

# Appendix A

## PROCEEDS OF CRIME (SCOTLAND) BILL

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### ARRANGEMENT OF CLAUSES

#### PART I

#### CONFISCATION OF THE PROCEEDS OF CRIME

##### *Confiscation orders*

##### Clause

1. General provision.
2. Benefit from commission of offence.
3. Realisable property.
4. Gifts.
5. Making of confiscation orders.
6. Statements relevant to making confiscation orders.
7. Postponed confiscation orders.
8. Increase in benefit or realisable property.
9. Realisable property inadequate to meet payments under confiscation order.
10. Confiscation orders where proceeds of crime discovered at later date.
11. Application of provisions relating to fines to enforcement of confiscation orders.
12. Interest on sums unpaid under confiscation orders.

##### *Exercise of powers*

13. Exercise of powers by court or administrator.

##### *Compensation*

14. Compensation.

## **PART II**

### **FORFEITURE OF PROPERTY USED IN CRIME**

Clause

15. Suspended forfeiture order.
16. Warrant to search for and seize property.
17. Forfeiture of property subject to suspended forfeiture order.
18. Recall or variation of suspended forfeiture order.
19. Property wrongly forfeited: return or compensation.
20. Appeal against court decision under s 18(1) or 19(1).

## **PART III**

### **RESTRAINT ORDERS**

21. Restraint orders.
22. Restraint orders in relation to realisable property.
23. Restraint orders in relation to forfeitable property.
24. Variation and recall of restraint orders.
25. Inhibition and arrestment of property affected by restraint orders or by interdict.
26. Administrators.

## **PART IV**

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

27. Recognition and enforcement orders made in England and Wales.
28. Provisions supplementary to s. 27.
29. Inhibition and arrestment of Scottish property affected by order registered under s. 27.
30. Enforcement of Northern Ireland orders.
31. Enforcement of orders made outside United Kingdom.
32. Registration of external confiscation orders.
33. Enforcement of Scottish orders in England and Wales.
34. Order in Council as regard taking of action in designated country.

## PART V

### MISCELLANEOUS AND GENERAL

Clause

- 35. Sequestration etc of person holding realisable or forfeitable property.
- 36. Disposal of family home under Part I or II.
- 37. Forfeiture of property where accused has died.
- 38. Interpretation.
- 39. Transitional provisions, minor and consequential amendments and repeals.
- 40. Citation, commencement and extent.

#### SCHEDULES:

- Schedule 1 Administrators.
- Schedule 2 Sequestration etc of Persons Holding Realisable or Forfeitable Property.
- Schedule 3 Amendments to the Criminal Justice (Scotland) Act 1987.
- Schedule 4 Minor and Consequential Amendments.
- Schedule 5 Repeals.

DRAFT

OF A

## **BILL**

TO

A.D. 1994

Make further provision for Scotland as regards the confiscation of the proceeds of crime and the forfeiture of property used or intended to be used for the purpose of committing, or facilitating the commission of, any offence; and for connected purposes.

**BE** IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

## PART I

### CONFISCATION OF THE PROCEEDS OF CRIME

#### *Confiscation orders*

General  
Provision.

1.-(1) Subject to the provisions of this Part of this Act, where in respect of any offence to which this part applies-

- (a) the accused is convicted, whether in solemn or summary proceedings; or
- (b) in the case of summary proceedings (without proceeding to conviction) a probation order is made in respect of the accused or an order is made discharging the accused 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 Part of this Act applies to any offence which has been prosecuted-

- (a) on indictment; or
- (b) 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).

(3) A confiscation order shall not be made unless the court orders some other disposal (including a probation order or 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 in respect of which it is made; 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) The standard of proof required of the prosecutor in the determination of any question as to-

- (a) whether a person has benefited from the commission of an offence;
- (b) the amount of any such benefit; or
- (c) the amount that might be realised, other than for the purposes of section 9(1) of this Act,

shall be proof beyond reasonable doubt.

(8) For the purposes of any appeal or review, a confiscation order is a sentence.

#### EXPLANATORY NOTES

- Notes:*
1. In the interest of brevity these notes are written on the assumption that the Bill is enacted - eg "Clause 3(2) implements Recommendation 9" rather than "Clause 3(2), if enacted, would implement Recommendation 9".
  2. References to "Recommendations" are to the Summary of Recommendations in Part XXI of this report.
  3. References to "paragraphs" are to the paragraphs of this report.
  4. These notes use the abbreviations listed in the Table of Abbreviations which follows the Table of Contents of this report and the expressions defined in clause 28 of the Bill.

#### *PART I*

This Part (clauses 1 to 14) deals with confiscation orders (clauses 1 to 12), the exercise by a court or administrator of powers conferred later in the Bill (clause 13) and compensation (clause 14). These matters are discussed in Parts II to X of the Report.

#### *Clause 1*

This clause specifies the circumstances in which a confiscation order is competent, the maximum sum the accused may be required to pay, the matters the prosecutor must prove and the standard of proof he must attain when applying to the court for the order.

#### *Subsection (1)*

This subsection provides that a confiscation order is an order of court requiring the accused to pay a sum of money. The court has a discretion both as to whether to make the order and, subject to subsection (5), as to its amount (recommendation 1, paragraphs 2.11-2.13). The court may make the order only on the application of the prosecutor, made after the accused is convicted or is found to have committed the offence (Recommendations 2 (in part), 28, paragraphs 3.2-3.4, 6.3, 6.4).

#### *Subsection (2)*

This subsection implements Recommendations 2 (in part) and 3 (see paragraphs 3.2-3.6). It specifies the nature of the offences in respect of which a confiscation order may be made. Offences relating to drug trafficking and financial assistance for terrorism are included, since provision for confiscation in these cases is made in the Acts mentioned. A confiscation order may be made in respect of any offence prosecuted on indictment, or in summary proceedings where the maximum penalty is a fine in excess of level 5 (currently £5000) or three months' imprisonment. The effect of the latter provision is that a confiscation order may not be imposed in the district court.

#### *Subsection (3)*

This subsection implements Recommendation 21(1) by providing that a confiscation order should be imposed only in addition to another order or sentence (paragraph 5.2).

#### *Subsection (4)*

This subsection makes it a condition of the making of a confiscation order that the accused should have "benefited" from the commission of the offence (Recommendation 1, paragraphs 2.11-2.13). "Benefit" is explained in clause 2.

#### *Subsection (5)*

This subsection prescribes the upper financial limit within which a confiscation order may be made. There is now lower limit (Recommendation 4, paragraphs 3.7, 3.8). The upper limit (Recommendation 5, paragraphs 3.9-3.11) is the lesser of the amount of the "benefit" (see clause 2) and "the amount that might be realised" (see clause 3(3)).

#### *Subsection (6)*

This subsection states when the prosecutor's application for a confiscation order is to be made. In solemn proceedings he is to apply when he moves for sentence or, in a remit to the High Court for sentence, before sentence is pronounced. In summary proceedings he is to apply after conviction. (Recommendation 28, paragraph 6.3, 6.4).

#### *Subsection (7)*

This subsection imposes on the prosecutor the burden of proving the matters mentioned. The standard of proof required of him is the criminal standard: beyond reasonable doubt. (Recommendation 29, paragraph 6.5; Recommendation 31, paragraphs 6.11-6.13).

*Subsection (8)*

This subsection is in the same terms as section 1(4) of the 1987 Act. It allows an offender to challenge by appeal either the amount of the order or the fact that it has been made. (Recommendation 27, paragraph 5.25).

Benefit from  
commission of  
offence.

2.-(1) For the purposes of this Part of this Act, 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) In determining whether an accused has benefited from the commission of an offence and, if he has, the amount of the benefit, 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; or

(c) where the application for the confiscation order has been made in respect of two or more offences, the date of the earlier or earliest offence.

(4) In this Act, "property" means any property wherever situated, whether heritable or moveable or whether corporeal or incorporeal.

EXPLANATORY NOTES

*Clause 2*

This clause sets out the criteria by which the court is to assess whether an offender has benefited from the commission of an offence. In particular, under subsection (2) the court may make two rebuttable assumptions.

*Subsection (1)*

This subsection implements Recommendation 6(1) and enables the court when assessing "benefit" to take a broad approach (paragraph 4.6). "Property" is defined in subsection (4).



*Subsection (2)*

This subsection and subsection (3) implement Recommendation 30. This subsection entitles the court to make two assumption about the advantage obtained, and the expenditure made, since "the relevant date". The offender is entitled to prove on the balance of probabilities that either assumption is incorrect. See paragraphs 6.7, 6.8.

*Subsection (3)*

This subsection defines "the relevant date" and confines the assumptions to the period since the date of the offence.

*Subsection (4)*

This subsection implements Recommendation 6(2) by giving "property" a wide definition consistent with that in the Laundering Convention (paragraph 4.3).

Realisable  
property.

3.-(1) In 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 Part of this Act applies; or
    - (ii) in respect of whom a restraint order has been made by virtue of section 22(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 Part of this Act;
  - (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 4(4) of this Act, for the purposes of this Part of this Act, 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 Part of this Act which have been made by him.

(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; 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 sequestered, 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 2 to this Act.

(6) In subsection (4) above, "money" includes cheques, banknotes, postal orders, money orders and foreign currency.

#### EXPLANATORY NOTES

##### *Clause 3*

This clause defines "realisable property" and specifies how it is to be valued.

##### *Subsection (1)*

This subsection implements Recommendations 7 and 8 (paragraphs 4.9-4.13) and defines "realisable property". That term includes: (a) the whole estate of a person against whom proceedings have been instituted (as defined in clause 38(3)) or in respect of whom a restraint order has been made before the institution of proceedings; (b) the whole estate of anyone to whom such a person has made a gift which is "caught" (as defined in clause 4(1)); (c) any other property in the possession or under the control of a person mentioned in paragraph (a) or (b); and (d) any income or estate vesting in such a person. The words "wherever situated" in paragraphs (a) and (b) make it clear that property abroad is covered (see paragraph 4.11(ii)).

##### *Subsection (2)*

This subsection implements Recommendation 9 (paragraph 4.13) and specifies three types of property which are not realisable: *first*, property held on a trust for a third person by an accused or the recipient of a gift; *secondly*, property subject to a suspended forfeiture order (see clause 15(2)), and *thirdly* property subject to a restraint order made in respect of any other offence.

*Subsection (3)*

This subsection implements Recommendation 12 and defines "the amount that might be realised" (referred to in clause 1(5)(b)) as (a) all the realisable property of the person concerned and (b) the value of all gifts "caught" by Part I of the Bill (defined in clause 4(1)) which have been made by him.

*Subsection (4)*

This subsection, which implements Recommendation 13(1), deals with the valuation of realisable property (other than money). The value of the property is its likely market value at the date on which the order would be made. However, the court is to have regard also to (i) any security or real burden which may have to be discharged before the property may be realised and (ii) any other factors which might reduce the amount recoverable (paragraph 4.14).

*Subsection (5)*

This subsection implements Recommendation 13(3). It requires the court to take into account (ie deduct from the value of realisable property) the value of any property which has been included in the estate of a holder of realisable property for the purposes of insolvency proceedings. Schedule 2 provides that realisable property will be included in his estate for these purposes if at the date of sequestration or bankruptcy there is no restraint order affecting the property.

*Subsection (6)*

This subsection, implementing Recommendation 13(2), defines "money" in subsection (4).

Gifts.

4.-(1) A gift, is caught by this Part of this Act if 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 3(1)(a)(i) of this Act for the time being relate.

(2) In assessing the value of a gift caught by this Part of this Act, 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 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 Part of this Act 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 Part of this Act 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 Part of this Act, 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 Part of this Act 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 Part of this Act and, if a confiscation order had 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.

#### EXPLANATORY NOTES

##### *Clause 4*

This clause specifies the circumstances in which a gift is "caught", prescribes rules for the assessment of its value and provides for the protection of the interests of an innocent recipient.

##### *Subsection (1)*

This subsection implements Recommendation 15 (paragraph 4.21) and states when a gift made by the offender will render the estate of the recipient liable to be realised to satisfy a confiscation order. The gift need not represent the proceeds of the offence. The subsection catches all gifts made after the commission of the offence or, where there is more than one offence, after the commission of the first offence. Gifts made prior to the commission of the offence are caught only if made "in contemplation" of the offence. Clause 13(3) provides that the powers to realise the recipient's estate must be exercised with a view to realising no more than the value of the gift as assessed under subsection (2), (3) or (4) below.

##### *Subsection (2)*

This subsection implements Recommendation 17(2) (see paragraph 4.25) and deals with the valuation of a gift which is neither a "sham transaction" (see subsection (3)) nor in the form

of money (see subsection (4)). This provision provides that the value of a gift is to be taken to be the greater of the following two values: (a) the value of the gift at the time of receipt, adjusted to take account of subsequent changes in the value of money; or (b) the total of (i) its likely market value (or that of any property representing it) and (ii) the value, adjusted to take account of subsequent changes in the value of money, of any other property and any other economic advantage obtained by the recipient because the gift was made. Examples of how these rules might be applied in practice are given in paragraph 4.24.

