Chapter 17.

Habeas Corpus.

Article 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const., art. 1, s. 18; Rev., s. 1819; C.S., s. 2203.)

§ 17-2. Habeas corpus not to be suspended.

The privileges of the writ of habeas corpus shall not be suspended. (Const., art. 1, s. 21; Rev., s. 1820; C.S., s. 2204.)

Article 2.

Application.

§ 17-3. Who may prosecute writ.

Every person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in G.S. 17-4, may prosecute a writ of habeas corpus, according to the provisions of this Chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom. (1868-9, c. 116, s. 1; Code, s. 1623; Rev., s. 1821; C.S., s. 2205.)

§ 17-4. When application denied.

Application to prosecute the writ shall be denied in the following cases:

(1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

(2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

(3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

(4) Where no probable ground for relief is shown in the application. (1868-9, c. 116, s. 2; Code, s. 1624; Rev., s. 1822; C.S., s. 2206; 1971, c. 528, s. 1.)

§ 17-5. By whom application is made.

Application for the writ may be made either by the party for whose relief it is intended or by any person in his behalf. (1868-9, c. 116, s. 3; Code, s. 1625; Rev., s. 1823; C.S., s. 2207.)

§ 17-6. To judge of appellate division or superior court in writing.

Application for the writ shall be made in writing, signed by the applicant –

(1) To any one of the justices or judges of the appellate division.
(2) To any one of the superior court judges, either during a session or in vacation. (1868-9, c. 116, s. 4; Code, s. 1626; Rev., s. 1824; C.S., s. 2208; 1969, c. 44, s. 41; 1971, c. 528, s. 2.)

§ 17-7. Contents of application.

The application must state, in substance, as follows:

(1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.
(2) The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.
(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.
(4) If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.
(5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits. (1868-9, c. 116, s. 5; Code, s. 1627; Rev., s. 1825; C.S., s. 2209.)

§ 17-8. Issuance of writ without application.

When the appellate division or superior court division, or any judge of either division, has evidence from any judicial proceeding before such court or judge that any person within this State is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ. (1868-9, c. 116, s. 10; Code, s. 1632; Rev., s. 1826; C.S., s. 2210; 1969, c. 44, s. 42.)

Article 3.

Writ.

§ 17-9. Writ granted without delay.

Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this Chapter, prohibited from prosecuting the writ. (1868-9, c. 116, s. 6; Code, s. 1628; Rev., s. 1827; C.S., s. 2211.)

§ 17-10. Penalty for refusal to grant.

If any judge authorized by this Chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars ($2,500). (1868-9, c. 116, s. 9; Code, s. 1631; Rev., s. 1828; C.S., s. 2212.)

§ 17-11. Sufficiency of writ; defects of form immaterial.

No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient –

(1) If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and anyone who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

(2) If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended. (1868-9, c. 116, ss. 7, 8; Code, ss. 1629, 1630; Rev., s. 1829; C.S., s. 2213.)

§ 17-12. Service of writ.

The writ of habeas corpus may be served by any qualified elector of this State thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out. (1868-9, c. 116, s. 32; Code, s. 1657; Rev., s. 1833; C.S., s. 2214.)

Article 4.

Return.

§ 17-13. When writ returnable.

Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein. (1868-9, c. 116, s. 31; Code, s. 1656; Rev., s. 1830; C.S., s. 2215.)

§ 17-14. Contents of return; verification.

The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally –

(1) Whether he has or has not the party in his custody or under his power or restraint.

(2) If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

(3) If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

(4) If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. (1868-9, c. 116, s. 11; Code, s. 1633; Rev., s. 1831; C.S., s. 2216.)

§ 17-15. Production of body if required.

If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided. (1868-9, c. 116, s. 14; Code, s. 1636; Rev., s. 1832; C.S., s. 2217.)

Article 5.

Enforcement of Writ.

§ 17-16. Attachment for failure to obey.

If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this State, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued. (1868-9, c. 116, s. 15; Code, s. 1637; Rev., s. 1834; C.S., s. 2218.)

§ 17-17. Liability of judge refusing attachment.

If any judge willfully refuses to grant the writ of attachment, as provided for in G.S. 17-16, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 2; Code, s. 1638; Rev., s. 1835; C.S., s. 2219.)

§ 17-18. Attachment against sheriff to be directed to coroner; procedure.

If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. (1868-9, c. 116, s. 16; Code, s. 1639; Rev., s. 1836; C.S., s. 2220.)

§ 17-19. Precept to bring up party detained.

The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for

whose benefit the writ of habeas corpus has been granted. (1868-9, c. 116, s. 17; Code, s. 1640; Rev., s. 1837; C.S., s. 2221.)

§ 17-20. Liability of judge refusing precept.

If any judge refuses to grant the precept provided for in G.S. 17-19, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 3; Code, s. 1641; Rev., s. 1838; C.S., s. 2222.)

§ 17-21. Liability of judge conniving at insufficient return.

If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars ($2,500). (1870-1, c. 221, s. 4; Code, s. 1642; Rev., s. 1839; C.S., s. 2223.)

§ 17-22. Power of county to aid service.

In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases. (1868-9, c. 116, s. 18; Code, s. 1643; Rev., s. 1840; C.S., s. 2224.)

