



# Criminal Justice (Scotland) Act 1995

## 1995 CHAPTER 20

### PART II

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

#### CHAPTER I

#### CONFISCATION OF THE PROCEEDS OF CRIME

##### *Confiscation orders*

#### **70 General provision.**

- (1) Subject to the provisions of this Chapter, where in respect of any offence to which this Chapter applies—
- the accused is convicted, whether in solemn or summary proceedings; or
  - in the case of summary proceedings (without proceeding to conviction) an order is made discharging him absolutely,
- the court, on the application of the prosecutor, may make an order (a “confiscation order”) requiring the accused to pay such sum as the court thinks fit.
- (2) This Chapter applies to any offence which has been prosecuted—
- on indictment; or
  - on summary complaint if the offence is punishable by a fine of an amount greater than the amount corresponding to level 5 on the standard scale or by imprisonment for a period longer than 3 months or by both such fine and imprisonment,

but it does not apply to an offence to which section 1 of the 1987 Act (offences relating to drug trafficking) relates or to an offence under Part III of the 1989 Act (financial assistance for terrorism).

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*Changes to legislation: There are currently no known outstanding effects for the Criminal Justice (Scotland) Act 1995, Part II. (See end of Document for details)*

- (3) A confiscation order shall not be made unless the court orders some other disposal (including an absolute discharge) in respect of the accused.
- (4) The court may make a confiscation order against an accused only if it is satisfied that he has benefited from the commission of the offence concerned.
- (5) The sum which a confiscation order requires an accused to pay must not exceed the lesser of—
  - (a) the amount of the benefit—
    - (i) from the commission of the offence; or
    - (ii) where section 71(4) of this Act applies, from the commission of the offence and any other offence to which this Chapter applies; or
  - (b) the amount that might be realised at the time the order is made.
- (6) Any application under this section shall be made—
  - (a) in proceedings on indictment, when the prosecutor moves for sentence or, if the accused is remitted for sentence under section 104 of the 1975 Act, before sentence is pronounced; and
  - (b) in summary proceedings, following the conviction of the accused.
- (7) For the purposes of any appeal or review, a confiscation order is a sentence.

## **71 Benefit from commission of offence.**

- (1) For the purposes of this Chapter, an accused shall be held to have benefited from the commission of an offence if in connection with its commission he has obtained, directly or indirectly, any property or other economic advantage.
- (2) Subject to subsection (4) below, in determining whether an accused has benefited from the commission of an offence and, if he has, the amount referred to in section 70(5)(a)(i) of this Act, the court may make the following assumptions, except in so far as he proves either of them, on the balance of probabilities, to be incorrect—
  - (a) that any property or other economic advantage which has been obtained by him since the relevant date has been obtained in connection with the commission of the offence; and
  - (b) that any expenditure by him since the relevant date was met out of property or other economic advantage obtained in connection with the commission of the offence.
- (3) In subsection (2) above “the relevant date” means—
  - (a) the date of the offence; or
  - (b) if the offence is found to have been committed over a period of time, the date occurring at the beginning of that period.
- (4) Where—
  - (a) the application for the confiscation order has been made in respect of two or more offences; or
  - (b) during the relevant period the accused has been convicted of at least one other offence to which this Chapter applies, being an offence committed after the coming into force of this Chapter,

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the court may, in determining the amount referred to in section 70(5)(a)(ii) of this Act, make the assumptions set out in subsection (5) below, except in so far as the accused proves either of those assumptions, on the balance of probabilities, to be incorrect.

- (5) Those assumptions are—
- (a) that any property or economic advantage which has been obtained by the accused during the relevant period has been obtained in connection with the commission of an offence to which this Chapter applies; and
  - (b) that any expenditure by him during the relevant period was met out of property or other economic advantage obtained in connection with the commission of such an offence.
- (6) In subsections (4) and (5) above, “the relevant period” means the period of six years ending with the date on which proceedings were instituted against the accused for the offence in respect of which the application for the confiscation order has been made.
- (7) In this Part of this Act, “property” means any property wherever situated, whether heritable or moveable or whether corporeal or incorporeal.

## **72 Realisable property.**

- (1) In this Part of this Act “realisable property” means, subject to subsection (2) below—
- (a) the whole estate wherever situated of a person—
    - (i) against whom proceedings have been instituted for an offence to which this Chapter applies; or
    - (ii) in respect of whom a restraint order has been made by virtue of section 95(3) of this Act;
  - (b) the whole estate wherever situated of a person to whom any person whose whole estate is realisable by virtue of paragraph (a) above has (directly or indirectly and whether in one transaction or in a series of transactions) made a gift caught by this Chapter;
  - (c) any other property in the possession or under the control of a person mentioned in paragraph (a) or (b) above; and
  - (d) any income or estate vesting in a person mentioned in paragraph (a) or (b) above.
- (2) Property is not realisable if—
- (a) held on trust by a person mentioned in subsection (1)(a) or (b) above for a person not so mentioned;
  - (b) a suspended forfeiture order is in force in respect of the property; or
  - (c) it is, for the time being, subject to a restraint order made in respect of other proceedings.
- (3) Subject to section 73(4) of this Act, for the purposes of this Chapter, the amount that might be realised at the time a confiscation order is made in respect of a person is the total value at that time of all his realisable property, and of all gifts caught by this Chapter which have been made by him, less any amount due by him at that time in respect of any compensation order under section 58 of the <sup>M1</sup>Criminal Justice (Scotland) Act 1980 made before the confiscation order.
- (4) In assessing the value of realisable property (other than money) of a person in respect of whom it proposes to make a confiscation order, the court shall have regard to the likely market value of the property at the date on which the order would be made;

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but it may also have regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation.

- (5) In assessing the value of realisable property of a person whose estate has been sequestrated, or who has been adjudged bankrupt in England and Wales or Northern Ireland, the court shall take into account the extent to which the property is subject to, as the case may be, sequestration or bankruptcy procedure by virtue of paragraph 1 or 2 of Schedule 4 to this Act.
- (6) In subsection (4) above, “money” includes cheques, banknotes, postal orders, money orders and foreign currency.

#### Marginal Citations

M1 1980 c. 62.

### 73 Gifts.

- (1) A gift is caught by this Chapter if—
- (a) it was made by the accused 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 mentioned in section 72(1)(a)(i) of this Act for the time being relate; or
  - (b) where subsection (4) of section 71 of this Act applies, it was made by the accused within the relevant period within the meaning of subsection (6) of that section.
- (2) In assessing the value of a gift caught by this Chapter, the court shall, subject to subsections (3) to (5) below, take it to be the greater of—
- (a) the value of the gift when received adjusted to take account of subsequent changes in the value of money; or
  - (b) both of the following—
    - (i) the likely market value, on the date on which the confiscation order is to be made, of—
      - (A) the gift, if retained; or
      - (B) where the recipient of the gift retains only part of it, the retained part, and any property or part of any property which, directly or indirectly, represents the gift; or
      - (C) where the recipient of the gift retains no part of it, any property or part of any property which, directly or indirectly, represents the gift; and
    - (ii) the value of any other property and any other economic advantage which by reason of the making of the gift the recipient of the gift has obtained, directly or indirectly, prior to the date on which the confiscation order is to be made, adjusted to take account of subsequent changes in the value of money.
- (3) The circumstances in which the accused is to be treated as making a gift include those where he transfers an interest in property to another person directly or indirectly for a consideration the value of which is significantly less than the value of that interest

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at the time of transfer; and in those circumstances the value of the gift shall be the difference between the value of that consideration and the value of that interest at the time of transfer adjusted to take account of subsequent changes in the value of money.

- (4) Where a gift caught by this Chapter was in the form of money and the recipient of the gift shows that, on the balance of probabilities, the money or any of it has not been used to purchase goods or services or to earn interest or any other return, the value of the gift or such part of it as has not been so used shall be taken to be the face value of the money or, as the case may be, unused amount of the money; and in this subsection, “money” includes cheques, banknotes, postal orders, money orders and foreign currency.
- (5) The court may, notwithstanding the foregoing provisions of this section, disregard the amount (or part of the amount) of a gift caught by this Chapter if it considers it improbable that such amount (or part) could be realised.
- (6) At any time before the realisation of property which is or represents a gift caught by this Chapter, the recipient of the gift may apply to the court for an order under this subsection, and, if the court is satisfied, on the balance of probabilities—
  - (a) that the person 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 not granted,it may make an order declaring that the gift or a part of the gift shall not be caught by this Chapter and that the property or part of the property of the recipient of the gift shall not be, or shall cease to be, realisable for the purposes of this Chapter and, if a confiscation order has already been made, varying that order accordingly, where necessary.
- (7) An appeal shall lie to the High Court at the instance of—
  - (a) the applicant against the refusal;
  - (b) the prosecutor against the granting,of an application under subsection (6) above, and the High Court in determining such an appeal may make such order as could have been made by the court on an application under subsection (6) above.
- (8) The procedure in an appeal under this section shall be the same as the procedure in an appeal against sentence.

#### **74 Making of confiscation orders.**

- (1) If the court decides to make a confiscation order, it shall determine the amount to be payable thereunder before making any decision as to—
  - (a) imposing a fine on the accused;
  - (b) making any order involving any payment by him.
- (2) Where a court makes a confiscation order against an accused in any proceedings, it shall, in respect of any offence of which he is convicted in those proceedings, take account of the order before—
  - (a) imposing any fine on him;

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- (b) making any order involving any other payment by him,  
 but subject to that, the court shall leave the order out of account in determining the appropriate sentence or other manner of dealing with the accused.
- (3) No enactment restricting the power of a court which deals with an accused in a particular way from dealing with him also in any other way shall, by reason only of the making of a confiscation order (or the postponement of a decision as regards making such an order), have the effect of restricting the court in dealing with the accused in any way it considers appropriate in respect of an offence.
- (4) Where a court makes both a confiscation order and a compensation order under section 58 of the <sup>M2</sup>Criminal Justice (Scotland) Act 1980 against the same person in the same proceedings in relation to the same offence and the offence involves the misappropriation of property, it shall direct that the compensation shall be paid first out of any sums applied towards the satisfaction of the confiscation order.

