the defendant, and, in my opinion, this exception is well taken. That the declarations of a deceased attesting witness to a will, respecting the incapacity of the testator at the time of its execution, are admissible in evidence when the validity of the instrument is the question to be tried, is not now an open question in this state. That such declarations may be given in evidence against the will, is settled by the case of *Townshend* vs. *Townshend*, 9 *Gill*, 506. But the principle upon which that case was decided, and the reasoning of the courts in the various cases relied upon by the Court of Appeals, in the brief opinion delivered by them, does not reach the present case. The point decided was, that you may give in evidence the declarations of a deceased subscribing witness to a will, that the party executing it was not at the time *compos mentis*, and the reason upon which this departure from the general rule is vindicated, is, that upon the death of the subscribing witness, proof of his handwriting establishes the fact of the sanity of the testator, and everything else essential to the validity of the instrument. The witnesses to a will being dead, upon proof of their handwriting, it will be admitted to probate, the principle being that the law places them around the testator, to try and judge of his capacity to perform the act about which he is engaged. This is the reasoning of the Court in *Harden* vs. *Hays*, 9 *Barr.*, 151, in which the authorities upon the subject in this country and in England appear to have been carefully and critically examined. And it would seem to be quite proper that when so much respect is paid to the mere attestation of the witness, that proof of it when he is dead involves the proof of every fact necessary to the validity of the will, his declaration of an opposite character should also be received. Why should the proof of the handwriting of the witness be equivalent to his oath,—to his oath that the testator was of sound and disposing mind—and his declarations to the contrary be rejected, because those declarations are not under oath? If the declarations are to be rejected because not sworn to, why should the attestation be received when no oath accompanies the act of attesting? And if the declarations are to be ex-