



# Criminal Justice (Scotland) Act 1995

## 1995 CHAPTER 20

### PART II

#### PROCEEDS OF CRIME AND PROPERTY USED IN CRIME

### CHAPTER V

#### MISCELLANEOUS AND GENERAL

#### **110 Sequestration etc. of person holding realisable or forfeitable property**

- (1) Schedule 4 to this Act shall have effect in relation to the sequestration, bankruptcy, winding up or receivership of persons or, as the case may be, companies holding realisable or forfeitable property.
- (2) In this section and in that Schedule “forfeitable property” means property which is or is liable to be the subject of a suspended forfeiture order.

#### **111 Disposal of family home under Chapter I or II**

- (1) This section applies where —
  - (a) a confiscation order has been made in relation to any person and the prosecutor has not satisfied the court that the person’s interest in his family home has been acquired by means of the benefit derived from the commission of the offence concerned; or
  - (b) a person’s family home has been forfeited to the Crown under section 90 of this Act.
- (2) Where this section applies, then, before the Crown disposes of any right or interest in the person’s family home it shall—
  - (a) obtain the relevant consent; or
  - (b) where it is unable to do so, apply to the court for authority to carry out the disposal.

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- (3) On an application being made to it under subsection (2)(b) above, the court, after having regard to all the circumstances of the case including—
- (a) the needs and financial resources of the spouse or former spouse of the person concerned;
  - (b) the needs and financial resources of any child of the family;
  - (c) the length of the period during which the family home has been used as a residence by any of the persons referred to in paragraph (a) or (b) above,
- may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 12 months) as it may consider reasonable in the circumstances or may grant the application subject to such conditions as it may prescribe.
- (4) Subsection (3) above shall apply—
- (a) to an action for division and sale of the family home of the person concerned; or
  - (b) to an action for the purpose of obtaining vacant possession of that home,
- brought by the Crown as it applies to an application under subsection (2)(b) above and, for the purposes of this subsection, any reference in the said subsection (3) to the granting of the application shall be construed as a reference to the granting of decree in the action.
- (5) In this section—
- “family home”, in relation to any person (in this subsection referred to as “the relevant person”) means any property in which the relevant person has or had (whether alone or in common with any other person) a right or interest, being property which is occupied as a residence by the relevant person and his or her spouse or by the relevant person’s spouse or former spouse (in any case with or without a child of the family) or by the relevant person with a child of the family;
- “child of the family” includes any child or grandchild of either the relevant person or his or her spouse or former spouse, and any person who has been treated by either the relevant person or his or her spouse or former spouse as if he or she were a child of the relevant person, spouse or former spouse, whatever the age of such a child, grandchild or person may be; and
- “relevant consent” means in relation to the disposal of any right or interest in a family home—
- (a) in a case where the family home is occupied by the spouse or former spouse of the relevant person, the consent of the spouse or, as the case may be, of the former spouse, whether or not the family home is also occupied by the relevant person;
  - (b) where paragraph (a) above does not apply, in a case where the family home is occupied by the relevant person with a child of the family, the consent of the relevant person.

## **112 Forfeiture of property where accused has died**

- (1) This section applies where at any time after criminal proceedings have been instituted against an accused for an offence to which Chapter I of this Part applies and before the accused has been sentenced or otherwise dealt with in the proceedings he dies.

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- (2) The Court of Session, if it is satisfied beyond reasonable doubt on an application being made to it by the Lord Advocate—
- (a) that the accused committed the offence; and
  - (b) that there is property—
    - (i) which the accused had obtained, directly or indirectly, in connection with the commission of the offence; or
    - (ii) which is a gift caught by Chapter I of this Part,
- may, subject to subsection (5) below, make an order which shall have the effect of forfeiting that property.
- (3) The Court of Session may, without prejudice to any other power available to it, at any time before the determination of the case, allow an amendment of the application under subsection (2) above if the amendment is of a type which could competently have been made in an indictment or complaint under section 123 or 335 of the 1975 Act in the criminal proceedings.
- (4) An application under subsection (2) above shall be made as soon as is reasonably practicable after the relevant information becomes available to the Lord Advocate, but, in any event, within 6 years commencing with the date of death of the accused.
- (5) An application under subsection (2) above in relation to property such as is mentioned in paragraph (b)(ii) of that subsection shall be served on the recipient of the gift and, if he satisfies the Court on the balance of probabilities—
- (a) that he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence or, if more than one, in contemplation of any of the offences or after the commission of the earlier or the earliest of the offences to which the proceedings for the time being relate; and
  - (b) that he was not associated with the giver in the commission of the offence; and
  - (c) that he would suffer hardship if the application were granted,
- the Court may refuse to make an order as mentioned in that subsection.
- (6) Where property has been forfeited under this section, then, if the Court of Session, on an application being made to it is satisfied by the applicant on the balance of probabilities that he was the owner of, or otherwise had an interest in, the property immediately before such forfeiture, it shall make an order under subsection (7) below.
- (7) An order under this subsection shall direct the Crown, if the applicant—
- (a) was the owner of the property, to return it to him if it is reasonably practicable to do so or, if not, to pay compensation to him of an amount determined under subsection (8) below; or
  - (b) otherwise had an interest in the property, to pay compensation to him of an amount corresponding to the value of such interest.
- (8) For the purposes of subsection (7) above, the amount determined under this subsection shall be an amount equal to the amount of any consideration received for the property or the value of any such consideration at the time of the disposal, or, if no consideration was received, an amount equal to the value of the property at the time of the disposal.
- (9) Property which has been forfeited under this section shall be dealt with by the Crown in such manner as seems to it to be appropriate.