#### **Marginal Citations**

**M2** 1980 c. 62.

## **75 Statements relevant to making confiscation orders.**

- (1) Where the prosecutor applies for the making of a confiscation order, the prosecutor may lodge with the clerk of court a statement as to any matters relevant—
- (a) to determining whether the accused has benefited from the commission of the offence; or
  - (b) to an assessment of the value of the accused's benefit for the purposes of section 70(5)(a) of this Act.
- (2) Without prejudice to section 150 (or as the case may be section 354) of the 1975 Act, if the accused accepts to any extent any allegation in the statement lodged under subsection (1) above, the court may, for the purpose of such determination or assessment as is mentioned in paragraph (a) or (b) of that subsection, treat his acceptance as conclusive of the matters to which it relates.
- (3) Where—
- (a) a statement is lodged under subsection (1) above; and
  - (b) the court is satisfied that a copy of that statement has been served on the accused,
- the court may require the accused to indicate, within such period as the court may specify, to what extent he accepts each allegation in the statement and, in so far as he does not accept any such allegation, to indicate the basis of such non-acceptance.
- (4) If the accused fails in any respect to comply with a requirement under subsection (3) above, he may be treated for the purposes of this section as accepting every allegation in the statement apart from any allegation in respect of which he has complied with the requirement.
- (5) Without prejudice to section 150 (or as the case may be section 354) of the 1975 Act, where—

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- (a) there is lodged with the clerk of court by the accused a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made; and
  - (b) the prosecutor accepts to any extent any allegation in the statement,
- the court may, for the purposes of that determination, treat that acceptance as conclusive of the matters to which it relates.
- (6) Without prejudice to section 76(1) of this Act, where—
- (a) any allegation in the statement lodged under subsection (1) above is challenged by the accused, or
  - (b) the basis of the non-acceptance by the accused of any such allegation is challenged by the prosecutor,
- the court shall consider the matters being challenged at a hearing.
- (7) Where the judge presiding at a hearing held under subsection (6) above is not the trial judge he may, on the application of either party, if he considers that it would be in the interests of justice to do so, adjourn the hearing to a date when the trial judge is available.

## **76 Postponed confiscation orders.**

- (1) If the court considers that it has some, but not sufficient, relevant information for the purpose of enabling it to come to a decision as to whether to make a confiscation order or that it does not have sufficient relevant information to enable it to come to a decision as to the amount to be payable under the confiscation order, it may, subject as the case may be to subsection (6) or (10) below, postpone that decision for a period not exceeding 6 months after the date of conviction for the purpose of enabling further information to be obtained.
- (2) Without prejudice to sections 179 and 219 (or as the case may be sections 380 and 432) of the 1975 Act, the court may, notwithstanding postponement under subsection (1) above and subject to subsection (3) below, proceed, on the prosecutor's motion therefor, to sentence or to otherwise deal with the accused in respect of the conviction.
- (3) Where the court proceeds as mentioned in subsection (2) above—
- (a) no fine shall be imposed on the accused; and
  - (b) no order shall be made involving any other payment by him,
- in relation to the conviction before the decision whether to make a confiscation order is taken.
- (4) Where in the case of conviction on indictment a decision has been postponed under subsection (1) above for a period, any intention to appeal under section 228 of the 1975 Act against conviction or against both conviction and any sentence passed during that period in respect of the conviction, shall be intimated under section 231(1) of the 1975 Act not within 2 weeks of the final determination of the proceedings but within 2 weeks of—
- (a) in the case of an appeal against conviction where there has been no such sentence, the day on which the period of postponement commences;
  - (b) in any other case, the day on which such sentence is passed in open court.
- (5) Notwithstanding any appeal of which intimation has been given by virtue of subsection (4) above, a person may appeal under section 228 of the 1975 Act against

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the confiscation order (if the decision is to make one) or against any other sentence passed, after the period of postponement, in respect of the conviction.

- (6) If during the period of postponement intimation is given by virtue of subsection (4) above by the person, the High Court may, on the application of the prosecutor, extend that period to a date up to 3 months after the date of disposal of the appeal.
- (7) This subsection applies where in the case of summary conviction a decision has been postponed under subsection (1) above for a period.
- (8) Where subsection (7) above applies and the offender appeals under section 442 of the 1975 Act against conviction or against both conviction and any sentence passed during the period of postponement—
  - (a) his application for a stated case shall be made not within one week of the final determination of the proceedings but within one week of the day mentioned in paragraph (a) or (b) of subsection (4) above;
  - (b) his draft stated case shall be prepared and issued not within 3 weeks of the final determination of the proceedings but within 3 weeks of the said day.
- (9) Where subsection (7) above applies, then, notwithstanding any appeal against conviction or sentence or both the offender may appeal under section 442(1)(a)(ii), and the prosecutor may appeal under section 442(1)(b)(ii), of the 1975 Act against any confiscation order or against any other sentence passed, after the period of postponement, in respect of the conviction.
- (10) Where subsection (7) above applies, then, if during the period of postponement the offender applies for a stated case or lodges a note of appeal, the High Court may, on the application of the prosecutor, extend the period of postponement to a date up to 3 months after the date of disposal of the appeal.

## **77 Increase in benefit or realisable property.**

- (1) This section applies where the court which made a confiscation order is satisfied, on an application made by the prosecutor, that at the time the application is made the benefit for the purposes of section 70(5)(a) of this Act, or the amount that might be realised, is greater than—
  - (a) the benefit; or, as the case may be,
  - (b) the amount that might be realised,
 which was taken into account when the order was made.
- (2) The considerations by reference to which the court may be satisfied as mentioned in subsection (1) above shall include—
  - (a) the benefit was greater than was taken into account when the confiscation order was made or has increased in value since the confiscation order was made; or
  - (b) further benefit has been obtained since the confiscation order was made; or
  - (c) the value of realisable property was greater than was taken into account when the confiscation order was made; or
  - (d) any realisable property taken into account at the time when the confiscation order was made has subsequently increased in value; or
  - (e) that the amount, or part of the amount, of a gift which was disregarded under section 73(5) of this Act could now be realised.



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- (3) An application under subsection (1) above shall be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor but in any event within 6 years commencing with the date when the person was convicted of the offence.
- (4) Where this section applies, and notwithstanding that any matters in relation to the making of the confiscation order are, by virtue of section 75(2) or (5) of this Act, to be treated as conclusive—
  - (a) the court may make a new confiscation order for the payment of such sum as appears to the court to be appropriate having regard to what is now shown to be the benefit or the amount that might be realised; and
  - (b) if the earlier confiscation order has not been satisfied then the court, in making the new confiscation order, shall recall the earlier order and may take into account the amount unpaid (including any interest payable by virtue of section 81(1) of this Act) under the earlier order.
- (5) Section 75 of this Act shall, subject to any necessary modifications, apply in relation to the making of a new confiscation order in pursuance of this section as it applies where the prosecutor has applied for the making of a confiscation order under section 70 of this Act.
- (6) The assumptions mentioned in section 71(2) and (5) of this Act shall not apply for the purposes of this section.

## **78 Realisable property inadequate to meet payments under confiscation order.**

- (1) This section applies where the court which made a confiscation order is satisfied on the balance of probabilities, on an application made to it by the accused or the prosecutor, that the value of the realisable property is inadequate to meet any amount unpaid (including any interest payable by virtue of section 81(1) of this Act) under the confiscation order.
- (2) When considering whether the value of the realisable property is inadequate the court—
  - (a) shall, unless already taken into account under section 72(5) of this Act, take into account the extent to which property of a person whose estate has been sequestrated or who has been adjudged bankrupt is or has been included in the bankrupt's estate for the purposes of the <sup>M3</sup>Bankruptcy (Scotland) Act 1985 or Part IX of the <sup>M4</sup>Insolvency Act 1986; and
  - (b) may disregard any inadequacy which appears to it to be attributable, wholly or partly, to anything done by the accused for the purpose of protecting the realisable property from realisation.
- (3) Where this section applies, the court shall recall the confiscation order and make a new confiscation order for the payment of such sum of a lesser amount than that for which the original order was made which appears to the court to be appropriate having regard to—
  - (a) the value of the realisable property as determined under subsection (1) above; and
  - (b) any amount paid in pursuance of the original order.

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- (4) Section 75 of this Act shall, subject to any necessary modifications, apply in relation to an application under this section as it applies where the prosecutor has applied for the making of a confiscation order under section 70 of this Act.