#### *Subsection (3)*

This subsection implements Recommendation 16(1) (paragraph 4.22) and provides for sham transactions where the offender has disposed of property for a sum which is significantly less than its value at the time of transfer.

#### *Subsection (4)*

This subsection implements Recommendation 17(1) (paragraph 4.23) and provides that where the gift was money (as here defined) and the recipient can show that the money has not been used, the value of the gift is the face value of the money.

#### *Subsection (5)*

This subsection implements Recommendation 18 (paragraph 4.27) and provides that if the court considers it improbable that the amount of a gift caught by the Act could be realised it may disregard that amount.

#### *Subsection (6)*

This subsection implements Recommendation 19(1) and (2) (paragraphs 4.28-4.30) and gives the court a discretion, on the application of the innocent recipient of a gift, to make an order declaring that the gift (or part of it) is not caught by the Act and that the property (or part of it) of the recipient is not realisable. If a confiscation order has already been made the court may vary that order accordingly, if necessary. The application may be made before or after a confiscation order has been made but before the property is realised. The recipient must prove on the balance of probabilities (1) that he was ignorant of the fact that the gift was made in contemplation of, or after, the offence; (2) that he was not associated with the giver in the commission of the offence; and (3) that he would suffer hardship if the application were not granted.

#### *Subsection (7)*

This subsection implements Recommendation 19(3) and provides for an appeal against the refusal or the granting of an application under subsection (6).

#### *Subsection (8)*

This subsection implements Recommendation 19(4) and provides that the procedure in such an appeal is the same as in an appeal against sentence.

Making of  
confiscation  
orders.

5.-(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;
- (c) making any suspended forfeiture order or an order for forfeiture under any other enactment.

(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;
- (b) making any order involving any other payment by him;
- (c) making any suspended forfeiture order or an order for forfeiture under any other enactment,

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.

1980 c.62

(4) Where a court makes both a confiscation order and a compensation order under section 58 of the 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.

#### EXPLANATORY NOTES

##### *Clause 5*

This clause is concerned with the relationship between a confiscation order and other orders the court may make when dealing with the offender.

##### *Subsection (1)*

This subsection implements Recommendation 23(1). It gives effect to the approach that the confiscation order should be the order of primary importance in the range of disposals

whose objective is to deprive the accused of his assets. It does so by requiring the court to determine the amount payable under the order before making any decisions as to other disposals in that range (paragraph 5.6).

*Subsection (2)*

This subsection implements Recommendations 24(1) and 25(1) (paragraphs 5.8-5.16). When making a confiscation order the court is directed: *first*, to take the order into account if it goes on to make a further order depriving the accused of money or property; but *second*, not to take the order into account when it is imposing any other type of sentence, including a custodial sentence.

*Subsection (3)*

This subsection implements Recommendation 22 (paragraph 5.4) and has the effect of disapplying, so far as they would relate to confiscation orders, any statutory provisions which forbid the use of one form of disposal in conjunction with another.

*Subsection (4)*

This subsection implements Recommendation 26(1) (paragraphs 5.17-5.24). It applies where the court makes both a confiscation order against the accused and a compensation order in favour of a person whose property has been misappropriated. The court is required to direct that the compensation is to be paid out of any sums applied towards the satisfaction of the compensation order.

Statements relevant to making confiscation orders.

6.-(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 from the commission of the offence.

(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 allegations, 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-

- (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 7(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,

a hearing shall be arranged before the trial judge or, if he is not available to preside at such a hearing within a reasonable time, before another judge, to consider the matters being challenged.

(7) In subsection (6) above "another judge" means, if the trial judge was-

- (a) a judge of the High Court of Justiciary, another judge of that Court,
- (b) a sheriff, another sheriff of the sheriffdom concerned.

#### EXPLANATORY NOTES

##### *Clause 6*

This clause makes provision for the use of written statements in the procedure prior to the making of a confiscation order. *First*, subsections (1) to (4) provide for the lodging by the Crown of a statement relevant either to the determination of whether the accused has benefited from the commission of the offence or to the assessment of the value of his benefit. *Second*, subsection (5) provides for the lodging by the accused of a statement relevant to

determining the amount that might be realised. Subsections (6) and (7) provide for a hearing on certain disputed issues.

*Subsection (1)*

Subsections (1) to (4) implement Recommendation 32 (paragraphs 6.14-6.19). This subsection provides that the prosecutor may lodge a statement when he moves for a confiscation order. On each of the issues mentioned in paragraphs (a) and (b) he must discharge the burden of proof to the criminal standard (clause 1(7)).

*Subsection (2)*

This subsection provides that where the offender accepts to any extent any allegation in a statement lodged under subsection (1) the court may treat his acceptance as conclusive of the matters to which it relates. The provisions of the 1975 Act mentioned in this provision deal with formal admissions and agreements.

*Subsection (3)*

This subsection entitles the court to require the accused to indicate to what extent he accepts each allegation in a statement lodged under subsection (1), and if he does not accept any allegation, to indicate the basis of such non-acceptance.

*Subsection (4)*

This subsection provides that failure to comply with requirements made under subsection (3) may be treated as acceptance of every allegation in the statement, apart from any allegation in respect of which the accused has complied with the requirement.

*Subsection (5)*

This subsection implements Recommendation 33 (paragraph 6.20) and deals with the accused's right to lodge a statement in relation to any matters relevant to determining the amount that might be realised. For the purposes of the determination, the court may treat the acceptance by the prosecutor of any allegation in the statement as conclusive of the matters to which it relates.

*Subsection (6)*

Subsections (6) and (7) implement Recommendation 34 (paragraphs 6.21, 6.22). This subsection requires a hearing to be held where either any allegation in the statement lodged under subsection (1) is challenged by the accused or the basis of the non-acceptance by the accused of any such allegation is challenged by the prosecutor. The hearing is to take place preferably before the trial judge and within a reasonable time.

*Subsection (7)*

This provision prescribes the status of the judge who is to preside at a hearing under subsection (6) if the trial judge is not available.

7.-(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; and
  - (c) no suspended forfeiture order nor an order for forfeiture under any other enactment shall be made in respect of 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 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.

## EXPLANATORY NOTES

### *Clause 7*

This clause implements Recommendation 36 (paragraphs 6.24-6.27). It enables the court to postpone deciding to make a confiscation order or determining the amount payable because it requires further information. Notwithstanding such a postponement the court may impose a custodial sentence. The clause also regulates appeals: subsections (4) to (6) deal with conviction on indictment; subsections (7) to (10) deal with summary convictions. The clause broadly follows the scheme of section 2 of the 1987 Act.

### *Subsection (1)*

This provision entitles the court to postpone a decision for up to 6 months. Subsection (6) and (10) entitle the court to extend the period of postponement where an appeal has been taken.

### *Subsection (2)*

This subsection provides that notwithstanding a postponement the court may sentence or otherwise deal with the accused in respect of the conviction, subject to subsection (3).

*Subsection (3)*

This subsection provides that until the court decides whether to make a confiscation order it is not entitled to impose any sentence designed to deprive the accused of any of his assets.

*Subsection (4)*

This subsection deals with the time-limit for intimating appeals against conviction or against conviction and sentence on indictment where there has been a postponement under subsection (1). Where no sentence has been pronounced, an appeal against conviction must be intimated within two weeks of the day on which the period of postponement commences. In all other cases the two weeks run from the date of the passing of the sentence.

*Subsection (5)*

This subsection permits an appeal against a confiscation order or any other sentence passed after the period of postponement.

*Subsection (6)*

This subsection provides that where an appeal is intimated under subsection (4) the court may, on the prosecutor's application, grant an extension of the postponement period for up to three months after the date of disposal of the appeal.

*Subsection (7)*

This subsection introduces subsections (8), (9) and (10) dealing with appeals where there has been a summary conviction and a postponement under subsection (1).

*Subsection (8)*

This subsection prescribes arrangements for appeals against conviction or conviction and sentence in summary proceedings similar to those under subsection (4) above.

*Subsection (9)*

This subsection corresponds to subsection (5).

*Subsection (10)*

This subsection is the counterpart of subsection (6). Where there is an application for a stated case or the lodging of a note of appeal during the period of postponement, the prosecutor may seek an extension of the period of postponement for up to three months from the date of the disposal of the appeal.

Increase in benefit or realisable property.

8.-(1) This section applies where the court which has made a confiscation order is satisfied, on an application made by the prosecutor, that at the time the application is made the benefit obtained in connection with the commission of the offence, 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 in connection with the commission of the offence 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 4(5) of this Act could now be realised.

(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 2(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 12(1) of this Act) under the earlier order.

(5) Section 6 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 1 of this Act.

(6) The assumptions mentioned in section 2(2) of this Act shall not apply for the purposes of this section.

## EXPLANATORY NOTES

### *Clause 8*

This is the first of three clauses (8, 9 and 10) providing for the variation of confiscation orders. This clause provides for a case where it becomes apparent that there has been an increase in the benefit or the realisable property after the confiscation order was made.

#### *Subsection (1)*

Subsections (1) to (3) implement Recommendation 38 (paragraph 7.3-7.9). This subsection introduces the clause and narrates the circumstances in which an application may be made by the prosecutor.

#### *Subsection (2)*

This subsection sets out the considerations which may satisfy the court that such an application should be granted.

#### *Subsection (3)*

This subsection provides that an application is to be made as soon as reasonably practicable after the relevant information becomes available but in any event within six years of conviction.

#### *Subsection (4)*

This subsection allows the court to make a new confiscation order (paragraph (a)). If the earlier confiscation order has not been satisfied the court in making the new order is to recall the earlier order and may take into account the amount unpaid (paragraph (b)).

#### *Subsection (5)*

This subsection applies generally the provisions of clause 6 (statements relevant to making confiscation orders).

#### *Subsection (6)*

This subsection provides that the assumptions mentioned in clause 2(2) are not applicable in proceedings under this clause.

Realisable property inadequate to meet payments under confiscation order.

9.-(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 12(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 3(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 Bankruptcy (Scotland) Act 1985 or Part IX of the Insolvency Act 1986; and

1985 c. 66.  
1986 c. 45.

(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.

(4) Section 6 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 1 of this Act.

#### EXPLANATORY NOTES

##### *Clause 9*

This clause implements Recommendation 41(1)-(4) (paragraphs 7.12 to 7.16) and deals with the circumstances in which a new confiscation order may be substituted requiring a smaller amount to be paid because there is inadequate realisable property to satisfy the original order.



*Subsection (1)*

This subsection enables either the accused or the prosecutor, after a confiscation order has been made, to apply to the court which made the order for a reduction of the amount to be recovered. The applicant must prove on the balance of probabilities that the value of the realisable property is inadequate to meet any amount unpaid.

*Subsection (2)*

Paragraph (a) requires the court, when considering whether the value of the realisable property is inadequate, to take into account the extent to which property of a person whose estate has been sequestrated or who has been adjudged bankrupt should be included in his estate. Paragraph (b) provides that the court is entitled to disregard any inadequacy which appears to be attributable to anything done by the accused for the purpose of protecting the realisable property from realisation.

*Subsection (3)*

Where the applicant satisfies the court that the realisable property is inadequate, the court is to recall the original confiscation order and make a new one for the payment of such lesser amount as is appropriate having regard to (a) the value of the realisable property (as now revalued under subsection (1)) and (b) the amount paid under the original order.

*Subsection (4)*

This subsection applies generally the provisions of clause 6 (statements relevant to making confiscation orders).

Confiscation orders where proceeds of crime discovered at later date.

**10.**-(1) This section applies where no confiscation order has been made in relation to an offence under section 1 or 7 of this Act.

(2) Where the court, on an application made to it by the prosecutor under this section, is satisfied beyond reasonable doubt-

- (a) that a person convicted of an offence to which this Part of this Act 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 1 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) Section 5 of this Act shall not apply in relation to a confiscation order made in pursuance of this section.

(6) Section 6 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 1 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 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.

1980 c. 62.

(8) The assumptions mentioned in section 2(2) 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 1 of this Act.

#### EXPLANATORY NOTES

##### *Clause 10*

This clause implements Recommendation 42(1)-(4) (paragraphs 7.17, 7.18). It applies where a confiscation order has not been made and proceeds of crime are discovered at a later date.

##### *Subsection (1)*

This subsection provides that this clause applies where a confiscation order has not been made.

##### *Subsection (2)*

This provision enables the court to make a confiscation order on an application by the prosecutor where it is satisfied to the criminal standard of proof (a) that the person convicted has benefited in connection with the commission of the offence and (b) that the information necessary to make a confiscation order was not available when he was convicted.

*Subsection (3)*

This subsection provides that the prosecutor must apply as soon as reasonably practicable after the relevant information becomes available and in any event within six years of the date of conviction.

*Subsection (4)*

This subsection requires the court to have regard to orders intended to deprive the offender of money or property which were made against him as part of the sentence already imposed.

*Subsection (5)*

This subsection excludes clause 5 (making of confiscation orders ) in relation to a confiscation order made under this clause.

*Subsection (6)*

This subsection applies generally the provisions of clause 6 (statements relevant to making confiscation orders).

*Subsection (7)*

This subsection is the counterpart of clause 5(4).

*Subsection (8)*

This subsection provides that the assumptions mentioned in clause 2(2) are not applicable in proceedings under this clause.

