

It is a rule, universally admitted, that the *allegata* and *probata*, must substantially correspond. A party cannot, in any case, be allowed to avail himself of proof of any matter, which he has not alleged; nor can the opposite party be called on to sustain a position not asserted; or to establish a fact which, by the course and terms of the pleadings, has been admitted to be true. An allegation *of insufficiency of assets is tantamount to an assertion, that the estate of the deceased is insolvent. It is a matter **286** presumed to be within the knowledge of the executor; and if he does not expressly and distinctly assert the fact of insufficiency, he virtually admits a sufficiency of assets, at least to satisfy the demand then made of him. It is impossible to consider the allegation in this answer as an assertion, that the estate of the late William Dawson is insolvent and insufficient to pay all his debts. The allegation, "that the assets now in her possession are insufficient," is unequivocal; the certainty of assets accruing, is distinctly referred to; and it is evident, from the general complexion of the answer, that the respondent could not with a safe conscience hazard the assertion, that the estate of her testator was insolvent. She has not, therefore, alleged, that there was not a sufficiency of assets to satisfy the claims made by this suit. *Dagley v. Crump, Dick. 35; Roberts v. Roberts, Dick. 573; Pullen v. Smith, 5 Ves. 21; Freeman v. Fairlie, 3 Meriv. 29; Drewry v. Thacker, 3 Swan. 548; Johnson v. Aston, 1 Cond. Chan. Rep. 38.*

But admitting such an averment to have been made, it has not been sustained by proof. The insufficiency of assets turns altogether upon the admission of the claim of James Dawson, as a valid and subsisting debt. The proof is, that the witness some time prior to the year 1816, when William Dawson came to this country, saw that he had charged himself on his books of accounts, with a bond given to James Dawson, his son, to secure the payment of the sum of \$16,000, after his, William Dawson's death; and that the witness heard, in the family, and from his mother, the defendant Eleanor Dawson, before the institution of this suit, that James Dawson had such a claim against the now late William Dawson, and that a small part of it had been paid; and, yet it was not until after Eleanor Dawson, as he says, had been informed of the claim in this case, and another claim against the estate of her testator, that she was induced to obtain leave to reform her account with the Orphans' Court, for the purpose of introducing into it, then for the first time, this claim of James Dawson. But failing in the attempt to have this claim allowed by that Court; and after she had heard that James Dawson had left England for India, she herself caused a suit to be instituted in his name against herself; and, on the 2d of June, 1826, confessed a judgment for the sum of \$19,834.35, with interest from the 31st of December, 1818, and