

And in case the sheriff had the body in court upon the return of the writ, the exigency of the writ was answered, and no action lay for an escape. 1 *Saunders* 35, note 1.—*Tidd's Prac.* 207 & 255. The *English capias ad respondendum* is the same as ours. *Tidd P. Forms* 40.—1 *Laws of N. H.* 92 (2). And in case the sheriff has the body in court upon the return of our writ, the exigency of the writ is answered. In an action for an escape on mesne process, the declaration must allege that the defendant in the original suit did not appear at court. 2 *Chitty Pl.* 299.—*A. Prec.* 289. It is, therefore, very clear, that this action cannot be maintained. The defendant had the body of *Griffin* in court at the return of the writ, which was all that the writ required of him. *Judgment for the defendant.*

Cady
vs.
Huntington.

(2) Statute of
Feb. 11, 1791.

CHARLES HUTCHINS versus TIMOTHY A. EDSON.

A sheriff in this state is not liable for the escape of a prisoner who is in his custody upon an execution not under seal.

THIS was an action of debt, for an escape upon execution. The cause was submitted to the decision of the court upon the following facts:

The plaintiff recovered judgment in the superior court in this county against one *Benjamin Blake*, and sued out execution upon the judgment, upon which execution *Blake* was arrested, and, being in the custody of the defendant, who is sheriff of this county, escaped; but the execution upon which *Blake* was arrested and in custody was not under the seal of the court.

Per curiam. If the execution upon which *Blake* was in custody was void, the defendant is not liable for the escape: but if it was only voidable for irregularity, he must be adjudged answerable. *Cro. Eliz.* 188.—2 *Williams' Saunders* 101, note 2.—2 *Salkeld* 700.—1 *Salkeld* 273.—11 *John.* 433, *Ray & al. vs. Hodgeboom.*—13 *John.* 378, *Scott vs. Shaw.*—13 *John.* 529, *Hinman vs. Brees.* The question

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then is, was the execution on which *Blake* was in custody, void? We are clearly of opinion that it was. The constitution of this state declares, that "all writs, issuing out of the clerk's office in any of the courts of law, shall be in the name of the state of *New-Hampshire*, and shall be under the seal of the court whence they issue;" and the fifteenth article in our bill of rights declares, that "no subject shall be arrested, imprisoned, &c., but by the judgment of his peers, or the law of the land." "*The law of the land*" here means process warranted by law. But a writ not under seal is not process warranted by law. Even an act of the legislature, directing our courts to issue writs without seal, would be repugnant to the constitution, and void. The constitution in our opinion has rendered a seal essential to the validity of all our writs; and no officer can justify any thing done under a writ of execution not under seal. It is no better warrant for an arrest than a piece of blank paper. As the defendant, therefore, could not legally detain *Blake*, he is not answerable for his escape, and there must be

Judgment for the defendant.

WILLIAM HADDUCK *versus* DAVID L. MURRAY.

When the holder and maker of a promissory note live in different towns, in order to render the endorser liable, demand must be made on the maker as soon after the note becomes due as can conveniently be done, considering the situation of the parties and the frequency of communication between their places of residence. The same rule exists as to giving notice to the endorser. When the facts as to the situation, distance, &c., of the parties are agreed on, or are found by the jury, the seasonableness of the demand becomes a question of law.

THIS was an action of assumpsit, brought by the plaintiff as endorsee of a promissory note made by one *Sargent*, and payable to the defendant September 25, 1816, and by the defendant endorsed to the plaintiff.

The cause was tried here at the last term, on the general issue. The plaintiff proved the execution and endorsement of the note: and offered to shew also that on the 1st day