*Subsection (9)*

This subsection provides that the court which has jurisdiction to make the confiscation order under this clause is the court which imposed the original sentence.

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

11.-(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 Magistrates' Courts Act 1980 and Article 96 of the 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 Prisons (Scotland) Act 1989 shall be construed as including a reference to an administrator appointed in relation 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 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.

(4) The reference in subsection (3) 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.

## EXPLANATORY NOTES

### *Clause 11*

This clause implements Recommendation 43 (paragraphs 8.2 to 8.8) and applies to the enforcement of confiscation orders various provisions of the 1975 Act relating to the enforcement of fines.

### *Subsection (1)*

This subsection applies two sets of statutory provisions: *first*, the fines enforcement and payment provisions of the 1975 Act with regard to solemn (sections 196 and 203) and summary (sections 402 and 412) procedure; and *second*, those provisions of the 1975 Act which are listed in subsection (2), as qualified in that subsection. The statutory provisions for the transfer of fines from Scotland to England and Wales and to Northern Ireland are to be construed accordingly.

### *Subsection (2)*

This subsection lists the provisions of the 1975 Act which, as qualified by the provisos in this subsection, are to apply to confiscation orders as they apply to fines. The effect is as follows:-

#### *(a) Section 396*

This section is concerned with the allowance of time to pay the amount required by a confiscation order. The effect of the proviso in this paragraph is that an allowance of time to pay must not prejudice the work of an administrator appointed in relation to the confiscation order; and that, pending the administrator's exercise of his powers and duties, the court may postpone any decision as to the allowing of time or further time for payment.

(b) *Section 397*

This section provides for applications for further time for payment. It is qualified by this paragraph in the same way as section 396.

(c) *Section 398*

Section 398(1) provides that where a court has made a confiscation order without imposing imprisonment in default of payment, it is not entitled to impose imprisonment on an offender for failing to make payment of the amount required unless on an occasion subsequent to that sentence the court has, in his presence, enquired into the reason why the amount has not been paid. Section 398(1) does not apply, however, where the offender is in prison.

This paragraph qualifies section 398(1) in two ways: *first*, the court must give the prosecutor an opportunity to be heard at any enquiry; and *second*, section 398(1) is to apply whether the offender is in prison or not.

(d) *Section 399*

This section provides that the court may order an offender to pay by instalments. This paragraph adds a proviso that such an order is to be without prejudice to the exercise by an administrator of his powers and duties.

(e) *Section 400*

This section empowers the court to order that an offender who has been allowed time for payment is to be placed under supervision pending payment.

(f) *Section 401(2) and (3)*

Section 401(2) provides that in the case of an offender who may not be imprisoned by reason of his age any reference to imprisonment in sections 396 and 400 is to be construed as a reference to the lawful form of detention in default of payment which is appropriate to him.

Section 401(3) provides that where a warrant has been issued for the apprehension of an offender for non-payment of a fine, the offender may make payment in full to a constable.

(g) *Section 403*

This section is concerned with the transfer of orders for payment within Scotland and from Scotland to England and Wales and to Northern Ireland.

(h) *Section 404*

This section prescribes the action to be taken by the clerk of court on a transfer order under section 403.

(i) *Section 406*

This section provides for the substitution of custody for imprisonment where a child defaults in payment.

(j) *Section 407*

This section is concerned with the imposition of a period of imprisonment for non-payment. Subsection (1A) prescribes a scale of maximum periods of imprisonment for non-payment which are related to the amount due.

The first proviso added by this paragraph states that the amount of a fine and the amount of a confiscation order are to be aggregated in order to ascertain the maximum period of imprisonment that may be imposed.

The second proviso obliges the court, before imposing imprisonment in terms of section 407, to require from any administrator appointed in relation to the confiscation order a report as to whether and in what way he is likely to exercise his statutory powers and duties. This proviso also entitles the court to postpone its decision in relation to the imposition of imprisonment pending the administrator's exercise of his functions. If as a result of the administrator's work the confiscation order is satisfied in whole or in part, the court might avoid imposing a term of imprisonment, or might impose a shorter term than it otherwise would have done.

(k) *Section 408*

This section provides that warrants of imprisonment for non-payment must specify a period at the expiry of which the person sentenced shall be discharged, notwithstanding non-payment.

(l) *Section 409*

This section provides that where a person committed to prison for non-payment pays any sum to the prison governor in part satisfaction of the amount due, the term of imprisonment is to be proportionately reduced. This paragraph extends the section to cover a payment in respect of the offender by an administrator appointed in relation to the confiscation order.

(m) *Section 411*

This section provides for the recovery by civil diligence of an amount due under a confiscation order. This paragraph adds that no order for such recovery is to be made where an administrator is appointed.

This paragraph, unlike the corresponding provision in section 7 of the 1987 Act, applies the proviso to section 411(3). The effect of applying that proviso is that recovery by civil diligence cannot be authorised after the offender has been imprisoned in default of payment of the amount due under the confiscation order. (Paragraphs 8.3, 8.4.)

(n) *Schedule 7*

This Schedule provides for the application of sums paid to a prison governor under section 409.

*Subsection (3)*

This subsection provides that where the offender has been sentenced to a period of imprisonment or detention (other than for life) in the proceedings in which the confiscation order has been made, any period of imprisonment or detention in default of payment of either the amount due or an instalment of the amount due under the order is to run from the expiry of that period. (Paragraph 8.8.)

*Subsection (4)*

This subsection provides that the period of imprisonment or detention imposed in the proceedings, referred to in subsection (3), is to include such a period on default of payment of a fine (or fine instalment) only where that default occurred before the issue of the warrant for imprisonment for the default in relation to the order.

Interest on sums unpaid under confiscation orders.

12.-(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 applicable to an award of damages in the Court of Session.

EXPLANATORY NOTES

*Clause 12*

This clause implements Recommendation 44 (paragraph 8.10) by providing for the payment of interest on sums unpaid under confiscation orders.

*Subsection (1)*

This subsection requires the payment of interest (at the rate mentioned in subsection (3)) to be paid on any amount outstanding under a confiscation order. The amount of the interest due is to be treated as part of the amount recoverable under the confiscation order.

*Subsection (2)*



This subsection provides that the term of imprisonment or detention fixed in default of payment in respect of the confiscation order may be increased if the aggregation of the interest and the principal amount due under the confiscation order brings out a sum which would attract a higher maximum period on the scale in section 407(1A) of the 1975 Act (see the notes to clause 11(2)(j)).

*Subsection (3)*

This subsection provides that the rate of interest is that applicable to an award of damages in the Court of Session (at present 8 per cent per annum: see paragraph 8.10, footnote).

*Exercise of powers*

Exercise of powers by court or administrator.

**13.**-(1) This section applies to the powers as regards realisable property on the conferred court by sections 21, 22, 24 and 25 of this Act in relation to confiscation orders and on an administrator by Schedule 1 to this Act.

(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 3(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 Part of this Act, 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 4 of this Act.

(4) The powers shall be exercised with a view to allowing any person other than a person mentioned in section 3(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.

EXPLANATORY NOTES

*Clause 13*

This clause implements Recommendation 45 (paragraph 9.4) and sets out the general principles governing the exercise of the powers conferred by the Bill on the court and on the administrator with regard to realisable property.

*Subsection (1)*

This subsection specifies the statutory powers conferred on the court (by clauses 21, 22, 24 and 25) or on an administrator (by Schedule 1) to which this clause applies. Clauses 21, 22 and 24 are concerned with restraint orders, and clause 25 with ancillary orders for arrestment, inhibition and interdict.

*Subsection (2)*

This subsection sets out the first principle: that the powers are to be exercised with a view to the satisfaction of the confiscation order by making available the value for the time being of the realisable property.

*Subsection (3)*

This subsection provides that where realisable property is held by the recipient of a gift caught by the Bill, the powers are to be exercised with a view to realising no more than the value of the gift.

*Subsection (4)*

This subsection provides that the powers are to be exercised to allow any person (other than the accused or the recipient of a caught gift) to retain or recover the value of any property held by him.

*Subsection (5)*

This subsection provides that an order may be made, or other action taken, in respect of a debt owed by the Crown. This provision is designed to elide questions of Crown immunity (paragraph 9.4(iv)).

*Subsection (6)*

This subsection states the principle that the obligation to satisfy the confiscation order takes priority over other obligations (paragraph 9.4(v)).

*Compensation*

Compensation.

14.-(1) Subject to subsection (3) below, if proceedings are instituted against a person for an offence to which this Part of this Act 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 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 22, 25 or 33 of or Schedule 1 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, by the policy authority or joint police committee for the police area for which that force is maintained ("constable", "police force", "police authority", "joint police committee" and "police area" having the meanings assigned to these terms by the Police (Scotland) Act 1967);

(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

1967 c.77.

respect of which the confiscation order was made; and subsection (7) of section 22 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.

#### EXPLANATORY NOTES

##### *Clause 14*

This clause implements Recommendation 59(2)-(6) (paragraphs 10.4-10.11) and sets out the circumstances in which compensation may be payable to a holder of realisable property who has suffered loss or damage as a result of the exercise of the powers of the court or an administrator.

##### *Subsection (1)*

This subsection gives a civil court (defined in subsection (7)) power to order compensation to be paid where (i) proceedings were instituted but (ii) the accused has been acquitted, or his conviction has been quashed on appeal, or he has been pardoned.

##### *Subsection (2)*

This subsection expressly preserves any right otherwise existing to raise proceedings in respect of delictual liability.

##### *Subsection (3)*

This subsection sets out the matters on which the court has to be satisfied: serious default on the part of an investigating authority, but for which the proceedings would not have been instituted or continued; and loss or damage in consequence of anything done in relation to the property.

##### *Subsection (4)*

By virtue of subsection (1) the court has a discretion as to whether to award compensation even if the matters specified in subsection (3) are established. This subsection confers on the court a further discretion as to the amount of compensation.

##### *Subsection (5)*

This subsection specifies that compensation is payable by the authority on whose behalf the person in default was acting.

##### *Subsection (6)*

This subsection provides that an application for compensation must be made not later than three years after the conclusion of the proceedings (see the notes to clause 22(7)).

*Subsection (7)*

This subsection defines "court" for the purposes of this clause.

**PART II**

**FORFEITURE OF PROPERTY USED IN CRIME**

Suspended  
forfeiture order.

**15.-(1)** This section applies where in respect of any offence-

- (a) the accused is convicted, whether in solemn or summary proceedings; or
- (b) in the case of summary proceedings, (without proceeding to conviction) a probation order is made in respect of the accused or an order is made discharging him absolutely.

(2) Where this section applies, the court may, if it is satisfied beyond reasonable doubt 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-

- (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,

make an order (a "suspended forfeiture order") in respect of that property.

(3) 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 upon the conviction of the accused.

(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.

(5) Any reference in this Part of this Act 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 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 17 of this Act, the proceeds of sale of that property shall be first directed towards satisfaction of the compensation order.

1980 c. 62.

(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 18 of this Act; or
  - (ii) a direction under section 19 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 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 17 of this Act.

(12) For the purposes of any appeal or review a suspended forfeiture order is a sentence.

(13) In this section "the court" does not include a district court.

## EXPLANATORY NOTES

### *PART II*

This Part (clauses 15 to 20) deals with the forfeiture of property used in crime, which is discussed in Parts XI to XVII of the report.

#### *Clause 15*

This clause prescribes the circumstances in which a suspended forfeiture order may be made and what the prosecutor must do after an order has been made.

#### *Subsection (1)*

This subsection implements Recommendation 69 (paragraphs 12.23-12.26) and provides that a suspended forfeiture order may be made where a person is convicted of any offence in solemn or summary proceedings or where, in summary proceedings, the court is satisfied that he committed the offence but does not proceed to conviction and either makes a probation order or grants an absolute discharge.

#### *Subsection (2)*

This subsection provides that an application for a suspended forfeiture order must be made by the prosecutor (Recommendation 70(1), paragraph 13.2). The court cannot make an order on its own initiative. The prosecutor must satisfy the court beyond reasonable doubt (Recommendation 71, paragraphs 13.3-13.5) as to (1) the relationship between the accused and the property and (2) the use or intended use of the property. (1) The property must have been in the accused's ownership or possession or under his control, either at the time of the offence or at the time of his apprehension (Recommendations 62, paragraphs 12.6, 12.7). (2) The property either must have been used for the purpose of committing, or facilitating the commission of, any offence, or must have been intended to be used for that purpose (Recommendation 63(1), paragraphs 12.8-12.11). "Property" is defined in clause 2(1) as "any property, wherever situated, whether heritable or moveable or whether corporeal or incorporeal".

*Subsection (3)*

This subsection implements Recommendation 70(2) (paragraph 13.2) and prescribes the stage of the proceedings at which the prosecutor's application for another is to be made.

*Subsection (4)*

This subsection implements Recommendation 76(1) (paragraph 13.11) and requires that anyone, other than the accused, who owns or has an interest in the property affected by the order must be named in the order. Notification is required under subsection (10)(a).

*Subsection (5)*

This subsection, which implements Recommendation 63(2) (paragraphs 12.9-12.11), is derived from sections 223(2) and 436(2) of the 1975 Act.

