

See Commonwealth all Manner of Evidence whereby the Truth is to be tryed
in Cases Controversies and Controversies, no exception or Reaso[n]e Considering
in Case can be offered as Proofer verius ad Testimonia. Seeing parties
ought to know the Law, and therefore Allegations only of Matters
of fact are allowed to be heard upon pretence of their coming by
certainty ad Diversum fund 1629 ad Tunc contra E. Henric.

*Our late Constitution answers to what the English call iure facti
 and (Actions Existing) upon Matter of fact, to Discrepancy from
 Law, known upon Matter of Law called a Demurrer. Issue from
 the French Justice to follow; & a single and certain Material going
 up and down of the Allegations and plead of the parties Consisting
 regularly of an affirmata, and Negativa. Such issue joined upon Mat-
 ter of fact is to be tried in England by a Jury of twelve men.
 Where as Issue joined upon Matter of Law is determined by the
 Judges. Upon a Trial of right that is known the Issue (which in
 other Actions is called the Point) from Motto, because the Whole
 Cause is put upon that point. The Judges in England, will not ad-
 dress the Relevancy of a cause either partly to prove any allegation
 they think fit, and then go to the point of Right arising from
 the facts proved. *Quia ex facto sed oritur: ut the Lord of Hales*
*do in his before answer.**

Art. 4

of Proof or legal Evidence.

Proof (Called on our Law probatio and termed in the
 English Law Evidence, because it makes the Subject adduced to the
 Juryman probable belief the Evidence) is an Act which persuades
 the Mind and creates a Belief in the Judge, that such a fact
 is true or false. Which is a Moral Demonstration and the
 truth guides that Man's actions, the most their Conscience having
 have regularly allowed them to follow. It may be made of par-
 ticulars each of which are but probable; for the Concurrence
 of probabilities amounts to Moral Certainty which Men
 doth aspire to, both in the Conduct of private affairs and in
 the Government of States and Empires. Fact is the only sub-
 ject that has of proof for the last is not to be proved, but only
 to be attested, being the Judge already doct or taught to know
 it. But the Law of England and other Nations being Matter
 of fact to us, is probable, by a Declaration of the Judge that
 obtained upon a Commission from our Judge 18 Feb 1675
 Laiell contra Rame 18 January 1678 Cunningham contra
 Brown. Proof is either particular and ordinary or General and Ex-
 traordinary.

Secta.

Sect. i.

Ordinary proof.
 Ordinary proof or probatibilis, is that which the Law
 determines to be held as certain. Ordinary Evidence
 in England is either Writs and Records which they call certa
 Evidence or that given by Testimony, which they term living evi-
 dence. The ordinary means are particularly as in following are
 Writs, witness, oath of party, and Confession, called in artic-
 ular proof, because they prove Directly, in terminis, and so
 require no art or skill to understand them. Which because
 of proof are some times easily, and sometimes separately made
 use of for proving one point. A bond against a bond for
 money was admitted to prove partly as well as
 such was the cause of the contract, partly to shew that
 the bond how little it was not sufficient to bind to him
 contra. A bond was taken away and reduced in value
 after party to the creditor, that the cause of it was
 not borrowed Money as it bore, and nothing in the way of the
 instrument itself, that the true cause of it was canceling
 a prior bond granted by the debtor to him, whereof a Discharge
 was now found out and produced, without supposing any
 reason of reduction to the creditor on the which the debtor
 did not say because the creditor was common to both points
 he made same 22 Feb 1676 Brown contra Lawrence. Some points
 can be proved only by witness and Testimony, by Writ or record
 partly others are allowed to be proved without, & here, as records
 of the same kind as for all the most material points, ~~and~~
 Writs, witness, or oath of party, as the purpose shall be served
 But Proof by Writ is not so strong as Evidence by Testimony
 or oath of party, for that may be disputed by posterior writ
 or oath of party, or may be taken away by Improbation; but
 oath of party cannot be disproved as falsity, nor can Evidence be
 received against the truth testimony of Concurring witnesses
 the disbeliefs by against the truth of their testimony
 wherein they are not contestable. See v. 4 Art. 42 § 8.

*Proof by Writ Comprehendit Thriographum & Typographium
 hanc Writ et print.*

Probative and Writs are either publick or private. The
 Roman law gives more faith to publick than to private writing,
 and the law of England gives such immovable credit to all
 matters of Record, made by any Judge of Record as such that
 it will never stand of an document against the truth thereof
 Hawkins Pl. 8. Ch. 1. Chaps. 65-81. But private writings
 are of more credit in Scotland if made with the seal of John
 which required in such writing according to their different statut-