§ 17-23. Obedience to order of discharge compelled.

Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this Chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars ($2,500), besides any special damages which such party may have sustained. (1868-9, c. 116, s. 24; Code, s. 1649; Rev., s. 1841; C.S., s. 2225.)

§ 17-24. No civil liability for obedience.

No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus. (1868-9, c. 116, s. 25; Code, s. 1650; Rev., s. 1842; C.S., s. 2226.)

§ 17-25. Recommittal after discharge; penalty.

If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 3581; C.S., s. 2227; 1993, c. 539, s. 306; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 17-26. Disobedience to writ or refusing copy of process; penalty.

If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one

thousand dollars ($1,000), or imprisoned not exceeding 12 months, and if such person be an officer, shall moreover be removed from office. (1868-9, c. 116, s. 27; Code, s. 1652; Rev., s. 3597; C.S., s. 2228.)

§ 17-27. Penalty for false return.

If any person shall make a false return to a writ of habeas corpus**,** he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, s. 28; Code, s. 1653; Rev., s. 3582; C.S., s. 2229; 1993, c. 539, s. 307; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 17-28. Penalty for concealing party entitled to writ.

If anyone having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, ss. 29, 30; Code, ss. 1654, 1655; Rev., s. 3583; C.S., s. 2230; 1993, c. 539, s. 308; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 6.

Proceedings and Judgment.

§ 17-29. Notice to interested parties.

When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable. (1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1; Code, s. 1634; Rev., s. 1843; C.S., s. 2231.)

§ 17-30. Notice to district attorney.

When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the district attorney of the district in which the person prosecuting the writ is detained. (1868-9, c. 116, s. 13; Code, s. 1635; Rev., s. 1844; C.S., s. 2232; 1973, c. 47, s. 2.)

§ 17-31. Subpoenas to witnesses.

Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpoena, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases. (1868-9, c. 116, s. 34; Code, s. 1659; Rev., s. 1845; C.S., s. 2233.)

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.

The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in

the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party. (1868-9, c. 116, s. 19; Code, s. 1644; Rev., s. 1846; C.S., s. 2234.)

§ 17-33. When party discharged.

If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

(1) Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

(2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

(3) Where the process is defective in some matter of substance required by law, rendering such process void.

(4) Where the process, though in proper form, has been issued in a case not allowed by law.

(5) Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.

(6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. (1868-9, c. 116, s. 20; Code, s. 1645; Rev., s. 1847; C.S., s. 2235.)

§ 17-34. When party remanded.

It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either –

(1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.

(2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.

(3) For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.

(4) That the time during which such party may be legally detained has not expired. (1868-9, c. 116, s. 21; Code, s. 1646; Rev., s. 1848; C.S., s. 2236.)

§ 17-35. When the party bailed or remanded.

If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if

not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto. (1868-9, c. 116, s. 22; Code, s. 1647; Rev., s. 1849; C.S., s. 2237.)

§ 17-36. Party held in execution not to be discharged.

When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail but shall be presently remanded, where he shall remain until discharged in due course of law. (2 Hen. V, c. 2; R.C., c. 31, s. 111; Code, s. 937; Rev., s. 1850; C.S., s. 2238.)

§ 17-37. When party ill, cause determined in his absence.

When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced. (1868-9, c. 116, s. 23; Code, s. 1648; Rev., s. 1851; C.S., s. 2239.)

§ 17-38. No second committal after discharge; penalty.

No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars ($2,500) to the party aggrieved thereby. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 1852; C.S., s. 2240.)

Article 7.

Habeas Corpus for Custody of Children in Certain Cases.

§§ 17-39 through 17-40. Repealed by Session Laws 1967, c. 1153, s. 1.

Article 8.

Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ.

Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the State, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any magistrate or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such magistrate or clerk may reside, to be examined as a witness before such magistrate or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a magistrate, or a clerk, and such person is confined in a county in which such magistrate or clerk does not reside, application for habeas corpus to testify may be made to any justice or judge of the General Court of

Justice. (1868-9, c. 116, ss. 37, 38; Code, ss. 1663, 1664; Rev., ss. 1855, 1856; C.S., s. 2243; 1969, c. 44, s. 43; 1971, c. 528, s. 3.)

§ 17-42. Contents of application.

The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant; and shall state–

(1) The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

(2) That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes. (1868-9, c. 116, s. 39; Code, s. 1665; Rev., s. 1857; C.S., s. 2244.)

§ 17-43. Service of writ.

The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this Chapter for the service and enforcement of the writ of habeas corpus cum causa. (1868-9, c. 116, s. 40; Code, s. 1666; Rev., s. 1858; C.S., s. 2245.)

§ 17-44. Applicant to pay expenses and give bond to return.

The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (1868-9, c. 116, s. 41; Code, s. 1667; Rev., s. 1859; C.S., s. 2246; 1971, c. 528, s. 4.)

§ 17-45. Duty of officer to whom writ delivered or on whom served.

It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars ($500.00). (1868-9, c. 116, s. 42; Code, s. 1668; Rev., s. 1860; C.S., s. 2247.)

§ 17-46. Prisoner to be remanded.

After having testified, the prisoner shall be remanded to the prison from which he was taken. (1868-9, c. 116, s. 43; Code, s. 1669; Rev., s. 1861; C.S., s. 2248.)