*Subsection (6)*

This subsection implements Recommendation 64 (paragraphs 12.12, 12.13). It provides that where by itself the use of property constitutes an offence that property is to be regarded as used for the purpose of committing the offence, unless this provision is excluded by an enactment creating a statutory offence.

*Subsection (7) , (8)*

These subsections implement Recommendation 67 (paragraphs 12.17 to 12.20). They make clear that, in the absence of contrary provision, a suspended forfeiture order is competent on conviction of a statutory offence to which a specific statutory provision for forfeiture applies.

*Subsection (9)*

This subsection implements Recommendation 79 (paragraphs 13.13 to 13.16). It deals with a case where the court makes both a suspended forfeiture order and a compensation order. It entitles the court to direct that in the event of the forfeiture of the property, the proceeds of sale are to be first directed towards satisfaction of the compensation order.

*Subsection (10)*

This subsection implements Recommendations 76(2), 77 and 78 (paragraphs 13.11, 13.12). It imposes certain duties on the prosecutor when an order has been made. He must notify in writing any person named in the order, telling him of his entitlement to apply to the court for the recall of the order (see the notes to clause 18) or, in the event of forfeiture, for the return of the property or for compensation (see the notes to clause 19). Where the property is heritable property in Scotland, the prosecutor must have a certified copy of the order entered in the appropriate property register. If the court so directs, he must advertise the order in an appropriate publication.



*Subsection (11)*

This subsection implements Recommendation 85 (paragraph 14.9). It provides that property subject to a suspended forfeiture order is to be the responsibility of the clerk of court until the order is recalled or the property is forfeited and disposed of.

*Subsection (12)*

This subsection implements Recommendation 80 (paragraph 13.17) and enables a suspended forfeiture order to be appealed or brought under review.

*Subsection (13)*

This subsection implements Recommendation 60 (paragraph 12.2). It has the effect that a suspended forfeiture order cannot be made by a district court.

Warrant to search  
for and seize  
property.

**16.-(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 institute 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.

## EXPLANATORY NOTES

### *Clause 16*

This clause makes provision for the granting of warrants to search for and seize property both before and after the making of a suspended forfeiture order. Sections 224 and 437 of the 1975 Act provide for the granting of a warrant to search for an article which has been forfeited by virtue of a specific power conferred by a statute which creates a particular offence and makes provision for the forfeiture of property to which that offence is related (see paragraph 16.4).

### *Subsection (1)*

This subsection implements Recommendation 93 (paragraph 16.8). It entitles the prosecutor to apply to the sheriff for a warrant to search for and seize property before a suspended forfeiture order is made, and either before or after the institution of proceedings (defined in clause 38(3)).

### *Subsection (2)*

This subsection implements Recommendation 74 (paragraphs 13.8, 13.9). It entitles the prosecutor to apply for a similar warrant after a suspended forfeiture order has been made.

### *Subsection (2)*

This subsection implements Recommendation 74 (paragraphs 13.8, 13.9). It entitles the prosecutor to apply for a similar warrant after a suspended forfeiture order has been made.

### *Subsection (3)*

This subsection entitles the prosecutor to apply for both a suspended forfeiture order and a warrant under subsection (2) at the same time. See paragraph 13.8.

Forfeiture of  
property subject  
to suspended  
forfeiture order.

**17.-(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 as follows-

- (a) heritable property situated in Scotland shall be forfeited at the end of the period of 6 months commencing with the date on which a certified copy of the suspended forfeiture order is recorded in the General Register of Sasines or 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 18 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 Crown; 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 Crown; 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 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 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 or, as the case may be, registered in the Register in which the suspended forfeiture order is recorded or registered.

## EXPLANATORY NOTES

### *Clause 17*

This clause specifies the time when property subject to a suspended forfeiture order is forfeited.

*Subsection (1)*

This subsection implements Recommendation 83(1), (2) and (3) (paragraphs 14.2-14.5). *Heritable property in Scotland* is forfeited six months after the date on which a certified copy of the suspended forfeiture order is entered in the appropriate property register. *Heritable property situated outside Scotland* is forfeited six months after the date of the making of the suspended forfeiture order. *Moveable property* is generally forfeited 60 days after that date: see subsection (2).

*Subsection (2)*

This subsection implements Recommendation 84 (paragraphs 14.7, 14.8). Moveable property certified by the prosecutor as being in any of the specified categories is forfeited immediately after the making of the suspended forfeiture order.

*Subsection (3)*

This subsection implements Recommendation 83(4) (paragraph 14.6). In the event of an application for recall or variation of the suspended forfeiture order, the property is not to be forfeited until the application is finally disposed of in favour of the Crown or until the expiry of the period of 6 months or 60 days, whichever is the later.

*Subsection (4)*

This subsection implements Recommendation 81 (paragraph 13.17). It makes provision similar to subsection (3) in the event of an appeal against conviction or sentence.

*Subsection (5)*

This subsection implements Recommendation 86 (paragraph 14.10). The effect of forfeiture is to vest the property in the Crown. This subsection provides that the Crown may deal with it at its discretion.

*Subsection (6)*

This subsection implements Recommendation 83(5) and (6) (paragraph 14.6). A certificate by the clerk of court is conclusive evidence of the fact and date of forfeiture. Where the property is heritable property in Scotland the prosecutor is required to enter a certified copy of the certificate in the appropriate property register.

Recall or  
variation of  
suspended  
forfeiture order.

18.-(1) The court shall, on an application being made to it under this section by a person other than the accused, recall 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 beyond

reasonable doubt by the prosecutor 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 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 an order ("a recalling order") recalling a suspended forfeiture order relates to heritable property situated in Scotland, the prosecutor shall, as soon as may be after the recalling order has been made, cause a certified copy of the recalling order to be recorded in the General Register of Sasines or 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 15(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 15(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 15(10) and 17 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 under section 17 of this Act.

(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 discharging 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.

#### EXPLANATORY NOTES

##### *Clause 18*

This clause provides for the recall or variation of a suspended forfeiture order.

##### *Subsection (1)*

Subsections (1)-(3) implement Recommendations 88 and 89 (paragraphs 15.3 to 15.10) and provide for the recall of a suspended forfeiture order on the application of a person other than the accused. This subsection requires the applicant to satisfy the court to the civil standard of proof that he is the owner of the property or has an interest in it.

##### *Subsection (2)*

This subsection requires the court to recall the order if, having been satisfied by the applicant in terms of subsection (1), it is not satisfied by the prosecutor, to the criminal standard of proof, that the applicant culpably failed to prevent the nefarious use of the property or knowingly acquired it after it had been so used.

##### *Subsection (3)*

This subsection provides that, even if the court is satisfied by the prosecutor in terms of subsection (2), it is to recall the order if it considers that, in the circumstances, forfeiture of the property would be excessive or inappropriate.

##### *Subsection (4)*

This subsection implements Recommendation 91 (paragraph 15.12). A certified copy of a suspended forfeiture order relating to heritage in Scotland will have been entered in the

appropriate property register in accordance with clause 15(10)(b). This subsection provides that the recall of the order is to be reflected in that register.

*Subsection (5)*

Subsections (5)-(7) implement Recommendation 87 (paragraph 15.2) and are concerned with the variation of a suspended forfeiture order at the instance of the prosecutor where he ascertains that the information in the order as to the interests of third parties in the property is incorrect. This subsection deals with circumstances in which it becomes apparent that the true owner or person interested is not known (in which case the name in the order is deleted) or that someone else is the true owner or person interested (in which case his name is substituted for the name in the order).

*Subsection (6)*

This subsection deals with a case where no-one was initially named in the order but the name of the true owner or person interested later becomes apparent and requires to be inserted in the order.

*Subsection (7)*

The court is required to grant an application under subsection (5) or (6). The consequences of making a suspended forfeiture order follow: see paragraph 15.2 and the notes to clauses 15(10) and 17.

*Subsection (8)*

This subsection implements Recommendation 87(2) (paragraph 15.2) and allows an application for variation or recall to be made at any time prior to the forfeiture of the property.

*Subsection (9)*

This subsection implements Recommendation 90 (paragraph 15.11) and provides that a court considering an application for recall or variation is not entitled to sentence the accused afresh.

*Subsection (10)*

This subsection provides that the court to which an application for recall or variation is to be made is the court which made the order.

Property wrongly  
forfeited: return  
or compensation

**19.-(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 under section 17 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, 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 beyond reasonable doubt by the prosecutor 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 17 of this Act, the prosecutor comes to believe that the person named in the



suspended forfeiture order in pursuance of section 15(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 15(4) of this Act or in a variation order under section 18(5) of this Act but, after the property concerned has been forfeited under section 17 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.

#### EXPLANATORY NOTES

##### *Clause 19*

This clause deals with the protection of a third party's rights where property he owned or in which had an interest has been wrongly forfeited, whether under this Bill or another statute. This clause entitles him to apply for the return of the property or for compensation.

##### *Subsection (1)*

Subsection (1), (3) and (4) implement Recommendation 100 (paragraphs 17.5, 17.6). They are similar to clause 18(1), (2) and (3). The applicant is required to establish his interest in the property to the civil standard of proof.

*Subsection (2)*

This subsection provides that the court is to direct the Crown to return the property to the applicant or, if that is not reasonably practicable or if he had an interest in the property other than as its owner, to pay compensation.

*Subsection (3)*

See the notes to clause 18(2).

*Subsection (4)*

See the notes to clause 18(3).

*Subsection (5)*

This subsection implements Recommendation 101 (paragraph 17.7) and is concerned with the quantification of compensation.

*Subsection (6)*

This subsection implements Recommendation 99(3) (paragraph 17.4) and requires an application to be made not later than three years after the date of forfeiture.

*Subsection (7)*

This subsection implements Recommendation 103 (paragraph 17.9). After forfeiture has taken place the prosecutor may ascertain that the suspended forfeiture order did not correctly identify the third party. If so, he must so inform the court in writing and notify any person who appears to be the true third party of his entitlement to apply for the return of the property or compensation.

*Subsection (8)*

This subsection also implements Recommendation 103 and deals with a case in which no-one was named in the order and the prosecutor later thinks he knows the identify of an interested third party. In that event, he must take the same steps as in subsection (7).

*Subsection (9)*

This subsection implements Recommendation 102 (paragraph 17.8) and, like clause 18(9), forbids the court to review its sentence when considering an application.

*Subsection (10)*

This subsection provides that the court to which an application under this clause is to be made is the court which made the suspended forfeiture order or the order for forfeiture.

Appeal against  
court decision  
under s 18(1) or  
19(1).

**20.-(1)** An appeal shall lie to the High Court of Justiciary at the instance  
of-

- (a) the applicant against the refusal;
- (b) the prosecutor against the granting,

of an applicant under section 18(1) or 19(1) 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, record or, as the case may be, register a certified copy of the interlocutor of the Court in the register in which the suspended forfeiture order was recorded or registered.

#### EXPLANATORY NOTES

##### *Clause 20*

This clause implements Recommendation 104 (paragraph 17.10) and provides for appeals against decisions on applications under clauses 18 and 19.

##### *Subsection (1)*

This subsection provides that either the applicant or the prosecutor may appeal.

##### *Subsection (2)*

The procedure is to be as in an appeal against sentence.

##### *Subsection (3)*

See the note to clause 18(4).

### PART III

#### RESTRAINT ORDERS

Restraint orders.

**21.**-(1) The court may, on the application of the prosecutor, make an order (in this Part of this Act referred to as a "restraint order") in the circumstances mentioned in-

- (a) section 22(2) or (3) of this Act interdicting-
  - (i) any person named in the order from dealing with this 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 Part I

of this Act 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 23(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 Part of this Act, 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 a restraint order is made in relation to heritable property situated in Scotland, the prosecutor shall forthwith record a certified copy of the order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(6) 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.

(7) Property seized under subsection (6) above shall be dealt with in accordance with the court's directions.

(8) In this Part of this Act, "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.

## EXPLANATORY NOTES

### *PART III*

This Part (clauses 21 to 26) provides for the making of restraint orders for the purpose of preserving property which either (1) may be realised to satisfy a confiscation order or (2) is, or is liable to be, the subject of a suspended forfeiture order. Restraint orders in relation to confiscation and forfeiture are respectively discussed in Parts IX and XVI of the report.

#### *Clause 21*

This clause contains general provisions as to the making by the appropriate civil court of restraint orders relative to confiscation or forfeiture proceedings.

#### *Subsection (1)*

This subsection implements Recommendations 46(2) and 94(1) and (2). It gives the court (defined in subsection (8)) a discretion to make a restraint order (see paragraphs 9.6 to 9.12). This is an order interdicting (a) a person named in the order from dealing with his realisable property (as defined in clause 3(1)); or (b) that person and any person named in the order (who appears to have received a gift from him caught by clause 4 of the Bill) from dealing with his or the other's realisable property; or (c) a person named in the order from dealing with property which is, or may be, subject to a suspended forfeiture order (made under clause 15). A restraint order relative to realisable property need not specify the property which it affects (see paragraph 9.8). The expression "dealing with property" is defined in subsection (4).