**Marginal Citations**

**M3** 1985 c. 66.

**M4** 1986 c. 45.

**79 Confiscation orders where proceeds of crime discovered at later date.**

- (1) This section applies where no confiscation order has been made in relation to an offence under section 70 or 76 of this Act.
- (2) Where the court, on an application made to it by the prosecutor under this section, is satisfied—
- (a) that a person convicted of an offence to which this Chapter applies has benefited in connection with the commission of the offence concerned;
  - (b) that the information necessary to enable a confiscation order to be made on the date on which an application under section 70 of this Act was or could have been made was not available to the prosecutor,
- it may make a confiscation order in relation to that person.
- (3) An application under this section shall be made as soon as is reasonably practicable after the relevant information becomes available to the prosecutor but in any event not later than 6 years after the date when the person was convicted of the offence.
- (4) In determining the sum to be payable under a confiscation order made in pursuance of this section, the court shall take into account—
- (a) any order involving any payment by the offender;
  - (b) any suspended forfeiture order or an order for forfeiture under any other enactment made in respect of the offender,
- which forms part of the sentence already imposed for the offence concerned.
- (5) Sections 70(3) and 74(1), (2) and (4) of this Act shall not apply in relation to a confiscation order made in pursuance of this section.
- (6) Section 75 of this Act shall, subject to any necessary modifications, apply in relation to the making of a confiscation order in pursuance of this section as it applies where the prosecutor has moved for a confiscation order under section 70 of this Act.
- (7) Where the court makes a confiscation order in pursuance of this section and a compensation order has been made under section 58 of the <sup>M5</sup>Criminal Justice (Scotland) Act 1980 in respect of misappropriation of property by the offender, the court shall direct that compensation shall first be paid out of any sums applied towards the satisfaction of the confiscation order to the extent of any sums outstanding in respect of the compensation order.
- (8) The assumptions mentioned in section 71(2) and (5) of this Act shall not apply for the purposes of this section.
- (9) In this section “the court” means the court which had jurisdiction in respect of the offence concerned to make a confiscation order under section 70 of this Act.

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#### Marginal Citations

M5 1980 c. 62.

### 80 Application of provisions relating to fines to enforcement of confiscation orders.

- (1) Sections 196 and 203, or sections 402 and 412, of the 1975 Act and the provisions of that Act specified in subsection (2) below (or those provisions as applied by section 194 of that Act) shall, subject to the qualifications mentioned in subsection (2) below, apply in relation to confiscation orders as they apply in relation to fines; and section 91 of the <sup>M6</sup>Magistrates' Courts Act 1980 and Article 96 of the <sup>M7</sup>Magistrates' Courts (Northern Ireland) Order 1981 (provisions relating to transfer of fines from Scotland etc.) shall be construed accordingly.
- (2) The provisions mentioned in subsection (1) above are—
- (a) section 396, provided that any allowance under that section of time (or further time) for payment shall be without prejudice to the exercise by any administrator appointed in relation to the confiscation order of his powers and duties under this Act; and the court may, pending such exercise, postpone any decision as to refusing or allowing time (or further time) for payment;
  - (b) section 397, subject to the like proviso as in paragraph (a) above;
  - (c) section 398, but as if subsection (1)—
    - (i) gave the prosecutor an opportunity to be heard at any enquiry thereunder; and
    - (ii) applied whether the offender was in prison or not;
  - (d) section 399, provided that any order of payment by instalments shall be without prejudice to such exercise as is mentioned in paragraph (a) above;
  - (e) section 400;
  - (f) section 401(2) and (3);
  - (g) section 403;
  - (h) section 404;
  - (i) section 406;
  - (j) section 407, provided that—
    - (i) where a court imposes a period of imprisonment both in respect of a fine and of a confiscation order the amounts in respect of which the period is imposed shall, for the purposes of subsection (1A) of that section, be aggregated; and
    - (ii) before imposing a period of imprisonment to which there is a liability by virtue of that section the court shall, if an administrator has been appointed in relation to the confiscation order, require a report from him as to whether and in what way he is likely to exercise his powers and duties under this Act and shall take that report into account; and the court may, pending such exercise, postpone any decision as to such imposition;
  - (k) section 408;
  - (l) section 409, except that the reference in subsection (1) of that section to the person paying a sum to the governor of the prison under conditions prescribed by rules made under the <sup>M8</sup>Prisons (Scotland) Act 1989 shall be construed as including a reference to an administrator appointed in relation

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- to the confiscation order making such payment under this Act in respect of the person;
- (m) section 411, provided that an order of recovery by civil diligence shall not be made under the section where an administrator is appointed in relation to the confiscation order;
- (n) Schedule 7.
- (3) Where a court, by virtue of subsection (1) above, orders the sum due under a confiscation order to be recovered by civil diligence under section 411 of the 1975 Act, any arrestment executed by a prosecutor under subsection (2) of section 99 of this Act shall be deemed to have been executed by the court as if that subsection authorised such execution.
- (4) Where in any proceedings a confiscation order has been made as regards a person and a period of imprisonment or detention is imposed on him in default of payment of its amount (or as the case may be of an instalment thereof), that period shall run from the expiry of any other period of imprisonment or detention (not being one of life imprisonment or detention for life) imposed on him in the proceedings.
- (5) The reference in subsection (4) above to “any other period of imprisonment or detention imposed” includes (without prejudice to the generality of the expression) a reference to such a period on default of payment of a fine (or instalment thereof); but only where that default had occurred before the warrant for imprisonment is issued for the default in relation to the order.

#### **Marginal Citations**

- M6** 1980 c. 43.  
**M7** S.I. 1981/1675 (N.I. 26).  
**M8** 1989 c. 45.

### **81 Interest on sums unpaid under confiscation orders.**

- (1) If any sum required to be paid by a person under a confiscation order is not paid when it is required to be paid (whether forthwith on the making of the order or at a time specified under section 396(1) of the 1975 Act) that person shall be liable to pay interest on that sum for the period for which it remains unpaid and the amount of the interest shall for the purposes of enforcement be treated as part of the amount to be recovered from him under the confiscation order.
- (2) The sheriff may, on the application of the prosecutor, increase the term of imprisonment or detention fixed in respect of the confiscation order under section 396(2) of the 1975 Act if the effect of subsection (1) above is to increase the maximum period applicable in relation to the order under section 407(1A) of the 1975 Act.
- (3) The rate of interest under subsection (1) above shall be the rate payable under a decree of the Court of Session.

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*Status: Point in time view as at 31/03/1996.*

*Changes to legislation: There are currently no known outstanding effects for the Criminal Justice (Scotland) Act 1995, Part II. (See end of Document for details)*

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### *Exercise of powers*

## **82 Exercise of powers by court or administrator.**

- (1) This section applies to the powers as regards realisable property conferred on the court by sections 94, 95, 97, 98 and 99 of and paragraphs 1, 4 and 12 of Schedule 3 to this Act in relation to confiscation orders and on an administrator by that Schedule.
- (2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the case of a person mentioned in section 72(1)(a) of this Act, the value for the time being of realisable property held by any person by the realisation of such property.
- (3) In the case of realisable property held by a person by virtue only of having received a gift made directly or indirectly by the accused which is caught by this Chapter, the powers shall be exercised with a view to realising no more than the value of the gift as assessed under subsection (2), (3) or (4) of section 73 of this Act.
- (4) The powers shall be exercised with a view to allowing any person other than a person mentioned in section 72(1)(a) of this Act or the recipient of any such gift to retain or recover the value of any property held by him.
- (5) An order may be made or other action taken in respect of a debt owed by the Crown.
- (6) In exercising those powers, no account shall be taken of any obligations of such a person or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.

### *Compensation*

## **83 Compensation.**

- (1) Subject to subsection (3) below, if proceedings are instituted against a person for an offence to which this Chapter applies and either—
  - (a) the proceedings do not result in his conviction for any such offence, or
  - (b) where he is convicted of one or more such offences—
    - (i) the conviction or convictions concerned are quashed (and no conviction for any such offence is substituted); or
    - (ii) he is pardoned by Her Majesty in respect of the conviction or convictions concerned,the court may, on an application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to do so.
- (2) Subsection (1) above is without prejudice to any right which may otherwise exist to institute proceedings in respect of delictual liability disclosed by such circumstances as are mentioned in paragraphs (a) and (b) of subsection (3) below.
- (3) The court shall not order compensation to be paid under subsection (1) above in any case unless satisfied—
  - (a) that there has been some serious default on the part of a person concerned in the investigation of the offence or offences concerned, being a person

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- mentioned in subsection (5) below, and that, but for that default, the proceedings would not have been instituted or continued; and
- (b) that the applicant has suffered loss or damage in consequence of anything done in relation to the property under section 94, 95, 97, 98, 99 or 108 of or Schedule 3 to this Act.
- (4) The amount of compensation to be paid under this section shall be such as the court thinks just in all the circumstances of the case.
- (5) Compensation payable under this section shall be paid, where the person in default was—
- (a) a constable of a police force within the meaning of the <sup>M9</sup>Police (Scotland) Act 1967, by the police authority or joint police board for the police area for which that force is maintained;
  - (b) a constable other than is mentioned in paragraph (a) above, but with the powers of such a constable, by the body under whose authority he acts;
  - (c) a procurator fiscal or was acting on behalf of the Lord Advocate, by the Lord Advocate;
  - (d) a person commissioned by the Commissioners of Customs and Excise, by those Commissioners; and
  - (e) an officer of the Commissioners of Inland Revenue, by those Commissioners.
- (6) An application for compensation under this section shall be made not later than three years after the conclusion of the proceedings in respect of which the confiscation order was made; and subsection (6) of section 95 of this Act shall apply for the purpose of determining when proceedings are concluded for the purposes of this subsection as it applies for the purposes of that section.
- (7) In this section, “the court” means the Court of Session or the sheriff exercising his civil jurisdiction.
- (8) Until the date on which paragraph 71 of Schedule 13 to the <sup>M10</sup>Local Government etc. (Scotland) Act 1994 comes into force, the reference in subsection (5)(a) above to a joint police board shall be construed as a reference to a joint police committee.

#### **Marginal Citations**

**M9** 1967 c. 77.

**M10** 1994 c. 39.

### *Investigations and disclosure of information*

#### **84 Order to make material available.**

- (1) The procurator fiscal may, for the purpose of an investigation into whether a person has benefited from the commission of an offence to which this Chapter applies and as to the amount of that benefit, apply to the sheriff for an order under subsection (2) below in relation to particular material or material of a particular description.
- (2) If on such an application the sheriff is satisfied that the conditions in subsection (4) below are fulfilled, he may make an order that the person who appears to him to be in possession of the material to which the application relates shall—

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- (a) produce it to a constable for him to take away; or
  - (b) give a constable access to it,
- within such period as the order may specify.

