood relatives and affines in direct line of one of the parties, or the spouse, even if separated, save in questions of state or of personal separation between spouses; and when they are heard, no regard shall be had to their depositions.

237. The parties always have the right to propose the motives which can render the deposition of a witness suspect. These motives ought to be set down for proof in the specified way.

When the motives for suspicion are not founded on a writing, the judicial authority cannot admit proof by means of witnesses, unless grave, precise and concordant circumstances are present.

If the motives for suspicion are proposed before the examination of the witness to whom they refer, the judge can grant the same the opportunity to explain.

In any case the witness alleged to be suspect ought to be examined, saving the authority of the judge evaluate, as is reasonable, his deposition.

4. Spanish Civil Code c.1244–1248 (1889)

(C.S. Walton trans., Washington DC, 1900)

[4. Obligations and contracts. 1. Obligations. 5. Proof of obligations. 5. Evidence by witnesses.]

1244. Evidence by witnesses shall be admissible in all cases in which it has not been expressly forbidden.

1245. All persons, of either sex, who are not unable by natural incapacity or by provisions of law, can be witnesses.

1246. The following cannot be witnesses by natural incapacity:

1. Lunatics or insane persons.
2. The blind and deaf, in things, knowledge of which depends upon sight and hearing.
3. Minors under fourteen years of age.

1247. The following persons are incapable by provisions of law:

1. Those who are directly interested in the suit.
2. The ascendants in the suits of their descendants and the latter in those of the former.
3. The father-in-law or mother-in-law in the suits of the son-in-law or daughter-in-law, and vice versa.
4. The husband in suits of his wife and the wife in those of the husband.
5. Those who, on account of their condition or profession, are bound to keep secrecy in matters relating to their profession or condition.

6. Those who are especially disqualified to be witnesses in certain acts.

The provisions of Nos. 2, 3, and 4 shall not be applied in suits in which it is intended to prove the birth or death of children or any other private family act, which it may not be possible to verify by any other means.

1248. The probatory force of the depositions of the witnesses shall be valued by the courts in accordance with the provisions of the Law of Civil Procedure, taking care to avoid that, by the simple coincidences of some depositions, unless their truthfulness be evident, the affairs may be finally decided in which are usually employed public deeds, private documents, or any commencement of written evidence.

5. German Code of Civil Procedure c.348–352 (1877)

(CD trans.)

[2. Procedure at first instance. 1. Procedure before regional tribunals. 7. Proof by witnesses.]

348. The following can refuse to testify:

1. The fiance of one of the parties;
2. The spouse of one of the parties, even after the dissolution of the marriage;
3. Relatives by blood or marriage in the direct line, or the persons who are united to them by the effect of adoption; in the collateral line blood relatives up to the third degree, relatives by marriage up to the second degree even after the dissolution of the marriage on which relation is founded;
4. Ministers of religion, for what has been confided to them in the exercise of their sacerdotal mission;
5. Persons who by virtue of their employment, state or profession receive the confidence of facts the secrecy of which is required by their very nature or by a legal provision, if the facts about which they are to depose are precisely those which fall under professional secrecy.

Persons designated under numbers 1–3 ought to be notified before their deposition of the right that they have to refuse to testify.

Persons designated under numbers 4–5 ought not, even if they consent to testify, be interrogated about facts the revelation of which would constitute a manifest violation of professional secrecy.

349. Testimony can be refused:

1. If the response to be made would have as its immediate consequence a material injury to the witness or one of those close to him designated under c.348,1–3.
2. If the response to be made would compromise the honor of the witness or of one of those close to him designated under c.348,1–3, or expose them to criminal prosecution.
3. If the witness could not reply without revealing an artistic or industrial secret.

350. In the cases provided in c.348,1–3 and 349,1, the witness cannot refuse to testify:

1. About the existence or content of an act, at the redaction of which he assisted as a witness;
2. About births, marriages or deaths of members of his family;
3. About questions of interest that result from his familial ties;
4. About acts concerning the litigation itself, when these acts are attributed to him as one who did them for himself or as representative of one of the parties.

The persons designated in c.348,4–5 cannot refuse their testimony when they have been relieved of the obligation of keeping the secret.

351. A witness who refuses to depose is obliged to make known and to support by writing or insertion in the court record the facts on which his refusal is based

352. The tribunal seised of the process decides, having heard the parties, if the refusal is founded in law.

...

6. Austrian Code of Civil Procedure c.320–327 (1895)

[Follows with some changes the German Code.]

7. Swiss Code of Civil Procedure, art. 168–176 (2008)¹

Title 10 Evidence. Chapter 3 Evidence. Section 1 Admissible Evidence

Art. 168

¹ The following evidence is admissible:

- a. testimony;
- b. physical records;
- c. inspection;
- d. expert opinion;
- e. written statements;
- f. questioning and statements of the parties.

² The provisions relating to matters of children in family law proceedings are reserved.

Section 2 Testimony

Art. 169 Subject matter

Any person who is not a party may testify on matters that he or she has directly witnessed.

¹ Prior to 2008, Swiss civil procedure was codified only at the canonical level. The unofficial translation given here is derived from <https://www.fedlex.admin.ch/eli/cc/2010/262/en>.

Art. 170 Summons

¹ Witnesses are summoned by the court.

² The court may allow the parties to bring along witnesses without a summons.

³ A witness may be questioned at his or her place of residence. The parties must be notified thereof in advance.

Art. 171 Form of statement

¹ A witness shall be cautioned as to the requirement to tell the truth before being questioned; if at least 14 years of age, the witness shall also be advised of the criminal consequences of perjury (Art. 307 SCC⁶²).

² The court shall question each witness individually with no other witnesses present; the foregoing is subject to the provisions on confrontation.

³ The witness must testify without notes; the court may authorise the use of written documents.

⁴ The court shall exclude witnesses from the remainder of the hearing as long as they have not been released from being a witness.

⁶² SR 311.0

Art. 172 Content of statement

The court shall ask witnesses:

a. to state their particulars;

b. to describe their personal relationship with the parties and other circumstances that may be relevant to the credibility of their testimony;

c. to state the facts of the case as they have observed them.

Art. 173 Additional questions

The parties may request that additional questions be put to the witness, or, with the consent of the court, they may themselves ask such questions.

Art. 174 Confrontation

Witnesses may be confronted with each other or with the parties.

Art. 175 Testimony of an expert witness

If a witness has special expertise, the court may also ask him or her questions about his or her assessment of the facts of the case.

Art. 176 Transcript

¹ The essential details of the statement shall be placed on record, which is then read out or given to the witness to read and thereafter signed by the witness. Additional questions requested by the parties that have been rejected are also recorded if a party so requests.⁶³

² In addition, the statement may be recorded on tape, by video or by other appropriate technical aids.

³ If statements are recorded during a hearing using technical aids in accordance with 2, the court or the examining member of the court may dispense with reading the transcript back to the person examined and or giving that person the transcript to read and sign. The recordings are placed in the case files together with the transcript.⁶⁴

⁶³ Amended by No I 1 of the FA of 28 Sept. 2012 (Transcription Regulations), in force since 1 May 2013 ([AS 2013 851](#); [BBI 2012 5707 5719](#)).

⁶⁴ Inserted by No I 1 of the FA of 28 Sept. 2012 (Transcription Regulations), in force since 1 May 2013 ([AS 2013 851](#); [BBI 2012 5707 5719](#)).