#### *Subsection (2)*

This subsection implements Recommendation 46(4). It is concerned with the qualification of a restraint order relative to realisable property by the inclusion of conditions and exceptions. The court has a discretion to make provision for reasonable living expenses (paragraph (a)), and is required to make provision for reasonable legal expenses (paragraph (b)). (See paragraphs 9.11, 9.12.)

*Subsection (3)*

This subsection implements Recommendation 50(1) and prescribes the procedure in an application for a restraint order. The order is to be made on an *ex parte* application by the prosecutor in chambers, and a copy of the order is to be intimated to each person affected by it. The object of hearing the application in chambers is to prevent property being disposed of before the order comes into effect. (See paragraph 9.25.)

*Subsection (4)*

This subsection defines "dealing" (Recommendation 46(3); paragraph 9.10). Paragraphs (a) and (b) follow section 9(3) of the 1987 Act and paragraph (c) takes account of article 3 of the Laundering Convention. The words in parenthesis make clear that the definition is not exhaustive.

*Subsection (5)*

This subsection implements Recommendation 50(2) and provides that where the restraint order affects heritable property in Scotland the prosecutor must enter a certified copy of the order in the appropriate property register. (See paragraph 9.25.)

*Subsections (6) and (7)*

These subsections implement Recommendations 53 (paragraph 9.31) and 97 (paragraph 16.11). Property subject to a restraint order may be seized to prevent its removal from the jurisdiction of the court (subsection (6)); and such property is dealt with in accordance with the court's directions (subsection (7)).

*Subsection (8)*

This subsection implements Recommendations 46(1) (paragraphs 9.3, 9.6, 9.7) and 94(1) (paragraph 16.10). It confers power to make a restraint order on the Court of Session or on the sheriff in the exercise of his civil jurisdiction according as the relevant criminal proceedings are in the High Court or the sheriff court.

Restraint orders  
in relation to  
realisable  
property.

**22.**-(1) A restraint order under section 21(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 Part I of this Act 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 8 or, as the case may be, section 10 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 8 or 10 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) Where a restraint order made in relation to heritable property situated in Scotland is recalled, the prosecutor shall forthwith record a certified copy of the recalling order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(7) 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
- (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).

(8) For the purposes of this section, proceedings on an application under section 8 or 10 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).

## EXPLANATORY NOTES

### *Clause 22*

This clause implements Recommendations 47, 48 and 49 (paragraphs 9.14-9.24). It is concerned with the making of a restraint order in relation to property which may be realised to satisfy a confiscation order.

### *Subsection (1)*

This subsection enables a restraint order to be made in any of the situations specified in subsections (1) and (2).

### *Subsection (2)*

This subsection implements Recommendation 47(1) and provides that a restraint order may be made where proceedings have been instituted (as defined in clause 38(3)) but not concluded (as defined in subsection (6) below) for an offence in respect of which it is competent to make a confiscation order (see clause 1(2)); and either a confiscation order has been made, or it appears to the court that such an order may be made if the accused is convicted.

### *Subsection (3)*

This subsection implements Recommendations 48(1), 49(1) and 49(2) and sets out the three further situations in which a restraint order may be made. Paragraph (a) provides for a case where proceedings are to be instituted within 28 days and it appears to the court that in the event of conviction a confiscation order may be made (see paragraphs 9.2, 9.22). Paragraph (b) provides that a restraint order may be made after sentence where the prosecutor has applied, or proposes to apply within 28 days, either

- (i) under clause 8 on the grounds that there has been an increase in the benefit or amount that might be realised or
- (ii) under clause 10 on the grounds that proceeds of the offence have been discovered after conviction and, in either case, it appears to the court that the prosecutor's application may be granted (see paragraph 9.23).

### *Subsection (4)*

This subsection implements Recommendation 48(2) and requires the court to recall a restraint order made in terms of subsection (3) before the institution of proceedings or the making of an



application if proceedings are not instituted, or an application is not made, within the 28 days referred to in that subsection.

*Subsection (5)*

This subsection implements Recommendation 51(5) and provides that where proceedings have been concluded, the prosecutor must apply for the recall of the order and the court must grant the application (see paragraph 9.26).

*Subsection (6)*

This subsection implements Recommendation 51(7) and requires the prosecutor to enter in the appropriate property register an order recalling a restraint order made in relation to heritable property in Scotland (see paragraph 9.26).

*Subsection (7)*

This subsection implements Recommendation 47(3). It lists the various circumstances in which proceedings are concluded for the purposes of this clause. This list is derived from section 47(5) of the 1987 Act, extended to summary proceedings (see paragraph 9.17).

*Subsection (8)*

This subsection implements Recommendation 51(6) and specifies when proceedings on an application under clause 8 or clause 10 are concluded for the purposes of this clause (see paragraph 9.26).

Restraint orders  
in relation to  
forfeitable  
property.

**23.**-(1) A restraint order may be made in respect of a person under section 21(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) Where a restraint order made in relation to heritable property situated in Scotland is recalled, the prosecutor shall forthwith record a certified copy of the recalling order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(6) 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.

## EXPLANATORY NOTES

### *Clause 23*

This clause implements Recommendations 94 and 95 (paragraphs 16.9-16.11). It is concerned with the making of a restraint order in relation to property which is, or is liable to be, subject to a suspended forfeiture order.

### *Subsection (1)*

This subsection implements Recommendation 94(3)(a). It specifies the first of the two sets of circumstances in which a restraint order may be made. Under this subsection an order may be made where proceedings have been instituted (as defined in clause 38(3)) but not concluded (as defined in subsection (5) below); and either a suspended forfeiture order has been made, or it appears to the court that such an order may be made if the accused is convicted.

### *Subsection (2)*

This subsection implements Recommendation 94(3)(b) and prescribes the second set of circumstances referred to above. Here, an order may be made where proceedings are to be

instituted within 28 days and it appears to the court that a suspended forfeiture order may be made if the accused is convicted.

*Subsection (3)*

This subsection and subsections (4) and (5) implement Recommendation 95(1). This subsection requires the court to recall a restraint order made in terms of subsection (2) if proceedings are not instituted within the 28 days referred to in that subsection.

*Subsection (4)*

This subsection provides that where proceedings have been concluded, the prosecutor must apply for the recall of the order and the court must grant the application.

*Subsection (5)*

This subsection requires the prosecutor to enter in the appropriate property register an order recalling a restraint order made in relation to heritable property in Scotland.

*Subsection (6)*

This subsection specifies when proceedings are concluded for the purposes of this clause.

Variation and recall of restraint orders.

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

- (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 Part I of this Act, 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 25(8) of this Act, the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted.

## EXPLANATORY NOTES

### *Clause 24*

This clause makes further general provisions about restraint orders, in addition to those in clause 21. It provides for applications for their variation and recall and for appeals against decisions on such applications.

### *Subsection (1)*

This subsection implements Recommendations 55(1) and 95(1). It enables the court to vary or recall a restraint order on the application of the prosecutor or any other person having an interest. "Any person having an interest" (in paragraph (b)) includes both the accused and the recipient of a caught gift. (See paragraph 9.27.) The recipient of a caught gift, however, must satisfy the conditions prescribed by subsection (2).

### *Subsection (2)*

This provision implements Recommendation 51(3). It sets out the three conditions which must be satisfied by an applicant who is the recipient of a gift caught by clause 4 of the Bill. The grounds are the same as those in clause 4(6). (See paragraphs 4.28-4.30, 9.27.)

### *Subsection (3)*

This provision implements Recommendations 51(2) and 95(1). It forbids, while an application is pending, the realisation of property in relation to which the restraint order was made. (See paragraphs 9.26, 16.11.)

### *Subsection (4)*

This subsection implements Recommendations 51(4) and 95(1). It provides that where a restraint order has been recalled, the court may order that the applicant's property should cease to be realisable or liable to forfeiture. (See paragraphs 9.27, 16.11.)

*Subsection (5)*

This subsection implements Recommendations 52(1) and 95(1). It provides for an appeal from the sheriff or the Lord Ordinary to the Inner House of the Court of Session. (See paragraphs 9.29, 9.30, 16.10.)

*Subsection (6)*

This subsection implements Recommendations 54(3) and 95(1). Where an interdict has been granted in connection with a restraint order (see the notes to clause 25(8)-(10)) and that order is recalled, the clerk of court is obliged so to inform forthwith each of the persons interdicted. (See paragraph 9.32.)

Inhibition and  
arrestment of  
property affected  
by restraint order  
or by interdict.

25.-(1) On the application of the prosecutor, the court may, in respect of-

- (a) heritable property in Scotland affected by a restraint order (whether such property generally or particular such property) make an order inhibiting any person interdicted by the order or, in relation to that property, under subsection (8) below; and
- (b) moveable property so affected (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 certified copy of an order under subsection (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the prosecutor against the person named in the order had been duly signeted, executed and recorded as aforesaid.

(3) An order under subsection (1)(a) above so far as it inhibits a person may be recalled or restricted by an order of the court, and an order under this subsection shall take effect (on the recording of a certified copy of the order made under this subsection in the Register of Inhibitions and Adjudications) as from the date of its making.

(4) Without prejudice to the effect of recording a certified copy under subsection (2) or (3) above, the prosecutor shall take all reasonable steps to intimate the making of an order under subsection (1) or (3) above to persons affected thereby.

(5) A warrant under subsection (1)(b) 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,

(6) The fact that a certified copy of an order has been recorded under subsection (2) above or an arrestment has been executed under

subsection (5) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Act in respect of that property.

(7) No inhibition to which a certified copy recorded under subsection (2) above relates, or arrestment executed under subsection (5) above, shall have effect once, or in so far as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall-

- (a) apply to the court for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and
- (b) transmit a certified copy of any order recalling or restricting the inhibition to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register.

(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) of section 21 of this Act shall apply in relation to subsection (8) above as they apply in relation to that section; and subsections (1), (2), (4) and (5) of section 24 of this Act shall apply in relation to an interdict under the said subsection (8) 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.

## EXPLANATORY NOTES

### *Clause 25*

This clause implements Recommendations 54, 55(1) and 95(2). It gives the court three ancillary powers in relation to property affected by a restraint order: (1) to order inhibition with regard to heritable property in Scotland, (2) to grant warrant for the arrestment of moveable property and (3) to interdict a person not named in the order from dealing with the property. (See paragraphs 9.32-9.36 (realisable property) and 16.9-16.11 (forfeitable property).)

### *Subsection (1)*

This subsection confers the first two powers mentioned above.

### *Subsection (2)*

This subsection provides that a certified copy of the order for inhibition is to be recorded in the Register of Inhibitions and Adjudications. The order is to take effect from the date of recording.

*Subsection (3)*

This subsection provides for the recall or restriction of an order for inhibition. The order for recall or restriction is to take effect from the date of its making. (See paragraph 9.34.)

*Subsection (4)*

This subsection requires the prosecutor to take all reasonable steps to intimate an order under subsection (1) or (3) to the persons affected.

*Subsection (5)*

This subsection equiparates a warrant for arrestment granted under subsection (1) to a warrant granted on the dependence of an action for debt at the instance of the prosecutor.

*Subsection (6)*

This subsection provides that the recording of an order for inhibition or the execution of an arrestment does not affect an administrator's powers under the Bill with regard to that property.

*Subsection (7)*

This subsection provides that an inhibition or arrestment under this clause is to cease to have effect if the original restraint order ceases to have effect. In that event the prosecutor must make an appropriate application to the court and ensure that the recall or restriction of an inhibition is reflected in the Register of Inhibitions and Adjudications.

*Subsection (8)*

Subsections (8), (9) and (10) implement Recommendations 54 and 95(2) (paragraphs 9.32, 16.11). This subsection provides that where a restraint order has been made the court may interdict a person who is not subject to it from dealing with the property it affects.

*Subsection (9)*

This subsection applies to such an interdict certain other provisions of the Bill: clauses 21(2)(a) (reasonable living expenses), 21(3)(a) (order made *ex parte* and in chambers) and 24(1), (2), (4) and (5) (variation, recall and appeal).

*Subsection (10)*

The interdict must be intimated to each person affected by it (see paragraph 9.25).

Administrators.

**26.** Schedule 1 to this Act shall have effect as regards the appointment of administrators under this Act.

## EXPLANATORY NOTES

### Clause 26

This clause introduces Schedule 1 which makes provision as to administrators appointed in relation to realisable or forfeitable property.

### PART IV

#### RECIPROCAL ARRANGEMENTS FOR ENFORCEMENT OF ORDERS

Recognition and enforcement of orders made in England and Wales

27.-(1) An order to which this section applies shall, subject to this section and section 28 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.

(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 28 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 sections 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 28 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 Part of this Act, "High Court" means the High Court of England and Wales.

## EXPLANATORY NOTES

### *PART IV*

This Part (clauses 27 to 34) deals with reciprocal arrangements for the enforcement of orders (see Part XVIII of the report).

#### *Clause 27*

This clause, together with clauses 28 and 29 and provisions in Schedule 5, implements Recommendation 108 (paragraph 18.4). It deals with the enforcement in Scotland of orders made in England and Wales under Part VI of the 1988 Act which is concerned with the confiscation of the proceeds of an offence to which that Part applies. These clauses replace sections 90 to 93 of the 1988 Act.