This subsection is subject to section 86(11) of this Act.

- (3) The period to be specified in an order under subsection (2) above shall be seven days unless it appears to the sheriff that a longer or shorter period would be appropriate in the particular circumstances of the application.
- (4) The conditions referred to in subsection (2) above are—
  - (a) that there are reasonable grounds for suspecting that a specified person has benefited from the commission of an offence to which this Chapter applies;
  - (b) that there are reasonable grounds for suspecting that the material to which the application relates—
    - (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made; and
    - (ii) does not consist of or include items subject to legal privilege; and
  - (c) that there are reasonable grounds for believing that it is in the public interest, having regard—
    - (i) to the benefit likely to accrue to the investigation if the material is obtained; and
    - (ii) to the circumstances under which the person in possession of the material holds it,that the material should be produced or that access to it should be given.
- (5) Where the sheriff makes an order under subsection (2)(b) above in relation to material on any premises he may, on the application of the procurator fiscal, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material.
- (6) An application under subsection (1) or (5) above may be made ex parte in chambers.
- (7) Provision may be made by rules of court as to—
  - (a) the discharge and variation of orders under this section, and
  - (b) proceedings relating to such orders.
- (8) Where the material to which an application under this section relates consists of information contained in a computer—
  - (a) an order under subsection (2)(a) above shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible; and
  - (b) an order under subsection (2)(b) above shall have effect as an order to give access to the material in a form in which it is visible and legible.
- (9) An order under subsection (2) above—
  - (a) shall not confer any right to production of, or access to, items subject to legal privilege;
  - (b) shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise; and

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(c) may be made in relation to material in the possession of an authorised government department;

and in this subsection “authorised government department” means a government department which is an authorised department for the purposes of the <sup>M11</sup>Crown Proceedings Act 1947.

(10) In this section—

- (a) “items subject to legal privilege” and “premises” have the same meanings as in section 40 of the <sup>M12</sup>Criminal Justice (Scotland) Act 1987; and
- (b) references to a person benefiting from the commission of an offence to which this Chapter applies, in relation to conduct which is not such an offence but which would have been if it had occurred in Scotland, shall be construed in accordance with section 71 of this Act as if that conduct had so occurred.

#### **Marginal Citations**

**M11** 1947 c. 44.

**M12** 1987 c. 41.

## **85 Authority for search.**

- (1) The procurator fiscal may, for the purpose of an investigation into whether a person has benefited from the commission of an offence to which this Chapter applies and as to the amount of that benefit, apply to the sheriff for a warrant under this section in relation to specified premises.
- (2) On such application the sheriff may issue a warrant authorising a constable to enter and search the premises if the sheriff is satisfied—
  - (a) that an order made under section 84 of this Act in relation to material on the premises has not been complied with; or
  - (b) that the conditions in subsection (3) below are fulfilled; or
  - (c) that the conditions in subsection (4) below are fulfilled.
- (3) The conditions referred to in subsection (2)(b) above are—
  - (a) that there are reasonable grounds for suspecting that a specified person has benefited from the commission of an offence to which this Chapter applies; and
  - (b) that the conditions in section 84(4)(b) and (c) of this Act are fulfilled in relation to any material on the premises; and
  - (c) that it would not be appropriate to make an order under that section in relation to the material because—
    - (i) it is not practicable to communicate with any person entitled to produce the material; or
    - (ii) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises on which the material is situated; or
    - (iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a constable could secure immediate access to the material.
- (4) The conditions referred to in subsection (2)(c) above are—



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- (a) that there are reasonable grounds for suspecting that a specified person has benefited from the commission of an offence to which this Chapter applies; and
  - (b) that there are reasonable grounds for suspecting that there is on the premises material relating to the specified person, or to the question whether that person has so benefited or the amount of that benefit, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, but that the material cannot at the time of the application be particularised; and
  - (c) that—
    - (i) it is not practicable to communicate with any person entitled to grant entry to the premises; or
    - (ii) entry to the premises will not be granted unless a warrant is produced; or
    - (iii) the investigation for the purpose of which the application is made might be seriously prejudiced unless a constable arriving at the premises could secure immediate entry to them.
- (5) Where a constable has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.
- (6) Subsection (10) of section 84 of this Act shall apply for the purposes of this section as it applies for the purposes of that section.

## **86 Disclosure of information held by government departments.**

- (1) Subject to subsection (4) below, the Court of Session may on an application by the Lord Advocate order any material mentioned in subsection (3) below which is in the possession of an authorised government department to be produced to the Court within such period as the Court may specify.
- (2) The power to make an order under subsection (1) above is exercisable if—
- (a) the powers conferred on the Court by section 94(1)(a) of this Act are exercisable by virtue of section 95(2) of this Act; or
  - (b) those powers are exercisable by virtue of section 95(3) of this Act and the Court has made a restraint order which has not been recalled.
- (3) The material referred to in subsection (1) above is any material which—
- (a) has been submitted to an officer of an authorised government department by a person who holds, or has at any time held, realisable property;
  - (b) has been made by an officer of an authorised government department in relation to such a person; or
  - (c) is correspondence which passed between an officer of an authorised government department and such a person;
- and an order under that subsection may require the production of all such material or of a particular description of such material, being material in the possession of the department concerned.
- (4) An order under subsection (1) above shall not require the production of any material unless it appears to the Court of Session that the material is likely to contain

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information that would facilitate the exercise of the powers conferred on the Court by section 94(1)(a) of or paragraph 1 or 12 of Schedule 3 to this Act or on an administrator appointed under paragraph 1(1) of that Schedule.

- (5) The Court may by order authorise the disclosure to such an administrator of any material produced under subsection (1) above or any part of such material; but the Court shall not make an order under this subsection unless a reasonable opportunity has been given for an officer of the department to make representations to the Court.
- (6) Material disclosed in pursuance of an order under subsection (5) above may, subject to any conditions contained in the order, be further disclosed for the purposes of the functions under Part II of this Act of the administrator or the High Court.
- (7) The Court of Session may by order authorise the disclosure to a person mentioned in subsection (8) below of any material produced under subsection (1) above or any part of such material; but the Court shall not make an order under this subsection unless—
  - (a) a reasonable opportunity has been given for an officer of the department to make representations to the Court; and
  - (b) it appears to the Court that the material is likely to be of substantial value in exercising functions relating to the investigation of crime.
- (8) The persons referred to in subsection (7) above are—
  - (a) a constable;
  - (b) the Lord Advocate or any procurator fiscal; and
  - (c) an officer within the meaning of the <sup>M13</sup>Customs and Excise Management Act 1979.
- (9) Material disclosed in pursuance of an order under subsection (7) above may, subject to any conditions contained in the order, be further disclosed for the purposes of functions relating to the investigation of crime or whether any person has benefited from the commission of an offence to which this Chapter applies or the amount of that benefit.
- (10) Material may be produced or disclosed in pursuance of this section notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise.
- (11) An order under subsection (1) above and, in the case of material in the possession of an authorised government department, an order under section 84(2) of this Act may require any officer of the department (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with such order; and any such order shall be served as if the proceedings were civil proceedings against the department.
- (12) Where any requirement is included in any order by virtue of subsection (11) above, the person on whom the order is served—
  - (a) shall take all reasonable steps to bring it to the attention of the officer concerned; and
  - (b) if the order is not brought to that officer's attention within the period referred to in subsection (1) above, shall report the reasons for the failure to the Court of Session,

and it shall also be the duty of any other officer of the department in receipt of the order to take such steps as are mentioned in paragraph (a) above.

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- (13) In this section “authorised government department” means a government department which is an authorised department for the purposes of the <sup>M14</sup>Crown Proceedings Act 1947; and subsection (10) of section 84 of this Act shall apply for the purposes of this section as it applies for the purposes of that section.

#### Marginal Citations

M13 1979 c. 2.

M14 1947 c. 44.

## CHAPTER II

### FORFEITURE OF PROPERTY USED IN CRIME

#### Modifications etc. (not altering text)

C1 Pt. II Ch. II (ss. 87-93) excluded (31.3.1996) by 1988 c. 53, s. 33A (as inserted by 1995 c. 20, s. 117(1), Sch. 6 Pt. II, para. 188); S.I. 1995/517, art. 3(2)

#### 87 Suspended forfeiture order.

- (1) This section applies where in respect of any offence—
- the accused is convicted, whether in solemn or summary proceedings; or
  - in the case of summary proceedings, (without proceeding to conviction) an order is made discharging him absolutely.
- (2) Where this section applies, the court may, if it is satisfied on the application of the prosecutor that any property which was at the time of the offence or of the accused’s apprehension in his ownership or possession or under his control—
- has been used for the purpose of committing, or facilitating the commission of, any offence; or
  - was intended to be used for that purpose,
- make an order (a “suspended forfeiture order”) in respect of that property.
- (3) Any application under this section shall be made—
- in proceedings on indictment, when the prosecutor moves for sentence or if the accused is remitted for sentence under section 104 of the 1975 Act, before sentence is pronounced; and
  - in summary proceedings, following upon the conviction of the accused or, as the case may be, the finding that he committed the offence with which he was charged.
- (4) If the prosecutor knows or reasonably suspects the identity of a person (other than the accused) as being the owner of, or otherwise having an interest in, the property to which the suspended forfeiture order relates, he shall intimate that fact to the court on making the application and the order shall name that person as a person having an interest or suspected of having an interest in the property.