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- (10) Where a restraint order is not in force in respect of a person when he dies in the circumstances mentioned in subsection (1) above, the Court of Session may, on the application of the Lord Advocate, in so far as the property concerned is—
  - (a) heritable property in Scotland, make an order inhibiting any person; and
  - (b) moveable property, grant warrant for arrestment if the property would be arrestable if the person entitled to it were a debtor.
- (11) Paragraphs (a) and (b) of subsection (1) and subsections (2) to (5) of section 98 of this Act shall, subject to any necessary modifications, apply for the purposes of subsection (10)(a) above as they apply for the purposes of that section.
- (12) Subsections (2) to (4) of section 99 of this Act shall, subject to any necessary modifications, apply for the purposes of subsection (10)(b) above as they apply for the purposes of that section.
- (13) Proceedings under this section are civil proceedings for the purposes of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

### **113 Transitional provision, amendment of 1987 Act, etc**

- (1) Where a person is charged with an offence in relation to which provision is made by Chapter I of this Part, being an offence committed before the coming into force of the said Chapter I, that Chapter shall not affect the powers of the court in the event of his being convicted of the offence.
- (2) Where a person is charged with an offence committed before the coming into force of Chapter II of this Part, in the event of his being convicted of the offence, the court shall be entitled to exercise the powers conferred by section 223 or section 436 of the 1975 Act, but not the powers conferred by that Chapter.
- (3) The 1987 Act shall be amended as specified in Schedule 5 to this Act.
- (4) Section 28 of the Bankruptcy Act 1914 (effect of order of discharge) shall have effect as if amounts payable under confiscation orders were debts excepted under subsection (1)(a) of that section.
- (5) In section 1(2)(a) of the Rehabilitation of Offenders Act 1974 (failure to pay fines etc. not to prevent person becoming rehabilitated) the reference to a fine or other sum adjudged to be paid by or on a conviction does not include a reference to an amount payable under a confiscation order.
- (6) Section 281(4) of the Insolvency Act 1986 (discharge of bankrupt not to release him from liabilities in respect of fines, etc.) shall have effect as if the reference to a fine included a reference to a confiscation order.
- (7) Section 55(2) of the Bankruptcy (Scotland) Act 1985 (discharge of debtor not to release him from liabilities in respect of fines, etc.) shall have effect as if the reference to a fine included a reference to a confiscation order.

### **114 Interpretation of Part II**

- (1) In this Part of this Act, unless the context otherwise requires—
  - “the 1987 Act” means the Criminal Justice (Scotland) Act 1987;
  - “the 1988 Act” means the Criminal Justice Act 1988;

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“the 1989 Act” means the Prevention of Terrorism (Temporary Provisions) Act 1989;

“accused” includes a person against whom criminal proceedings have been instituted in relation to the commission of an offence and a person convicted of an offence;

“clerk of court” includes the sheriff clerk;

“confiscation order” means an order made under section 70(1), 77(4), 78(3) or 79 of this Act;

“interest”, in relation to property, includes right;

“property” has the meaning assigned by section 71 of this Act;

“realisable property” has the meaning assigned by section 72 of this Act;

“restraint order” means an order made under section 94 of this Act;

“suspended forfeiture order” means an order made under section 87(2) of this Act.

(2) This Part of this Act shall (except where the context otherwise requires) be construed as one with the 1975 Act.

(3) For the purposes of this Part of this Act proceedings for an offence are instituted against a person—

- (a) on his arrest without warrant;
- (b) when he is charged with the offence without being arrested;
- (c) when a warrant to arrest him is granted;
- (d) when a warrant to cite him is granted;
- (e) in summary proceedings, on the first calling of the case; or
- (f) when a petition is intimated to him or an indictment or a complaint is served on him,

and, where the application of this subsection would result in there being more than one time for the institution of proceedings, they shall be taken to be instituted at the earliest of those times.

(4) Any reference in this Part of this Act to a conviction of an offence includes a reference to a finding that the offence has been committed.