#### *Subsection (1)*

This subsection provides that the orders to which this clause applies (see subsection (5)) are to have effect in the law of Scotland but are to be enforced in Scotland only in accordance with this clause and clause 28.

#### *Subsection (2)*

This subsection provides that a receiver's functions for the purposes of the specified sections of the 1988 Act are to have effect in the law of Scotland. A receiver may be appointed in respect of realisable property affected by a restraint order (section 77(8)) or a confiscation order (section 80(2)). Section 77 is concerned with restraint orders, section 80 with the realisation of property and section 81 with the application of the proceeds of realisation and other sums.

#### *Subsection (3)*

This subsection provides that where an order to which this clause applies (see subsection (5)) is registered under this clause, the order is to have effect in the three respects mentioned as if it had originally been made in the Court of Session.

*Subsection (4)*

This subsection prohibits the enforcement in Scotland of a charging order made under section 78 of the 1988 Act in relation to realisable property or interest or dividends payable in respect of such property.

*Subsection (5)*

This subsection specifies the orders to which this clause applies.

*Subsection (6)*

This subsection provides that references to an order under section 77 include references to a discharge of a restraint order under section 76(4) of the 1988 Act if proceedings in respect of the offence are not instituted within such time as the court considers reasonable.

*Subsection (7)*

This subsection defines "order" in this clause and in clause 28.

*Subsection (8)*

Section 80(6) of the 1988 Act empowers the court to order a holder of realisable property other than the defendant or the recipient of a gift caught by Part VI of that Act to buy out the beneficial interest of the defendant or recipient in the property by making a payment to the receiver. This subsection provides that nothing in such an order is to prejudice 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.

*Subsection (9)*

This subsection provides a definition of "High Court" for this Part of the Bill. Elsewhere in the Bill, by virtue of clause 38(2), it has the meaning assigned by section 462(1) of the 1975 Act: the High Court of Justiciary and any court held by the Lords Commissioners of Justiciary, or any of them.

Provisions  
supplementary to  
s. 27.

**28.**-(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 27 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 27 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 enforce 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 27 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 Administration of Justice (Scotland) Act 1972 (extended power to order inspection 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 27 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.

## EXPLANATORY NOTES

### *Clause 28*

As already noted, this clause, together with clauses 27 and 29, implements Recommendation 108. It restates, with modifications, sections 91 and 93 of the 1988 Act.

### *Subsection (1)*

This subsection requires the Court of Session to direct the registration of orders to which clause 27 applies.

### *Subsection (2)*

This subsection provides that clauses 27(1) and (3) and 28(1) are subject to any rules of court about (1) enforcement; (2) the sisting of proceedings for the enforcement of orders; and (3) the modification or cancellation of the registration if the order is modified or revoked or ceases to have effect.

### *Subsection (3)*

This subsection provides that clauses 27 and 28 are without prejudice to any enactment or rule of law about the effect of notice or the want of it in relation to orders of the High Court of England and Wales.

*Subsection (4)*

This subsection gives the Court of Session the power to make orders for the inspection of documents and other matters under section 1 of the Administration of Justice (Scotland) Act 1972 in relation to proceedings brought, or likely to be brought, under Part VI of the 1988 Act in the High Court of England and Wales.

*Subsection (5)*

This subsection confers on the Court of Session certain supplementary powers.

*Subsection (6)*

This subsection restates section 93 of the 1988 Act and provides for the proof in Scotland of High Court orders made under Part VI of the 1988 Act.

Inhibition and arrestment of Scottish property affected by order registered under s. 27.

**29.**-(1) On the application of the prosecutor, the Court of Session may, in respect of-

- (a) heritable property in Scotland affected by a restraint order registered under section 27 of this Act (whether such property generally or particular such property) make an order inhibiting any person with an interest in that property;
- (b) moveable property so affected (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 certified copy of an order under subsection (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the prosecutor against the person named in the order had been duly signeted, executed and recorded as aforesaid.

(3) An order under subsection (1)(a) above so far as it inhibits a person may be recalled or restricted by an order of the court, and an order under this subsection shall take effect (on the recording of a certified copy of the order made under this subsection in the Register of Inhibitions and Adjudications) as from the date of its making.

(4) Without prejudice to the effect of recording a certified copy under subsection (2) or (3) above, the prosecutor shall take all reasonable steps to intimate the making of an order under subsection (1) or (3) above to persons affected thereby.

(5) A warrant under subsection (1)(b) 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.

(6) The fact that a certified copy of an order has been recorded under subsection (2) above or an arrestment has been executed under subsection (5) 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.

(7) No inhibition to which a certified copy recorded under subsection (2) above relates, or arrestment executed under subsection (5) above, shall have effect once, or insofar as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall-

- (a) apply to the court for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and
- (b) transmit a certified copy of any order recalling or restricting the inhibition to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register.

(8) Any power of the Court of Session to recall, loose or restrict inhibitions or arrestments shall, in relation to an order containing an inhibition under subsection (1)(a) above or an arrestment proceeding upon a warrant under subsection (1)(b) 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.

(9) For the purposes of this section "prosecutor" includes, where an order has been made by virtue of subsection (2) of section 76 of the 1988 Act and the information mentioned in that subsection has not yet been laid, the person as regards whom the court which made the order was satisfied as is mentioned in subsection (3)(b) of the said section 76.

#### EXPLANATORY NOTES

##### *Clause 29*

This clause restates, with modifications, section 92 of the 1988 Act. It makes supplementary provision for the enforcement of restraint orders registered in Scotland under clause 27 by giving the Court of Session additional powers to order inhibition and arrestment. (See paragraphs 9.33 to 9.37 and the notes to clause 25.)

##### *Subsection (1)*

This subsection is in the same terms as clause 25(1) except that here the Court of Session has exclusive jurisdiction and the restraint orders referred to are those registered under clause 27.

*Subsections (2)-(5)*

These subsections are in the same terms as subsections (2)-(5) of clause 25.

*Subsection (6)*

This subsection is in the same terms as clause 25(6) except that here the arrestment or inhibition is not to prejudice the exercise of a receiver's powers (as opposed to an administrator's powers under the Scottish procedure).

*Subsection (7)*

This subsection is in the same terms as clause 25(7).

*Subsection (8)*

This subsection, restating section 92(4) of the 1988 Act, provides that any powers of the Court of Session to recall, loose or restrict inhibitions or arrestments are to be exercised with a view to achieving the purposes specified in section 80 of the 1988 Act (which deals with the realisation of property).

*Subsection (9)*

This subsection defines "prosecutor" for the purposes of this clause. Section 76(2) of the 1988 Act provides for the making of a restraint order before a person is charged.

Enforcement of  
Northern Ireland  
orders.

30.-(1) Her Majesty may by Order in Council provide that, for the purposes of Part III of and Schedules 1 and 2 to this Act, 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 Part I of this Act applies included a reference to any offence under the law of Northern Ireland (not being an offence to which that Part 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 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.

#### EXPLANATORY NOTES

##### *Clause 30*

This clause implements Recommendation 109 (paragraph 18.5). It restates, with modifications, section 95 of the 1988 Act which provides for the introduction by delegated legislation of arrangements for enforcing, in Scotland, Northern Ireland legislation equivalent to Part VI of the 1988 Act.

##### *Subsection (1)*

This subsection provides that an Order in Council may make appropriate modifications to this Bill.

##### *Subsection (2)*

This subsection states that the Order in Council may provide for the provisions mentioned in subsection (1) to have effect with regard to Northern Ireland subject to further modifications specified in the Order.

##### *Subsection (3)*

This subsection provides that the Order in Council may contain incidental, consequential and transitional provisions.

##### *Subsection (4)*

This subsection provides that the Order in Council is to be subject to the negative resolution procedure.

Enforcement of orders made outside United Kingdom.

**31.-(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, Part I of this Act and Part III of this Act 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 32 of this Act; and
- (ii) such incidental, consequential and transitional provision,

as appears to Her Majesty to be expedient.

(2) In this Part of this Act-

"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 Part I of this Act 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 Part I or Part III of this Act 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.

## EXPLANATORY NOTES

### *Clause 31*

This clause and clause 32 implement Recommendation 113 which is concerned with the enforcement in Scotland of confiscation and ancillary orders made outside the United Kingdom relative to offences similar to, or corresponding with, offences to which Part I of the Bill applies. (See paragraphs 18.7 to 18.9).

### *Subsection (1)*

Paragraph (a) provides that in relation to a country or territory outside the United Kingdom designated by an Order in Council (a "designated country"), "external confiscation orders" (as defined in subsection (2)) are to be enforceable in Scotland in the same way as confiscation orders and restraint orders made under the Bill are enforceable in Scotland. Paragraph (b) provides that the order may also provide for the evidence or proof of any matter and make incidental provisions.



*Subsection (2)*

This subsection defines "designated country" and "external confiscation order". The latter definition is framed broadly, for the reasons given in paragraph 18.8. The inclusion of "property" covers external confiscation orders directed at specific items of property. "Economic advantage" covers benefits from the commission of an offence which may not be regarded as rewards or property. The inclusion of "economic advantage" reflects the provision about "benefit" in clause 2(1) of the Bill.

*Subsection (3)*

This subsection is a standard form provision.

*Subsection (4)*

This subsection provides that the Order in Council may modify Parts I and III of this Bill.

*Subsection (5)*

This subsection provides that the Order in Council is to be subject to the negative resolution procedure.

Registration of external confiscation orders.

**32.**-(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-

- (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.

## EXPLANATORY NOTES

### *Clause 32*

This clause further implements Recommendation 113 by providing for the registration in Scotland of "external confiscation orders" as defined in clause 31(2).

#### *Subsection (1)*

This subsection empowers the Court of Session to register an external confiscation order if the specified conditions are met.

#### *Subsection (2)*

This subsection deals with the meaning of "appeal" in subsection (1)(a).

#### *Subsection (3)*

This subsection provides for the cancellation of the registration of an external confiscation order if it appears to the Court that it has been satisfied, whether in either of the ways mentioned here and in clause 22(6)(f), or otherwise.

Enforcement of  
Scottish orders in  
England and  
Wales.

33.-(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 Part I, II or III of this Act 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 1 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 Part I, II or III of this Act 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 aforesaid purposes 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 aforesaid purposes.
- (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.

#### EXPLANATORY NOTES

##### *Clause 33*

This clause implements Recommendations 106 and 116 (paragraphs 18.3, 18.14). It provides for the recognition and enforcement in England and Wales of orders and functions under Parts I, II and III of this Bill and of forfeiture orders made in Scotland under any enactment other than the Prevention of Terrorism (Temporary Provisions) Act 1989. The clause is in substantially the same terms as section 24A of the 1986 Act as inserted by section 31 of the 1987 Act.

##### *Subsection (1)*

Under this subsection provision may be made by Order in Council for the three purposes mentioned: (a) to enable property in England and Wales which is realisable property (as defined in clause 3(1) of the Bill) to be used or realised for the payment of any amount payable under a Scottish confiscation order (as defined in clause 38(1)); (b) to secure that where no confiscation order has been made in Scotland, property in England and Wales which is realisable property is available to satisfy such an order if one is made; and (c), to enforce in England and Wales Scottish restraint orders, suspended forfeiture orders and forfeiture orders made in terms of any enactment other than the 1989 Act (see paragraph 18.14). The latter Act has its own scheme for the enforcement of Scottish orders in England and Wales (1989 Act, Schedule 4, paragraphs 8 and 9).

*Subsections (2) and (3)*

These subsections list the particular matters for which the Order may make provision: the recognition and enforcement of orders under Parts I, II and III of the Bill, the functions of an administrator appointed under Schedule 1 to the Bill, and the proof of Scottish orders in England and Wales.

*Subsection (4)*

This subsection enables the Order to amend or apply (with or without modifications) any enactment.

*Subsections (5) and (6)*

These subsections are in standard form: see the notes to clause 30(3) and (4).

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

34.-(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 31 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.

## EXPLANATORY NOTES

*Clause 34*

This clause implements Recommendations 115 and 119 (paragraphs 18.11, 18.12, 18.19). It provides for the enforcement outside the United Kingdom of confiscation and ancillary orders made in Scotland (and is thus the counterpart of section 32 of the 1987 Act amended as proposed in Recommendation 114: see paragraph 18.12). It also provides for the enforcement outside the United Kingdom of restraint orders and suspended forfeiture orders made under this Bill, and of forfeiture orders made under any other enactment.

*Subsection (1)*

Under this subsection an Order in Council may provide for the enforcement in a designated country (as defined in clause 31(2)) of the orders referred to above.

*Subsection (2)*

This subsection provides that the Order may include a direction that proceeds arising out of action taken in a designated country with a view to satisfying a confiscation order which are retained there are to be treated as reducing the amount payable under the order. (For the rationale of this provision see paragraph 18.11.)

*Subsection (3)*

This subsection enables the Order in Council to amend or apply (with or without modification) any enactment.

*Subsection (4)*

This subsection applies the specified provisions of clause 31 to orders under this clause.

**PART V**

**MISCELLANEOUS AND GENERAL**

Sequestration etc of person holding realisable or forfeitable property.

**35.**-(1) Schedule 2 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 the said Schedule 2, "forfeitable property" means property which is or is liable to be the subject of a suspended forfeiture order.