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- (5) Any reference in this Chapter to facilitating the commission of an offence shall include a reference to the taking of any steps after it has been committed for the purpose of disposing of any property to which it relates or of avoiding apprehension or detection.
- (6) Where, by itself, the use of property constitutes an offence in whole or in part, that property shall be regarded for the purpose of subsection (2)(a) above as used for the purpose of committing the offence, unless the enactment which created the offence expressly excludes the application of this section.
- (7) Subject to subsection (8) below, where the accused is convicted of an offence under any enactment, the court shall not be precluded from making a suspended forfeiture order in respect of any property by reason only that the property would not be liable to forfeiture under that enactment.
- (8) Subsection (7) shall not apply—
  - (a) if the enactment concerned expressly excludes the application of this section; or
  - (b) to any property which has been used or has been intended to be used as mentioned in subsection (2)(a) or (b) above in relation to the offence of which the accused has been convicted, if the enactment concerned specifies the category of property which is to be liable to forfeiture thereunder, and the category so specified does not include the category of property which has been used or has been intended to be used as aforesaid.
- (9) Where the court makes both a suspended forfeiture order and a compensation order under section 58 of the <sup>M15</sup>Criminal Justice (Scotland) Act 1980 against the same accused in the same proceedings, it may order that, in the event of the property subject to the suspended forfeiture order being forfeited under section 90 of this Act, the proceeds of sale of that property shall be first directed towards satisfaction of the compensation order.
- (10) As soon as may be after a suspended forfeiture order has been made, the prosecutor—
  - (a) shall notify in writing any person named in the order in pursuance of subsection (4) above that the order has been made, and that the person so notified may be entitled to apply to the court for—
    - (i) the order to be recalled under section 91 of this Act; or
    - (ii) a direction under section 92 of this Act; and
  - (b) if the property in respect of which the order has been made includes heritable property in Scotland, shall cause a certified copy of the order to be recorded in the General Register of Sasines or as the case may be registered in the Land Register of Scotland; and
  - (c) if the court directs him to do so, shall insert a notice in the Edinburgh Gazette or in such other newspaper or journal as appears to the court to be appropriate specifying the terms of the suspended forfeiture order.
- (11) Any property in respect of which a suspended forfeiture order is made shall be taken into the possession of or placed under the control of the clerk of court until—
  - (a) the order is recalled; or
  - (b) the property is forfeited to the Crown and disposed of under section 90 of this Act or forfeited to another person under that section.
- (12) For the purposes of any appeal or review a suspended forfeiture order is a sentence.

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- (13) Where, in disposing of an appeal, the High Court makes an order the effect of which is to release from liability to forfeiture any heritable property in Scotland in respect of which a suspended forfeiture order was made, the prosecutor shall, as soon as may be after the appeal has been disposed of, cause a certified copy of the order of the court to be recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland.
- (14) In this section “the court” does not include a district court, whether or not constituted by a stipendiary magistrate.

#### Marginal Citations

M15 1980 c. 62.

### 88 Forfeiture: district court.

- (1) Where, in respect of any offence tried in the district court, the accused is convicted or (without proceeding to conviction) an order is made discharging him absolutely the court may, if it is satisfied on the application of the prosecutor that any moveable property which was at the time of the offence or of the accused’s apprehension in his ownership or possession or under his control—
- (a) has been used for the purpose of committing, or facilitating the commission of, any offence; or
  - (b) was intended to be used for that purpose,
- order that the property shall be forfeited to and vest in the Crown or such other person as the court may direct.
- (2) Any application under subsection (1) above shall be made following upon the conviction of the accused or, as the case may be, the finding that he committed the offence with which he was charged.
- (3) Where, by itself, the use of property constitutes an offence in whole or in part, that property shall be regarded for the purpose of subsection (1)(a) above as used for the purpose of committing the offence, unless the enactment which created the offence expressly excludes the application of this section.
- (4) Subject to subsection (5) below, where the accused is convicted of an offence under any enactment, the court shall not be precluded from making an order under subsection (1) above in respect of any property by reason only that the property would not be liable to forfeiture under that enactment.
- (5) Subsection (4) above shall not apply—
- (a) if the enactment concerned expressly excludes the application of this section; or
  - (b) to any property which has been used or has been intended to be used as mentioned in subsection (1)(a) or (b) above in relation to the offence of which the accused has been convicted, if the enactment concerned specifies the category of property which is to be liable to forfeiture thereunder, and the category so specified does not include the category of property which has been used or has been intended to be used as aforesaid.
- (6) Where the court makes—

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- (a) an order under subsection (1) above that property shall be forfeited to the Crown; and
- (b) a compensation order under section 58 of the <sup>M16</sup>Criminal Justice (Scotland) Act 1980,

against the same accused in the same proceedings, it may order that the proceeds of sale of the property forfeited by virtue of subsection (1) above shall be first directed towards satisfaction of the compensation order.

- (7) For the purposes of any appeal or review an order under subsection (1) above is a sentence.
- (8) In this section “the court” means the district court.

#### **Marginal Citations**

**M16** 1980 c. 62.

### **89 Warrant to search for and seize property.**

- (1) Where—
  - (a) the sheriff is satisfied, on an application being made to him by the prosecutor—
    - (i) that proceedings have been, or are likely to be, instituted against a person in Scotland for an offence; and
    - (ii) that there is reasonable cause to believe that property specified in the application is to be found in a place or in premises specified in the application; and
  - (b) it appears to him that there are reasonable grounds for thinking that in the event of the person being convicted of the offence a suspended forfeiture order might be made in relation to the property,
 he may grant a warrant authorising a person named therein to enter and search the place or premises and seize the property.
- (2) Where a court has made a suspended forfeiture order in respect of any property, if it is satisfied on the application of the prosecutor—
  - (a) that there is reasonable cause to believe that the property is to be found in any place or premises; and
  - (b) that admission to the place or premises has been refused or that it is reasonably believed that such admission will be refused,
 it may grant a warrant authorising a person named therein to enter and search the place or premises and seize the property.
- (3) An application for a warrant under subsection (2) above may be made at the same time as an application for a suspended forfeiture order.

### **90 Forfeiture of property subject to suspended forfeiture order.**

- (1) Subject to the following provisions of this section, property in respect of which a suspended forfeiture order has been made shall be forfeited to and vest in the Crown, or such other person as the court may direct, as follows—

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- (a) heritable property situated in Scotland shall be forfeited at the end of the period of six months commencing with the date on which a certified copy of the suspended forfeiture order is recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland;
  - (b) heritable property situated outside Scotland shall be forfeited at the end of the period of six months commencing with the date of the making of the suspended forfeiture order;
  - (c) moveable property shall be forfeited at the end of the period of 60 days commencing with the date of the making of the suspended forfeiture order.
- (2) Notwithstanding subsection (1)(c) above, moveable property which is certified by the prosecutor as being—
  - (a) of a perishable or dangerous nature;
  - (b) of no commercial value; or
  - (c) property which cannot lawfully be sold, supplied or possessed,shall be forfeited immediately after the making of the suspended forfeiture order.
- (3) If an application for recall or variation of the suspended forfeiture order concerned has been made under section 91 of this Act, there shall be no forfeiture of property mentioned in paragraph (a), (b) or (c) of subsection (1) above unless and until whichever is the later of the following occurs—
  - (a) the application is finally disposed of in favour of the prosecutor, or
  - (b) the period mentioned in that paragraph has expired.
- (4) Without prejudice to subsection (2) above, in the event of an appeal against conviction or sentence, there shall be no forfeiture of property until whichever is the later of the following occurs—
  - (a) the appeal, if it is proceeded with, is determined in favour of the prosecutor, or
  - (b) the period mentioned in paragraph (a) or, as the case may be, (b) or (c) of subsection (1) above has expired.
- (5) Property which has been forfeited to the Crown under this section shall be dealt with by the Crown in such manner as seems to it to be appropriate.
- (6) A certificate by the clerk of court that property was forfeited to and vested in the Crown, or another person, under this section on the date specified in the certificate shall be conclusive evidence of that fact; and, in the case of a certificate in respect of heritable property situated in Scotland, the prosecutor shall, forthwith, cause a certified copy of the certificate to be recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland.

## **91 Recall or variation of suspended forfeiture order.**

- (1) The court shall, on an application being made to it under this section by a person other than the accused, make an order (a “recalling order”) recalling a suspended forfeiture order in relation to any property or an interest in property if—
  - (a) it is satisfied by the applicant on the balance of probabilities that he is the owner of the property or otherwise has an interest in it; and
  - (b) subsection (2) or subsection (3) below is applicable.
- (2) This subsection applies if the court is not satisfied by the prosecutor that—

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- (a) where the applicant was the owner of or otherwise had an interest in the property before the commission of the offence in connection with which the suspended forfeiture order was made, he—
    - (i) knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of, the offence, and
    - (ii) did not take all the steps which were reasonable for him to take to prevent such intended use; or
  - (b) where he has become the owner of, or has otherwise acquired an interest in, the property after the commission of the offence, the applicant knew or ought to have known that the property had been intended to be, or had been, so used.
- (3) This subsection applies if the court is satisfied as mentioned in subsection (2) above, but it appears to the court that, in all the circumstances of the case, forfeiture of the property would be excessive or inappropriate.
- (4) Where a recalling order relates to heritable property situated in Scotland, the prosecutor shall, as soon as may be after—
- (a) the expiry of the period within which the prosecutor may appeal under section 93(1)(b) of this Act against the making of the order without such an appeal being lodged; or
  - (b) where such an appeal is lodged within that period, the determination of the appeal in favour of the recalling order,
- cause a certified copy of the recalling order to be recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland.
- (5) Where the prosecutor believes that the person named in the suspended forfeiture order in pursuance of section 87(4) of this Act is not the owner of, or does not otherwise have an interest in, the property concerned then—
- (a) if he does not know who the true owner is, or who otherwise truly has the interest, he may apply to the court under this section for an order varying the suspended forfeiture order by deleting that name from it;
  - (b) if he does know or reasonably suspects the identity of the true owner or the person who otherwise truly has the interest (“the correct person”), he may apply to the court under this section for an order varying the suspended forfeiture order by substituting the name of the correct person for that of the person so named.
- (6) Where no person is named in the suspended forfeiture order in pursuance of section 87(4) of this Act but the prosecutor later comes to believe that a person is, or may be, the owner of, or otherwise has or may have an interest in, the property concerned, he may apply to the court for an order varying the suspended forfeiture order by naming that person as a person having or being suspected of having such an interest.
- (7) The court shall grant any application made in pursuance of subsection (5) or (6) above; and sections 87(10) and 90 of this Act shall apply in relation to an order varying a suspended forfeiture order in accordance with an application under subsection (5) or (6) above as they apply in relation to a suspended forfeiture order.
- (8) An application under this section may be made at any time before the property concerned is forfeited to the Crown or another person under section 90 of this Act.



