

GOODRICH AS ADR. vs. FRITZ.

Where judgment is obtained against a party, he appeals to this court, the judgment is affirmed, but, pending the appeal, he dies, and afterwards the judgment is revived against his administrator, and certified to the Probate Court for classification and allowance, the affidavit prescribed by *sec. 88, chap. 4, Digest*, is not a prerequisite to the allowance in the Probate Court. It is a case of action pending at the death of the party, within the meaning of *sec. 86, chap. 4, Digest*, and the revivor against the administrator was an allowance of the claim.

Appeal from the Johnson Circuit Court.

The facts are stated in the opinion of this court.

BATSON, for the appellant. The appellee failed to make an affidavit as required by *sec. 88, chap. 4, Digest*, wherefore the motion for judgment of non-suit against him ought to have been sustained. *Ib. sec. 93. Ryan et al. use; &c. vs. Lemon as ad. 2 Eng. 78.*

WATKINS & CURRAN, contra. There was no necessity for an affidavit. The action was pending in this court against the intestate at the time of his death, and subsequently revived in the circuit court against the administrator, and ordered to be paid. *Digest, chap. 4, sec. 86, 87.* If the administrator had any defence, he should have made it in the circuit court; when that court ren-

dered judgment against him, his rights were precluded, and the probate court was bound to class the claim.

Scott, J. The only question presented in this case relates to the affidavit prescribed by the 88th sec. (*Digest*, p. 126,) of the administration statute. During the lifetime of the intestate a judgment was recovered against him, in the circuit court of Johnson county, which, on appeal to this court, was affirmed. Pending this appeal, the intestate departed this life. After this affirmation, but before a revivor, this judgment was allowed and classed in the probate court, and, on appeal to the circuit court, that allowance and classification was reversed. Afterwards the judgment was revived, in the Johnson circuit court, against the administrator, and, being certified down to the probate court, was classed in that court against the objection of the administrator, who moved for non-suit, urging the want of the affidavit prescribed by the statute. That classification, on appeal to the circuit court, was affirmed, and must be affirmed here. There was no necessity for an affidavit. The action was pending against the intestate on his appeal at the time of his death. The revivor against the administrator, in the circuit court, allowed the claim, and the overruling of the appellant's motion for non-suit, and subsequent classification in the probate court, were proper. *Digest*, 126, sec. 86.

Finding no error in the judgment of the circuit court, it must be affirmed with costs.