**EXPLANATORY NOTES**

*PART V*

*Clause 35*

*Subsection (1)*

This subsection implements Recommendations 57(2) and 98 and introduces Schedule 2 which makes provision with regard to the sequestration, bankruptcy, winding up or receivership of persons or companies holding realisable or forfeitable property.

*Subsection (2)*

This subsection defines "forfeitable property" for the purposes of this clause and Schedule 2.

Disposal of family home under Part I or II.

**36.**-(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 beyond reasonable doubt that the person's interest in his family home has been acquired by means of the benefit derived from the commission of the offence concerned; or

(b) a person's family home has been forfeited to the Crown under section 17 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 was 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-

(a) "family home", in relation to any person (in this subsection referred to as "the relevant person") means any property in

which the relevant person had (whether alone or in common with any other person) a right or interest, being property which was 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 or the family;

- (b) "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
- (c) "relevant consent" means in relation to the disposal of any right or interest in a family home-
  - (i) 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;
  - (ii) where sub-paragraph (i) 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.

#### EXPLANATORY NOTES

##### *Clause 36*

This clause implements Recommendations 14(1) and 105 (paragraphs 4.15-4.18, 17.11) and provides that where a confiscation order has been made or a person's family home (defined in subsection (5)(a)) has been forfeited under the Bill, the Crown is not entitled to dispose of any right or interest in the family home without either the consent of the family members involved or the authority of the court.

##### *Subsection (1)*

This subsection specifies the circumstances in which the protection of the clause is available. Where a confiscation order has been made, the prosecutor must have failed to satisfy the court beyond reasonable doubt that the family home has been acquired by means of the benefit derived from the commission of the offence (see paragraph 4.18). The clause also applies where the family home has been forfeited under clause 17 (see paragraph 17.11).

##### *Subsection (2)*

This subsection and subsections (3), (4) and (5) are analogous to section 40(1) to (4) of the Bankruptcy (Scotland) Act 1985 (see paragraphs 4.16 to 4.18). This subsection provides that the Crown may not dispose of any right or interest in the person's family home unless it first obtains the relevant consent (defined in subsection (5)(c)) or the authority of the court.

*Subsection (3)*

This subsection prescribes the powers and duties of the court when considering an application by the Crown under subsection (2)(b). It must have regard to all the circumstances, including those listed. "Child of the family" is defined in subsection (5)(b). The court may (1) grant the application, (2) postpone the granting of the application for a period not exceeding 12 months, or (3) grant the application subject to conditions.

*Subsection (4)*

This subsection applies subsection (3) to an action brought by the Crown (a) for division and sale of the family home or (b) for the purpose of obtaining vacant possession of it.

*Subsection (5)*

These definitions are derived from those in section 40(4) of the Bankruptcy (Scotland) Act 1985 which are discussed in paragraphs 4.16 and 4.17.

*"Family home"*

This definition is intended to protect property occupied as a residence by the accused and his spouse, or by his spouse or former spouse, or by the accused and a child of the family. Thus the accused is not protected if he resides in the property alone, or with a friend, or with a parent. The definition could apply to more than one house in which the accused has a right or interest: for example, to a house occupied by himself and his present spouse and to a house occupied by his former spouse.

*"Child of the family"*

This definition has no age-limit and includes any child or grandchild of the accused or his spouse or former spouse, and any person whom any of them has treated as if he or she were his or her child.

*"Relevant consent"*

Where the family home is occupied by the spouse or former spouse, the consent of that person is required. If the house is occupied by the accused with a child of the family but not with a spouse or former spouse, the consent of the accused himself is required.

Forfeiture of property where accused has died.

37.-(1) This section applies where at any time after criminal proceedings have been instituted against an accused for an offence to which Part I of this Act 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 Part I of this Act,

may, subject to subsection (5) below, make an order which shall have the effect of forfeiting that property.

(3) The Court of Session may, without prejudice to any other power available to it, at any time before the determination of the case, allow an amendment of the application under subsection (2) above if the amendment is of a type which could competently have been made in an indictment or complaint under section 123 or 335 of the 1975 Act in the criminal proceedings.

(4) An application under subsection (2) above shall be made as soon as is reasonably practicable after the relevant information becomes available to the Lord Advocate, but, in any event, within 6 years commencing with the date of death of the accused.

(5) An application under subsection (2) above in relation to property such as is mentioned in paragraph (b)(ii) of that subsection shall be served on the recipient of the gift and, if he satisfies the Court on the balance of probabilities-

(a) that he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence or, if more than one, in contemplation of any of the offences or after the commission of the earlier or the earliest of the offences to which the proceedings for the time being relate; and

(b) that he was not associated with the giver in the commission of the offence; and

(c) that he would suffer hardship if the application were granted,

the Court may refuse to make an order as mentioned in that subsection.

(6) Where property has been forfeited under this section, then, if the Court of Session, on an application being made to it is satisfied by the applicant on the balance of probabilities that he was the owner of, or otherwise had an interest in, the property immediately before such forfeiture, it shall make an order under subsection (7) below.

(7) An order under this subsection shall direct the Crown, if the applicant-

(a) was the owner of the property, to return it to him if it is

reasonably practicable to do so or, if not, to pay compensation to him of an amount determined under subsection (8) below; or

- (b) otherwise had an interest in the property, to pay compensation to him of an amount corresponding to the value of such interest.

(8) For the purposes of subsection (7) above, the amount determined under this subsection shall be an amount equal to the amount of any consideration received for the property or the value of any such consideration at the time of the disposal, or, if no consideration was received, an amount equal to the value of the property at the time of the disposal.

(9) Property which has been forfeited under this section shall be dealt with by the Crown in such manner as seems to it to be appropriate.

(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,

and subsections (2) to (7) of section 25 of this Act shall, subject to any necessary modifications, apply for the purposes of this subsection as they apply for the purposes of subsection (1) of that section.

1968 c. 70.

(11) Proceedings under this section are civil proceedings for the purposes of section 10 of the Law Reform (Miscellaneous Proceedings)(Scotland) Act 1968.

## EXPLANATORY NOTES

### *Clause 37*

This clause implements Recommendations 120 to 124 in Part XIX of the report. It enables the Crown to apply to the Court of Session for the forfeiture of property in a case where proceedings have been instituted against an accused for an offence to which Part I of the Bill applies but he has died before being sentenced. In contrast to confiscation proceedings, this procedure is competent only in a civil court, the Court of Session. In contrast to other forfeiture proceedings, a forfeiture order made in these proceedings relates to property which has been obtained in connection with the commission of an offence or which is a gift caught by Part I of the Bill. (A suspended forfeiture order relates to property used or intended to be used in the commission of an offence (see clause 15(2))). If the accused has been convicted, there is a rebuttable presumption that he committed the offence. If he has not been convicted, the court must be satisfied beyond reasonable doubt that he did commit the offence. Protection is

afforded to an innocent recipient of a caught gift and to a third party with an interest in property which has been forfeited in error.

*Subsection (1)*

This subsection implements Recommendation 120 (paragraphs 19.4-19.8) and provides that this clause applies where a confiscation order would have been competent in the event of conviction (because proceedings have been instituted against the accused for an offence to which Part I of the Bill applies) but the accused has died before being sentenced or otherwise dealt with.

*Subsection (2)*

This subsection implements Recommendation 121(1) and (4) (paragraphs 19.1-19.15). The application may be brought only by the Lord Advocate in the Court of Session. The Lord Advocate must satisfy the Court beyond reasonable doubt (a) that the accused committed the offence and (b) that there is property (i) which the accused obtained in connection with its commission or (ii) which is a gift caught by Part I of this Bill. "Property" is defined in clause 2(4).

*Subsection (3)*

This subsection implements Recommendation 121(3) (paragraph 19.11). It entitles the Court to allow any amendment of the application which does not change the character of the offence with which the accused was charged in the proceedings.

*Subsection (4)*

This subsection implements Recommendation 122 (paragraph 19.18) by making provision as to the period after the death within which the application must be made.

*Subsection (5)*

This subsection implements Recommendation 121(6) (paragraph 19.16). An application relative to an alleged caught gift must be served on the alleged recipient. If the Crown proves to the criminal standard of proof that the property is a caught gift, the court has a discretion not to order forfeiture if the recipient proves, to the civil standard, the matters already discussed in relation to clauses 4(6) and 24(2).

*Subsections (6), (7) and (8)*

These subsections implement Recommendation 124 (paragraph 19.21). They protect the interests of a third party whose property has been forfeited by mistake. Under subsection (5) he may apply to the Court for the return of the property or for compensation. He must satisfy the Court to the civil standard of proof that he was the owner of the property or had an interest in it. Under subsection (6), if the Court is so satisfied, it must direct the Crown to return the property to the applicant or to pay compensation. The amount of compensation is determined in accordance with subsection (7)(b) or (8), which are in the same terms as clause 19(2)(b) and (5).

*Subsection (9)*

This subsection is in the same terms as clause 17(5).

*Subsection (10)*

This subsection implements Recommendation 123 (paragraphs 19.19, 19.20). It provides a procedure whereby property may be preserved by inhibition or arrestment pending the determination of the application for forfeiture in a case where a restraint order is not already in force. The procedure is analogous to that available where property is affected by a restraint order (see the notes to clause 25).

*Subsection (11)*

This subsection implements Recommendation 121(5) (paragraph 19.12) and applies the general rule as to convictions as evidence in civil proceedings. Where the accused has died after conviction and is proved to have been convicted of the offence, he is taken to have committed the offence unless the contrary is proved.

Interpretation.

**38.**-(1) In this Act, unless the context otherwise requires-

1975 c. 21. "the 1975 Act" means the Criminal Procedure (Scotland) Act 1975;

1987 c. 41. "the 1987 Act" means the Criminal Justice (Scotland) Act 1987;

1988 c. 33. "the 1988 Act" means the Criminal Justice Act 1988;

1989 c.4. "the 1989 Act" means the Prevention of Terrorism (Temporary Provisions) Act 1989;

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

"clerk of court" includes the sheriff clerk;

"confiscation order" means an order made under section 1(1), 8(4), 9(3) or 10 of this Act;

"interest", in relation to property, includes right;

"property" has the meaning assigned by section 2 of this Act;

"realisable property" has the meaning assigned by section 3 of this Act;

"restraint order" means an order made under section 21 of this Act;

"suspended forfeiture order" means an order made under section 15(2) of this Act.

(2) This Act shall (except where the context otherwise requires) be

construed as one with the 1975 Act.

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

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

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

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

#### EXPLANATORY NOTES

##### *Clause 38*

##### *Subsection (1)*

In the definition of "accused" a "person" includes a body of persons corporate or unincorporate (Interpretation Act 1978, Schedule 1).

##### *Subsection (2)*

There is a provision to the same effect as this subsection in section 47(2) of the 1987 Act (see paragraph 20.7).

##### *Subsection (3)*

This subsection implements Recommendation 47(2) (paragraph 9.16). It lists six events upon which, for the purposes of the Bill, proceedings for an offence are to be taken to be instituted. Where more than one of them have occurred, the earliest is to be taken to institute the proceedings.

##### *Subsection (4)*

This subsection provides that a reference to a conviction includes a reference to a finding that the offence has been committed. Such a finding is made by a summary criminal court when granting an absolute discharge or making a probation order. (See paragraphs 3.4, 20.7.)

Transitional provisions, minor and consequential amendments and repeals.

39.-(1) Where a person is charged with an offence in relation to which provision is made by Part I of this Act, being an offence committed before the coming into force of the said Part I, that Part 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 Part II of this Act, 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 the said Part II.

1987 c.41

(3) The Criminal Justice (Scotland) Act 1987 shall be amended as specified in Schedule 3 to this Act.

(4) The enactments mentioned in Schedule 4 to this Act shall have effect subject to the amendments there specified (being minor amendments or amendments consequential on the provisions of this Act).

4 & 5 Geo. 5 c. 59.

(5) Section 28 of the Bankruptcy Act 1914 (effect of order of discharge) shall have effect as if amounts payable under confiscation orders were debts excepted under subsection (1)(a) of that section.

1974 c. 53.

(6) In section 1(2)(a) of the Rehabilitation of Offenders Act 1974 (failure to pay fines etc not to prevent person becoming rehabilitated) the reference to a fine or other sum adjudged to be paid by or on a conviction does not include a reference to an amount payable under a confiscation order.

1986 c. 45.

(7) Section 281(4) of the Insolvency Act 1986 (discharge of bankrupt not to release him from liabilities in respect of fines, etc) shall have effect as if the reference to a fine included a reference to a confiscation order.

1985 c. 66.

(8) Section 55(2) of the Bankruptcy (Scotland) Act 1985 (discharge of debtor not to release him from liabilities in respect of fines, etc) shall have effect as if the reference to a fine included a reference to a confiscation order.

(9) The enactments set out in Schedule 5 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

## EXPLANATORY NOTES

### *Clause 39*

#### *Subsection (1)*

This subsection implements Recommendation 126(1) (paragraph 20.8). It provides that the powers conferred by Part I of the Bill are not to be exercised in proceedings for an offence committed before Part I comes into force.

