of the reports; but it may be presumed, that the reasoning on the side of the prevailing party was approved, namely, that the indorsement being made at the time it purported to bear date, and being according to the usual and ordinary course of business in such cases, and which it was not for the interest of the obligee at that time to make, was entitled to be considered by the Jury; and that from it, in the absence of opposing proof, the fact of actual payment of the interest might be inferred. This doctrine has been recognised and confirmed by subsequent decisions.[1]

§ 123. Thus, we have seen, that there are *four classes of declarations*, which, though usually treated under the head of hearsay, are in truth *original evidence;* the *first* class consisting of cases, where the fact that the declaration was made, and not its truth or falsity, is the point in question; the *second*, including expressions of bodily or mental feelings, where the existence, or nature of such feelings is the subject of inquiry; the *third*, consisting of cases of pedigree, and including the declarations of those nearly related to the party whose pedigree is in question; and the *fourth*, embracing all other cases, where the declaration offered in evidence may be regarded as part of the *res gestæ*. All these classes are involved in the principle of the last; and have been separately treated, merely for the sake of greater distinctness.

§ 124. Subject to these qualifications and seeming exceptions, the *general rule* of law *rejects all hearsay reports* of transactions, whether verbal or written, given by persons not produced as witnesses.[2] The principle of this rule is, that

[1] Bosworth *v.* Cotchett, Dom. Proc. May 6, 1824; Phil. & Am. on Evid. 348; Gleadow *v.* Atkin, 1 Crompt. & Mees. 410; Anderson *v.* Weston, 6 Bing. N. C. 296; 2 Smith's Leading Cases, 197; Addams *v.* Seitzinger, 1 Watts & Serg. 243.

[2] "If," says Mr. Justice Buller, "the first speech were without oath, another oath, that there was such speech, makes it no more than a bare speaking, and so of no value in a Court of Justice." Bull. N. P. 294.

such evidence requires credit to be given to a statement, made by a person who is not subjected to the ordinary tests, enjoined by the law, for ascertaining the correctness and completeness of his testimony; namely, that oral testimony should be delivered in the presence of the Court or a Magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross examination. Such evidence, moreover, as to oral declarations, is very liable to be fallacious, and its value is, therefore, greatly lessened by the probability that the declaration was imperfectly heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a conviction; for where the declaration, or statement, is sworn to have been made when no third person was present, or by a person who is since dead, it is hardly possible to punish the witness, even if his testimony is an entire fabrication.[1] To these reasons may be added considerations of public interest and convenience for rejecting hearsay evidence. The greatly increased expense and the vexation which the adverse party must incur, in order to rebut or explain it, the vast consumption of public time thereby occasioned, the multiplication of collateral issues, for decision by the Jury, and the danger of losing sight of the main question, and of the justice of the case, if this sort of proof were admitted, are considerations of too grave a character to be

[1] Phil. & Am. on Evid. 217; 1 Phil. Evid. 205, 206. See, as to the liability of words to misconstruction, the remarks of Mr. Justice Foster, in his Discourse on High Treason, ch 1, § 7. The rule excluding hearsay is not of great antiquity. One of the earliest cases, in which it was administered, was that of Samson *v.* Yardly and Tothill, 2 Keb. 223, pl. 74, 19 Car. 2.

overlooked by the Court or the Legislature, in determining the question of changing the rule.[1]

§ 125. This rule applies, though the declaration offered in evidence was made upon oath, and in the course of a judicial proceeding, if the *litigating parties are not the same.* Thus, the deposition of a pauper, as to the place of his settlement, taken *ex parte* before a magistrate, was rejected, though the pauper himself had since absconded, and was not to be found.[2] The rule also applies, notwithstanding no better evidence is to be found, and though it is certain that, if the declaration offered is rejected, no other evidence can possibly be obtained; as, for example, if it purports to be the declaration of the only eye-witness of the transaction, and he is since dead.[3]

§ 126. An *exception* to this rule has been contended for, in the admission of the *declarations of a deceased attesting witness* to a deed or will, in disparagement of the evidence afforded by his signature. This exception has been asserted, on two

[1] Mima Queen *v.* Hepburn, 7 Cranch, 290, 296, per Marshall, C. J.

[2] Rex *v.* Nuneham Courtney, 1 East, 373; Rex *v.* Ferry Frystone, 2 East, 54; Rex *v.* Eriswell, 3 T. R. 707 – 725, per Ld. Kenyon, C. J., and Grose, J., whose opinions are approved and adopted in Mima Queen *v.* Hepburn, 7 Cranch, 296. The American Cases on the admission and rejection of hearsay are collected in Cowen & Hill's note 432, to 1 Phil. Evid. 229.

[3] Phil. & Am. on Evid. 220, 221; 1 Phil. Evid. 209, 210. In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent witness. And if the relation has been handed down to the witness at second hand, and through several successive relators, each only stating what he received from an intermediate relator, it is still admissible, if the original and intermediate relators are all dead, and would have been competent witnesses if living. Tait on Evid. p. 430, 431. But the reason for receiving hearsay evidence in cases where, as is generally the case in Scotland, the Judges determine upon the facts in dispute, as well as upon the law, is stated and vindicated by Sir James Mansfield, in the Berkley Peerage case, 4 Campb. 415.

grounds; *first*, that as the party, offering the deed, used the declaration of the witness, evidenced by his signature, to prove the execution, the other party might well be permitted to use any other declaration of the same witness, to disprove it; — and *secondly*, that such declaration was in the nature of a substitute for the loss of the benefit of a cross examination of the attesting witness; by which, either the fact confessed would have been proved, or the witness might have been contradicted, and his credit impeached. Both these grounds were fully considered in a case in the Exchequer, and were overruled by the Court; the first, because the evidence of the handwriting, in the attestation, is not used as a declaration by the witness, but is offered merely to show the fact that he put his name there, in the manner in which attestations are usually placed to genuine signatures; and the second, chiefly because of the mischiefs which would ensue, if the general rule excluding hearsay were thus broken in upon. For the security of solemn instruments would thereby become much impaired, and the rights of parties under them would be liable to be affected at remote periods, by loose declarations of the attesting witnesses, which could neither be explained nor contradicted, by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for though the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross examination of the living witness, the other party would have none for the loss of his power of reëxamination.[1]

[1] Stobart *v.* Dryden, 1 Mees. & W. 615.