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*Status: Point in time view as at 31/03/1996.*

*Changes to legislation: There are currently no known outstanding effects for the Criminal Justice (Scotland) Act 1995, Part II. (See end of Document for details)*

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- (9) The court shall not be entitled in considering any application under this section to review the sentence passed, or any probation order or order of discharge made, in respect of the offence concerned otherwise than as provided by this section.
- (10) In this section “the court” means the court which made the suspended forfeiture order.

## **92 Property wrongly forfeited: return or compensation.**

- (1) Where the court, on an application being made to it by a person other than the accused—
- (a) is satisfied by the applicant on the balance of probabilities that in relation to any property forfeited to the Crown or another person under section 90 of this Act or by virtue of an order for forfeiture made under any other enactment he was the owner of, or a person otherwise having an interest in, the property immediately before such forfeiture; and
  - (b) subsection (3) or (4) below is applicable,
- it shall make an order under subsection (2) below.
- (2) An order under this subsection shall direct the Crown or, as the case may be, the other person, if the applicant—
- (a) was the owner of the property, to return it to him if reasonably practicable to do so or, if not, to pay compensation to him of an amount determined under subsection (5) 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.
- (3) This subsection applies if the court is not satisfied that—
- (a) where the applicant was the owner of or otherwise had an interest in the property before the commission of the offence in connection with which the suspended forfeiture order or order for forfeiture was made, he knew or ought to have known that the property was intended to be used for the purpose of committing, or facilitating the commission of, the offence, and did not take all the steps which were reasonable for him to take to prevent such intended use; or
  - (b) where the applicant has become the owner of, or has otherwise acquired an interest in, the property after the commission of the offence, he knew or ought to have known that the property had been intended to be, or had been, so used.
- (4) This subsection applies if the court is satisfied as mentioned in subsection (3) above, but it appears to the court that, in all the circumstances of the case, forfeiture of the property would be excessive or inappropriate.
- (5) For the purposes of subsection (2) 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.
- (6) An application under subsection (1) shall be made not later than three years after the date on which the property was forfeited as mentioned in subsection (1)(a) above.
- (7) Where, after property has been forfeited by virtue of section 90 of this Act, the prosecutor comes to believe that the person named in the suspended forfeiture order

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in pursuance of section 87(4) of this Act is not the owner of, or a person otherwise having an interest in, the property concerned, then—

- (a) whether he knows who the true owner was, or who the person truly with the interest was, or not, he shall forthwith notify the court in writing of that belief; and
  - (b) if he does know or reasonably suspects the identity of the person who was the true owner or who truly had the interest, he shall forthwith notify that person in writing that he may be entitled to apply to the court for a direction under this section.
- (8) Where no person has been named in the suspended forfeiture order in pursuance of section 87(4) of this Act or in a variation order under section 91(5) of this Act but, after the property concerned has been forfeited under section 90 of this Act, the prosecutor comes to believe that a person was or might have been the owner of, or otherwise had or might have had an interest in, the property concerned, he shall forthwith notify—
- (a) the court of his belief; and
  - (b) that person in writing that he may be entitled to apply to the court for a direction under this section.
- (9) The court shall not be entitled in considering any application under this section to review the sentence passed, or any probation order or order of discharge made, in respect of the offence concerned otherwise than as provided by this section.
- (10) In this section “the court” means the court which made the suspended forfeiture order or order for forfeiture.

### **93 Appeal against court decision under section 91(1) or 92(2).**

- (1) An appeal shall lie to the High Court of Justiciary at the instance of—
- (a) the applicant against the refusal to make;
  - (b) the prosecutor against the making of,
- an order under section 91(1) or 92(2) of this Act, and the High Court in determining such an appeal may make such order as could have been made by the court on an application under that section.
- (2) The procedure in an appeal under this section shall be the same as the procedure in an appeal against sentence.
- (3) Where a suspended forfeiture order relating to heritable property situated in Scotland is recalled on appeal to the High Court of Justiciary, the prosecutor shall, as soon as may be after the appeal has been disposed of, cause a certified copy of the interlocutor of the Court to be recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland.

## **CHAPTER III**

### **RESTRAINT ORDERS**

### **94 Restraint orders.**

- (1) The court may, on the application of the prosecutor, make an order (in this Chapter referred to as a “restraint order”) in the circumstances mentioned in—

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- (a) section 95(2) or (3) of this Act interdicting—
    - (i) any person named in the order from dealing with his realisable property; or
    - (ii) that person and any person named in the order as appearing to the court to have received from him a gift caught by Chapter I of this Part from dealing with their own, or the other's, realisable property, (whenever that property was acquired and whether it is described in the order or not); and
  - (b) section 96(1) of this Act interdicting any person named in the order from dealing with any property which is, or is liable to be, the subject of a suspended forfeiture order.
- (2) A restraint order made under subsection (1)(a) above may contain conditions and exceptions to which the interdict shall be subject and in particular—
- (a) may provide for the release to the person named in the order of such reasonable living expenses as the court thinks fit; and
  - (b) shall provide for the release of property in so far as it is required to meet reasonable legal expenses payable or likely to be payable in relation to proceedings—
    - (i) as regards the offence by virtue of which the restraint order has been made; or
    - (ii) as regards a confiscation order made on conviction of the offence.
- (3) A restraint order shall—
- (a) be made on an ex parte application which shall be heard in chambers; and
  - (b) without prejudice to the time when it becomes effective, be intimated to each person affected by it.
- (4) For the purposes of this Chapter, dealing with property includes (without prejudice to the generality of the expression)—
- (a) making a payment to any person in reduction of the amount of a debt;
  - (b) removing the property from the jurisdiction of the court; and
  - (c) transferring or disposing of the property.
- (5) Where the court has made a restraint order, a constable or a person commissioned by the Commissioners of Customs and Excise may, for the purpose of preventing any property subject to the order being removed from the jurisdiction of the court, seize that property.
- (6) Property seized under subsection (5) above shall be dealt with in accordance with the court's directions.
- (7) In this Chapter "the court" means where, as regards the criminal proceedings in question, a trial diet or a diet fixed for the purposes of section 102 of the 1975 Act is intended to be held, is being or has been held—
- (a) in the High Court of Justiciary, the Court of Session;
  - (b) in the sheriff court, a sheriff of that court exercising his civil jurisdiction.
- (8) The court may, where it has granted a restraint order, interdict a person not subject to that order from dealing with property affected by it while it is in force.
- (9) Subsections (2)(a) and (3)(a) above shall apply in relation to subsection (8) above as they apply in relation to subsection (1) above; and subsections (1), (2), (4) and (5) of

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section 97 of this Act shall apply in relation to an interdict under subsection (8) above as they apply in relation to a restraint order.

- (10) Without prejudice to the time when it becomes effective, an interdict under subsection (8) above shall be intimated to each person affected by it.

## **95 Restraint orders in relation to realisable property.**

- (1) A restraint order under section 94(1)(a) of this Act may be made in the circumstances mentioned in either subsection (2) or (3) below.
- (2) For the purposes of this subsection, the circumstances are—
- (a) proceedings have been instituted against an accused in Scotland for an offence to which Chapter I of this Part applies;
  - (b) the proceedings have not been concluded; and
  - (c) either a confiscation order has been made or it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a confiscation order may be made in those proceedings.
- (3) For the purposes of this subsection, the circumstances are that the court is satisfied that—
- (a) it is proposed to institute proceedings within 28 days against a person suspected of such an offence and it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a confiscation order may be made in those proceedings; or
  - (b) the prosecutor has made, or proposes within 28 days to make, an application under section 77 or, as the case may be, section 79 of this Act in relation to that person in respect of the offence, and it appears to the court that there are reasonable grounds for thinking that the application may be granted.
- (4) Where the court has made a restraint order in the circumstances mentioned in subsection (3)(a) or (b) above and no proceedings have been instituted or application made within 28 days as mentioned in that subsection, the prosecutor shall forthwith apply to the court for the recall of the order and the court shall grant the application.
- (5) When proceedings for the offence or, as the case may be, proceedings on an application under section 77 or 79 of this Act are concluded, the prosecutor shall forthwith apply to the court for recall of the order and the court shall grant the application.
- (6) For the purposes of this section, proceedings are concluded as regards an offence where—
- (a) the trial diet is deserted simpliciter;
  - (b) the accused is acquitted or, under section 101 or 331A of the 1975 Act, discharged or liberated;
  - (c) the High Court of Justiciary or, as the case may be, the sheriff sentences or otherwise deals with him without making a confiscation order and without postponing a decision as regards making such an order;
  - (d) after such postponement as is mentioned in paragraph (c) above, the High Court of Justiciary or, as the case may be, the sheriff decides not to make a confiscation order;
  - (e) his conviction is quashed; or

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- (f) a confiscation order made in the proceedings is satisfied (whether by payment of the amount due under the order or by the accused serving imprisonment in default).
- (7) For the purposes of this section, proceedings on an application under section 77 or 79 of this Act are concluded—
- (a) when the application is refused; or
  - (b) where the application is granted, when a confiscation order made in the proceedings is satisfied (whether by payment of the amount due under the order or by the accused serving imprisonment in default).

