

in the state of Virginia, without any further authentication whatever. This, if allowed, would place the simple attestation of every justice of the peace, over the whole Union, upon a footing with that of such officers of this state. I do not think it would be safe to extend our comity so far. A reasonable and just degree of caution demands, that some solemn additional public testimonial should be required to shew, that the judicial officer or magistrate before whom such an affidavit has been made was, in truth, the public functionary he states himself to be. I am, therefore, of opinion, that the authentication of this paper is not such as to entitle it, on that ground, to be received as the answer of the defendant *Philip A. L. Contee*.

But the plaintiffs have expressly consented to receive this as the answer on oath of *Philip A. L. Contee*, without any further or other authentication; and that they may so receive it, is warranted by every day's practice of this court, as well as by many authorities to be found in the English books to the same effect. (m) If, on its being so received by the plaintiff, it will bind the respondent as effectually as if made upon oath, I can see no reason why it should not be equally as binding upon any co-defendant so far as his interest may be affected by the answer of such defendant on oath; since such co-defendant could not except to it because of its not having been sworn to, or because of its insufficiency, or for any other cause. I am, therefore, of opinion, no fraud being shewn or even intimated, that this must be regarded as the answer of *Philip A. L. Contee*, to all intents and purposes whatever.

The next inquiry is, whether *Eleanor Dawson* has alleged, or shewn a deficiency of assets. In her answer she says, 'that she has not yet been able to settle up the estate of the said testator, and that there are considerable debts now due to the same which are still unpaid; and the assets now in her possession are insufficient to discharge the debts due by the testator.'

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 *allega-*

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(m) ——— *v. Lake*, 6 Ves. 171; ——— *v. Gwillim*, 6 Ves. 285; *Bayley v. De Walkiers*, 10 Ves. 441; *Harding v. Harding*, 12 Ves. 159; 1 Harri. Prac. Chan. 285.