## **96 Restraint orders in relation to forfeitable property.**

- (1) A restraint order may be made in respect of a person under section 94(1)(b) where—
- (a) proceedings have been instituted against him in Scotland for an offence;
  - (b) the proceedings have not been concluded; and
  - (c) a suspended forfeiture order has been made in respect of the property concerned or it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a suspended forfeiture order may be made in those proceedings.
- (2) A restraint order may also be made where the court is satisfied that it is proposed to institute proceedings in respect of an offence within 28 days and it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a suspended forfeiture order may be made in those proceedings.
- (3) Where the court has made a restraint order by virtue of subsection (2) above, and no proceedings have been instituted within 28 days as mentioned in that subsection, the prosecutor shall forthwith apply to the court for the recall of the order and the court shall grant the application.
- (4) When proceedings for the offence are concluded, the prosecutor shall forthwith apply to the court for recall of the order and the court shall grant the application.
- (5) For the purposes of this section, proceedings are concluded as regards an offence where—
- (a) the trial is deserted simpliciter;
  - (b) the accused is acquitted or, under section 101 or 331A of the 1975 Act, discharged or liberated;
  - (c) the High Court of Justiciary or (as the case may be) the sheriff sentences or otherwise deals with him without making a suspended forfeiture order;
  - (d) his conviction is quashed;
  - (e) a suspended forfeiture order made in the proceedings is recalled, or varied so as to exclude from forfeiture any property to which the restraint order relates; or
  - (f) the property, or part of the property, to which the restraint order relates is forfeited.

## **97 Variation and recall of restraint orders.**

- (1) Subject to subsections (2) and (3) below, the court may, at the instance of—

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*Changes to legislation: There are currently no known outstanding effects for the Criminal Justice (Scotland) Act 1995, Part II. (See end of Document for details)*

- (a) the prosecutor, at any time vary or recall a restraint order in relation to any person or to any property;
  - (b) any person having an interest, at any time vary or recall a restraint order in relation to the person or to any property.
- (2) On an application made under subsection (1)(b) above by a person named in a restraint order as having received a gift caught by Chapter I of this Part, the court may recall the order in relation to that person if it is satisfied 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 order were not recalled.
- (3) Where an application has been made under subsection (1) above for the variation or recall of a restraint order, any property in relation to which the restraint order was made shall not be realised during the period beginning with the making of the application and ending with the determination of the application by the court.
- (4) The court may, where it has recalled a restraint order as mentioned in subsection (1) (b) or (2) above, order that property of the person at whose instance it was recalled shall cease to be realisable or, as the case may be, liable to forfeiture.
- (5) The prosecutor or any person having an interest may reclaim or appeal to the Court of Session against an interlocutor refusing, varying or recalling or refusing to vary or recall a restraint order, within such period as may be prescribed by Act of Sederunt.
- (6) Where, in relation to a restraint order which is recalled, interdict has been granted under section 94(8) of this Act, the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted.

## **98 Inhibition of property affected by restraint order or by interdict.**

- (1) On the application of the Lord Advocate, the Court of Session may in respect of heritable realisable property in Scotland affected by a restraint order (whether such property generally or particular such property) grant warrant for inhibition against any person interdicted by the order or, in relation to that property, under section 94(8) of this Act; and subject to the provisions of this Part of this Act, the warrant—
- (a) shall have effect as if granted on the dependence of an action for debt at the instance of the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly; and
  - (b) shall have the effect of letters of inhibition and shall forthwith be registered by the Lord Advocate in the Register of Inhibitions and Adjudications.
- (2) Section 155 of the <sup>M17</sup>Titles to Land Consolidation (Scotland) Act 1868 (effective date of inhibition) shall apply in relation to an inhibition for which warrant has been granted under subsection (1) above as that section applies to an inhibition by separate letters or contained in a summons.
- (3) In the application of section 158 of that Act of 1868 (recall of inhibition) to such an inhibition as is mentioned in subsection (2) above, references in that section to a particular Lord Ordinary shall be construed as references to any Lord Ordinary.

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- (4) The fact that an inhibition has been executed under subsection (1) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Part of this Act in respect of that property.
- (5) No inhibition executed under subsection (1) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for the inhibition has been granted has ceased to have effect in respect of that property; and the Lord Advocate shall—
  - (a) apply for the recall, or as the case may be restriction, of the inhibition; and
  - (b) ensure that the recall, or restriction, of an inhibition on such application is reflected in the Register of Inhibitions and Adjudications.

#### **Marginal Citations**

M17 1868 c.101.

### **99 Arrestment of property affected by restraint order.**

- (1) On the application of the prosecutor, the court may, in respect of moveable property affected by a restraint order (whether such property generally or particular such property), grant warrant for arrestment if the property would be arrestable if the person entitled to it were a debtor.
- (2) A warrant under subsection (1) above shall have effect as if granted on the dependence of an action for debt at the instance of the prosecutor against the person and may be executed, recalled, loosed or restricted accordingly.
- (3) The fact that an arrestment has been executed under subsection (2) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Part of this Act in respect of that property.
- (4) No arrestment executed under subsection (2) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall apply to the court for an order recalling, or as the case may be, restricting the arrestment accordingly.

### **100 Administrators.**

Schedule 3 to this Act shall have effect as regards the appointment of administrators under this Part of this Act.

## **CHAPTER IV**

### **RECIPROCAL ARRANGEMENTS FOR ENFORCEMENT OF ORDERS**

### **101 Recognition and enforcement of orders made in England and Wales.**

- (1) An order to which this section applies shall, subject to this section and section 102 of this Act, have effect in the law of Scotland but shall be enforced in Scotland only in accordance with this section and that section.

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- (2) A receiver’s functions under or for the purposes of section 77, 80 or 81 of the 1988 Act shall, subject to this section and section 102 of this Act, have effect in the law of Scotland.
- (3) If an order to which this section applies is registered under this section—
  - (a) the Court of Session shall have, in relation to its enforcement, the same power;
  - (b) proceedings for or with respect to its enforcement may be taken, and
  - (c) proceedings for or with respect to any contravention of such an order (whether before or after such registration) may be taken,
 as if the order had originally been made in that Court.
- (4) Nothing in this section enables any provision of an order which empowers a receiver to do anything in Scotland under section 80(3)(a) of the 1988 Act to have effect in the law of Scotland.
- (5) The orders to which this section applies are orders of the High Court—
  - (a) made under section 77, 78 or 81 of the 1988 Act;
  - (b) relating to the exercise by that Court of its powers under those sections; or
  - (c) relating to receivers in the performance of their functions under the said section 77, 78 or 81,
 but not including an order in proceedings for enforcement of any such order.
- (6) References in this section to an order under section 77 of the 1988 Act include references to a discharge under section 76(4) of that Act of such an order.
- (7) In this section and in section 102 of this Act, “order” means any order, direction or judgment (by whatever name called).
- (8) Nothing in any order of the High Court under section 80(6) of the 1988 Act prejudices any enactment or rule of law in respect of the recording of deeds relating to heritable property in Scotland or the registration of interests in such property.
- (9) In this Chapter, “High Court” means the High Court of England and Wales.

## **102 Provisions supplementary to section 101.**

- (1) The Court of Session shall, on application made to it in accordance with rules of court for registration of an order to which section 101 of this Act applies, direct that the order shall, in accordance with such rules, be registered in that Court.
- (2) Subsections (1) and (3) of section 101 of this Act and subsection (1) above are subject to any provision made by rules of court—
  - (a) as to the manner in which and conditions subject to which that section applies are to be enforced in Scotland;
  - (b) for the sisting of proceedings for enforcement of such an order;
  - (c) for the modification or cancellation of the registration of such an order if the order is modified or revoked or ceases to have effect.
- (3) This section and section 101 of this Act are without prejudice to any enactment or rule of law as to the effect of notice or the want of it in relation to orders of the High Court.
- (4) The Court of Session shall have the like power to make an order under section 1 of the <sup>M18</sup>Administration of Justice (Scotland) Act 1972 (extended power to order inspection



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of documents etc.) in relation to proceedings brought or likely to be brought under Part VI of the 1988 Act in the High Court as if those proceedings were brought or were likely to be brought in the Court of Session.

- (5) The Court of Session may, additionally, for the purpose of—
- (a) assisting the achievement in Scotland of the purposes of orders to which section 101 of this Act applies;
  - (b) assisting receivers performing functions thereunder or for the purposes of section 77, 80 or 81 of the 1988 Act,
- make such orders and do otherwise as seems to it appropriate.
- (6) A document purporting to be a copy of an order under or for the purposes of Part VI of the 1988 Act by the High Court and to be certified as such by a proper officer of that Court shall, in Scotland, be sufficient evidence of the order.

#### Marginal Citations

M18 1972 c.59.

### 103 Inhibition of Scottish property affected by order registered under section 101.

- (1) On the application of the Lord Advocate, the Court of Session may in respect of heritable realisable property in Scotland affected by a restraint order registered under section 101 of this Act (whether such property generally or particular such property) grant warrant for inhibition against any person with an interest in that property; and the warrant—
- (a) shall have effect as if granted on the dependence of an action for debt at the instance of the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly;
  - (b) shall have the effect of letters of inhibition and shall forthwith be registered by the Lord Advocate in the Register of Inhibitions and Adjudications.
- (2) Section 155 of the <sup>M19</sup>Titles to Land Consolidation (Scotland) Act 1868 (effective date of inhibition) shall apply in relation to an inhibition for which warrant has been granted under subsection (1) above as that section applies to an inhibition by separate letters or contained in a summons.
- (3) In the application of section 158 of that Act of 1868 (recall of inhibition) to such an inhibition as is mentioned in subsection (2) above, references in that section to a particular Lord Ordinary shall be construed as references to any Lord Ordinary.
- (4) The fact that an inhibition has been executed under subsection (1) above in respect of property shall not prejudice the exercise of a receiver's powers under or for the purposes of section 77, 80 or 81 of the 1988 Act in respect of that property.
- (5) No inhibition executed under subsection (1) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for the inhibition has been granted has ceased to have effect in respect of that property; and the Lord Advocate shall—
- (a) apply for the recall, or as the case may be restriction, of the inhibition; and
  - (b) ensure that the recall, or restriction, of an inhibition on such application is reflected in the Register of Inhibitions and Adjudications.

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- (6) Any power of the Court of Session to recall, loose or restrict inhibitions shall, in relation to an order containing an inhibition under subsection (1) above and without prejudice to any other consideration lawfully applying to the exercise of the power, be exercised with a view to achieving the purposes specified in section 80 of the 1988 Act.

#### **Marginal Citations**

**M19** 1868 c.101.

### **104 Arrestment of Scottish property affected by order registered under section 101.**

- (1) On the application of the Lord Advocate, the Court of Session may, in respect of moveable property affected by a restraint order registered under section 101 of this Act (whether such property generally or particular such property), grant warrant for arrestment if the property would be arrestable if the person entitled to it were a debtor.
- (2) A warrant under subsection (1) above shall have effect as if granted on the dependence of an action for debt at the instance of the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly.
- (3) The fact that an arrestment has been executed under subsection (2) above in respect of property shall not prejudice the exercise of a receiver's powers under or for the purposes of section 77, 80 or 81 of the 1988 Act in respect of that property.
- (4) No arrestment executed under subsection (2) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the Lord Advocate shall apply to the Court of Session for an order recalling, or as the case may be, restricting the arrestment accordingly.
- (5) Any power of the Court of Session to recall, loose or restrict arrestments shall, in relation to an arrestment proceeding upon a warrant under subsection (1) above and without prejudice to any other consideration lawfully applying to the exercise of the power, be exercised with a view to achieving the purposes specified in section 80 of the 1988 Act.

### **105 Enforcement of Northern Ireland orders.**

- (1) Her Majesty may by Order in Council provide that, for the purposes of Chapter III of Part II of and Schedules 3 and 4 to this Act, this Part of this Act shall have effect as if—
  - (a) references to confiscation orders included a reference to orders made by courts in Northern Ireland which appear to Her Majesty to correspond to confiscation orders;
  - (b) references to offences to which Chapter I of this Part applies included a reference to any offence under the law of Northern Ireland (not being an offence to which that Chapter applies) which appears to Her Majesty to correspond to such an offence; and
  - (c) such other modifications were made as may be specified in the Order in Council, being modifications which appear to Her Majesty to be requisite or desirable having regard to procedural differences which may for the time being exist between Scotland and Northern Ireland; and without prejudice to the generality of this paragraph modifications may include provision as to the

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circumstances in which proceedings in Northern Ireland are to be treated for the purposes of those sections as instituted or as concluded.

- (2) An Order in Council under this section may provide for the provisions mentioned in subsection (1) above to have effect in relation to anything done or to be done in Northern Ireland subject to such further modifications as may be specified in the Order.
- (3) An Order in Council under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient.
- (4) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

## **106 Enforcement of orders made outside United Kingdom.**

- (1) Her Majesty may by Order in Council—
  - (a) direct in relation to a country or territory outside the United Kingdom designated by the Order that, subject to such modifications as may be specified, Chapter I of this Part and Chapter III of this Part so far as it relates to realisable property shall apply in relation to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there;
  - (b) make—
    - (i) such provision as to evidence or proof of any matter for the purposes of this section and section 107 of this Act; and
    - (ii) such incidental, consequential and transitional provision, as appears to Her Majesty to be expedient.
- (2) In this Chapter—

“designated country” means a country or territory designated by an Order in Council made under this section; and

“external confiscation order” means an order made by a court in a designated country for the purpose of recovering payments or other rewards or property or other economic advantage received in connection with an offence corresponding with or similar to an offence to which Chapter I of this Part applies or the value of such payments, property, reward or economic advantage.
- (3) An Order in Council under this section may make different provision for different cases or classes of case.
- (4) The power to make an Order in Council under this section includes power to modify Chapter I of this Part or Chapter III of this Part so far as it relates to realisable property in such a way as to confer power on a person to exercise a discretion.
- (5) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

## **107 Registration of external confiscation orders.**

- (1) On an application made by or on behalf of the Government of a designated country, the Court of Session may register an external confiscation order made there if—

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- (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
  - (b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
  - (c) it is of the opinion that enforcing the order in Scotland would not be contrary to the interests of justice.
- (2) In subsection (1) above “appeal” includes—
- (a) any proceedings by way of discharging or setting aside a judgment; and
  - (b) an application for a new trial or a stay of execution.
- (3) The Court of Session shall cancel the registration of an external confiscation order if it appears to the court that the order has been satisfied by payment of the amount due under it or by the person against whom it was made serving imprisonment in default of payment or by any other means.

## **108 Enforcement of Scottish orders in England and Wales.**

- (1) Her Majesty may by Order in Council make such provision as Her Majesty considers expedient for the purpose—
- (a) of enabling property in England and Wales which is realisable property to be used or realised for the payment of any amount payable under a confiscation order;
  - (b) of securing that, where no confiscation order has been made, property in England and Wales which is realisable property is available, in the event that such an order is so made, to be used or realised for the payment of any amount payable under it; and
  - (c) of enabling the enforcement in England and Wales of restraint orders, suspended forfeiture orders and forfeiture orders under any enactment other than the 1989 Act.
- (2) Without prejudice to the generality of the power conferred by subsection (1) above, an Order in Council under this section may—
- (a) provide that, subject to any specific conditions, such description of orders made under or for the purposes of Chapter I, II or III of this Part so far as it relates to realisable property shall have effect in the law of England and Wales;
  - (b) provide that, subject to any specified conditions, the functions of a person appointed under Schedule 3 to this Act shall have effect in the law of England and Wales;
  - (c) make provision—
    - (i) for the registration in the High Court of such descriptions of orders made under or for the purposes of Chapter I, II or III of this Part so far as it relates to realisable property as may be specified; and
    - (ii) for the High Court to have, in relation to the enforcement of orders made under or for the purposes of Chapter I, II or III of this Part so far as it so relates which are so registered, such powers as may be specified; and
  - (d) make provision as to the proof in England and Wales of orders made under or for the purposes of Chapter I, II or III of this Part so far as it so relates.

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- (3) In subsection (2) above “specified” means specified in an Order in Council under this section.
- (4) An Order in Council under this section may amend or apply, with or without modifications, any enactment.
- (5) An Order in Council under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient.
- (6) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

**109 Order in Council as regards taking of action in designated country.**

- (1) Her Majesty may by Order in Council make such provision in connection with the taking of action in a designated country in consequence of the making of a restraint order, confiscation order or suspended forfeiture order under this Act or a forfeiture order under any other enactment as appears to Her Majesty to be expedient.
- (2) Without prejudice to the generality of subsection (1) above, the provision contained in an Order in Council made under this section may include a direction that in such circumstances as may be specified proceeds arising out of action taken in a designated country with a view to satisfying a confiscation order which are retained there shall nevertheless be treated as reducing the amount payable under the confiscation order to such extent as may be specified.
- (3) An Order in Council under this section may amend or apply, with or without modifications, any enactment.
- (4) Subsections (1)(b), (3) and (5) of section 106 of this Act shall apply in respect of Orders in Council under this section as they apply in respect of Orders in Council under that section.

## 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

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- (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.
- (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;

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- (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.

**Modifications etc. (not altering text)**

- C2** S. 111 extended (with modifications) (31.3.1996) by 1987 c. 41, s. 7A (as inserted by 1995 c. 20, s. 113(1), **Sch. 5 para. 10**); S.I. 1996/517, **art. 3(2)** (with art. 5)

**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.
- (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.

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- (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.
- (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 <sup>M20</sup>Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

**Marginal Citations**

**M20** 1968 c. 70.

**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.



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- (4) Section 28 of the <sup>M21</sup>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 <sup>M22</sup>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 <sup>M23</sup>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 <sup>M24</sup>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.

#### Marginal Citations

- M21** 4 & 5 Geo.5 c. 59  
**M22** 1974 c. 53.  
**M23** 1986 c. 45.  
**M24** 1985 c. 66.

## 114 Interpretation of Part II.

- (1) In this Part of this Act, unless the context otherwise requires—
  - “the 1987 Act” means the <sup>M25</sup>Criminal Justice (Scotland) Act 1987;
  - “the 1988 Act” means the <sup>M26</sup>Criminal Justice Act 1988;
  - “the 1989 Act” means the <sup>M27</sup>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;

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- (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.

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**Marginal Citations**

**M25** 1987 c. 41.

**M26** 1988 c. 33.

**M27** 1989 c. 4.

**Status:**

Point in time view as at 31/03/1996.

**Changes to legislation:**

There are currently no known outstanding effects for the Criminal Justice (Scotland) Act 1995, Part II.