*Subsection (2)*

This subsection implements Recommendation 126(2) (paragraph 20.8). It provides for a case where, after Part II of the Bill comes into force, a person is convicted of an offence committed before its coming into force. The court may exercise the powers of forfeiture conferred by section 223 or 436 of the 1975 Act (notwithstanding the repeal of these sections by Schedule 5 to the Bill), and may not exercise the powers conferred by Part II.

*Subsection (3)*

This subsection introduces Schedule 3 to the Bill, which contains amendments to the Criminal Justice (Scotland) Act 1987. (See paragraphs 20.4 and 20.5.)

*Subsection (4)*

This subsection introduces Schedule 4 to the Bill, which contains minor and consequential amendments to statutes other than the 1987 Act.

*Subsections (5) to (8)*

These subsections make minor amendments, corresponding to those made by section 45(1), (2), (4) and (5)(c) of the 1987 Act, to take account of confiscation orders made in terms of the Bill.

*Subsection (9)*

This subsection introduces Schedule 5 to the Bill, which is concerned with repeals.

Citation,  
Commencement  
and extent.

40.-(1) This Act may be cited as the Proceeds of Crime (Scotland) Act 1994.

(2) This Act, except this section, shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) Subject to subsections (4) to (6) below, this Act extends only to Scotland.

(4) This section, section 35 of and Schedule 2 to this Act extend to England and Wales as well as to Scotland.

(5) Section 33 of this Act extends only to England and Wales.

(6) Section 30 of and paragraph 15 of Schedule 4 to this Act extend only to Northern Ireland.

## EXPLANATORY NOTES

### *Clause 40*

These are provisions in the usual form on short title, commencement and extent. The reasons for the short title are given in paragraph 20.1.



## SCHEDULES

### SCHEDULE 1

#### ADMINISTRATORS

Section 26.

##### *Appointment of Administrators*

1.-(1) On the application of the prosecutor the court may as regards property-

- (a) affected by a restraint order or a suspended forfeiture order, appointed a person to manage, or otherwise deal with, the property; or
- (b) where a suspended forfeiture order or a confiscation order has been made, appoint a person (or empower an appointee under paragraph (a) above) to realise the property,

in accordance with the court's directions and may (whether on making the appointment or from time to time) require any person having possession of the property to give possession of it to the appointee (any such appointee being in this Act referred to as an "administrator").

(2) A requirement under sub-paragraph (1) above-

- (a) subject to sub-sub-paragraph (b) below, may relate to the property generally or to particular such property and may be subject to such exceptions and conditions as may be specified by the court;
- (b) shall relate to property mentioned in paragraph (b) of section 3(1) of this Act only if expressly stated so to do and then only in so far as the person in whom such property is vested is named in the requirement as being subject to it.

(3) On a requirement being imposed under sub-paragraph (1) above-

- (a) the clerk of court shall forthwith notify-
  - (i) the person in respect of whom the restraint order, or as the case may be the suspended forfeiture order or confiscation order, has been made; and
  - (ii) any other person named in the requirement as being subject to it; and
- (b) any dealing of or with such person in relation to the property shall be of no effect in a question with the administrator unless whoever dealt with the person had, at the time when the dealing

occurred, no knowledge of the appointment.

(4) The court, at the instance of any person having an interest, may at any time-

(a) vary or withdraw a requirement imposed under sub-paragraph (1) above; or

(b) without prejudice to paragraph 4 below or to the powers and duties of an administrator pending a decision under this sub-paragraph, on cause shown, remove the administrator from office.

(5) On the death or resignation of the administrator, or on his removal from office under sub-paragraph (4)(b) above or paragraph 5 below, the court shall appoint a new administrator.

(6) Such of the property (if any) as was, by virtue of paragraph 2(3) below, vested in the administrator who has died, resigned or been removed shall forthwith vest in the new administrator; and any requirement imposed under sub-paragraph (1) above shall, on the person subject to the requirement being notified in writing of the appointment by the appointee, apply in relation to the appointee instead of in relation to his predecessor.

(7) The administration of property by an administrator shall be deemed continuous notwithstanding any temporary vacancy in that office.

(8) Any appointment under this paragraph shall be on such conditions as to caution as the accountant of court may think fit to impose; but the premium of any bond of caution or other security thereby required of the administrator shall be treated as part of his outlays in his acting as such.

(9) Without prejudice to paragraph 5 below, section 6 of the Judicial Factors (Scotland) Act 1889 (supervision of judicial factors) shall not apply in relation to an appointment under this section.

52 & 53 Vict. C.  
39.

## EXPLANATORY NOTES

### *Schedule 1*

This Schedule, which is introduced by clause 26, implements Recommendations 56(2) and 96 by making provision as to administrators appointed in relation to realisable or forfeitable property. Paragraphs 1 to 9, 11 and 12 are derived from sections 13 to 22 and 24 of the 1987 Act as amended by Schedule 3 to the Bill. In the following notes, references to these sections are to their terms as so amended. The effect of the amendments is shown in Appendix B to the report.

These sections of the 1987 Act are also the model for articles 10 to 16 of the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 1991 (SI 1991 No 1468: for amending orders see para 18.17, third footnote). Articles 10 to

16 of that order are concerned with the appointment of administrators for the purpose of enforcing in Scotland orders made by a court overseas for the forfeiture and destruction or other disposal of property used in connection with the commission of a drug trafficking offence.

Most of the provisions of this Schedule apply to both confiscation and forfeiture proceedings. Where any provision applies to only one type of proceedings there is a note to that effect below.

In this Schedule "the court" has the meaning assigned by clause 21(8).

#### *Paragraph 1*

This paragraph is derived from section 13 of the 1987 Act.

#### *Sub-paragraph (1)*

This sub-paragraph provides that an administrator may be appointed on the application of the prosecutor. He may be required to fulfil either or both of two functions: first, to manage or otherwise deal with property affected by a restraint order, either in confiscation or in forfeiture proceedings, or by a suspended forfeiture order in forfeiture proceedings; and secondly, to realise the property after a confiscation order or a suspended forfeiture order has been made. As to realisation in the latter case, see paragraph 16.11.

#### *Sub-paragraph (2)*

This sub-paragraph is applicable only in confiscation proceedings, where a restraint order may apply to a person's whole estate. In sub-sub-paragraph (b), "property mentioned in paragraph (b) of section 3(1) of this Act" is the estate of the recipient of a caught gift.

### *Functions of administrators*

- 2.-(1) Subject to paragraph 5 below, an administrator-
- (a) shall be entitled to take possession of, and if appointed (or empowered) under paragraph 1(1)(b) above where a confiscation order has been made shall as soon as practicable take possession of, the property as regards which he has been appointed and of any document which both-
    - (i) is in the possession or control of the person (in this paragraph referred to as "A") in whom the property is vested (or would be vested but for an order made under sub-paragraph (3) below); and
    - (ii) relates to the property or to A's assets, business or financial affairs;
  - (b) shall be entitled to have access to, and to copy, any document relating to the property or to A's assets, business or financial affairs and not in such possession or control as is mentioned in

paragraph (a) above;

- (c) may bring, defend or continue any legal proceedings relating to the property;
- (d) may borrow money in so far as it is necessary to do so to safeguard the property and may for the purposes of such borrowing create a security over any part of the property;
- (e) may, if the administrator considers that to do so would be beneficial for the management or realisation of the property-
  - (i) carry on any business of A;
  - (ii) exercise any right of A as holder of securities in a company;
  - (iii) grant a lease of the property or take on lease any other property; or
  - (iv) enter into any contract, or execute any deed, as regards the property or as regards A's business;
- (f) may, where any right, option or other power forms part of A's estate, make payments or incur liabilities with view to-
  - (i) obtaining property which is the subject of; or
  - (ii) maintaining,  
the right, option or power;
- (g) may effect or maintain insurance policies as regards the property on A's business;
- (h) where he has been appointed under paragraph 1(1)(b) above may, where A has an uncompleted title to any heritable estate, complete title thereto;

Provided that completion of title in A's name shall not validate by accretion any unperfected right in favour of any person other than the administrator;

- (j) may sell, purchase or exchange property or discharge any security for an obligation due to A:

Provided that it shall be incompetent for the administrator or an associate of his (within the meaning of section 74 of the Bankruptcy (Scotland) Act 1985) to purchase any of A's property in pursuance of this paragraph;

- (k) may claim, vote and draw dividends in the sequestration of the estate (or bankruptcy or liquidation) of a debtor of A and may accede to a voluntary trust deed for creditors of such a debtor;

- (l) may discharge any of his functions through agents or employees;

Provided that the administrator shall be personally liable to meet the fees and expenses of any such agent or employee out of such remuneration as is payable to the administrator by virtue of paragraph 6(1) and (3) below;

- (m) may take such professional advice as he may consider requisite for the proper discharge of his functions;
  - (n) may at any time apply to the court for directions as regards the discharge of his functions;
  - (o) may exercise any power specifically conferred on him by the court, whether such conferral was at the time of his appointment or on his subsequent application to the court in that regard; and
  - (p) may do anything incidental to the above powers and duties.
- (2) Subject to the proviso to sub-paragraph (1)(j) above-
    - (a) a person dealing with an administrator in good faith and for value shall not require to determine whether the administrator is acting within the powers mentioned in that subsection; and
    - (b) the validity of any title shall not be challengeable by reason only of the administrator having acted outwith those powers.

(3) The exercise of a power mentioned in any of sub-paragraphs (1)(c) to (k) above shall be in A's name except where and in so far as an order made by the court under this sub-paragraph (either on its own motion or on the application of the administrator) has vested the property in the administrator (or in his predecessor in that office).

#### EXPLANATORY NOTES

##### *Paragraph 2*

This paragraph corresponds to section 14 of the 1987 Act.

##### *Sub-paragraph (1)*

This sub-paragraph sets out the powers and duties of the administrator. Where a confiscation order has been made he is obliged by sub-sub-paragraph (a) to take possession of the property and any document in the specified category as soon as practicable. Paragraph 5(1) provides that an administrator proposing to exercise functions conferred by sub-sub-paragraphs (c) to (p) must first obtain the consent of the Accountant of Court to such exercise.

##### *Money received by administrator*

3.-(1) Subject to sub-paragraph (2) below, all money received by an administrator in the exercise of his functions shall be deposited by him, in

the name (unless vested in the administrator by virtue of paragraph 2(3) above) of the holder of the property realised, in an appropriate bank or institution.

(2) The administrator may at any time retain in his hands a sum not exceeding £200 or such other sum as may be prescribed by the Secretary of State by regulations made by statutory instrument.

1979 c. 37.

(3) In sub-paragraph (1) above, "appropriate bank or institution" means a bank or institution mentioned in section 2(1) of the Banking Act 1979 or for the time being specified in Schedule 1 to that Act.

#### EXPLANATORY NOTES

##### *Paragraph 3*

This paragraph corresponds to section 15 of the 1987 Act.

##### *Application of proceeds of realisation and other sums*

4.-(1) This paragraph applies only to an administrator appointed to realise property where a confiscation order has been made.

(2) Subject to sub-paragraph (3) below, sums in the hands of an administrator which are-

- (a) proceeds of a realisation of property under paragraph 1 above, and
- (b) other property held by the person in respect of whom the confiscation order was made,

shall first be applied in payment of any expenses to the payment of which a person is entitled under paragraph 5(2) of Schedule 2 to this Act and then shall, after such payments (if any) as the court may direct have been made out of those proceeds and sums, be applied on the person's behalf towards the satisfaction of the confiscation order.

(3) If, after the amount payable under the confiscation order has been fully paid, any such proceeds and sums remain in the hands of the administrator, he shall distribute them-

- (a) among such of those who held property which has been realised under the Act, and
- (b) in such proportions,

as the court may, after giving such persons an opportunity to be heard as regards the matter, direct.

(4) The receipt of any sum by a sheriff clerk on account of an amount payable under a confiscation order shall reduce the amount so

payable, but the sheriff clerk shall apply the money-

- (a) first, in payment of any expenses to the payment of which a person is entitled under paragraph 5(2) of Schedule 2 to this Act but which were not paid to him under sub-paragraph (2) above;
- (b) next, in payment of the administrator's remuneration and expenses;
- (c) next, in reimbursement of any sums paid by the Lord Advocate under paragraph 8(2) below;
- (d) next, in accordance with any direction given by the court under section 5(4) or 10(7) of this Act,

and the balance shall be payable and recoverable (or as the case may be disposed of) under section 203 or 412 of the 1975 Act (destination of fines) as applied by section 11 of this Act.

#### EXPLANATORY NOTES

##### *Paragraph 4*

This paragraph, which corresponds to section 16 of the 1987 Act, applies only where a confiscation order has been made.

##### *Sub-paragraph (2)*

Paragraph 5(2) of Schedule 2 is concerned with the entitlement to expenses of an insolvency practitioner who has dealt with property subject to a restraint order.

##### *Sub-paragraph (4)*

Sub-sub-paragraph (c) refers to paragraph 8(2) of this Schedule which provides that if no sum is available for payment under sub-sub-paragraph (b), the amount due is to be paid by the Lord Advocate.

Sub-sub-paragraph (d) refers to a direction under section 5(4) or 10(7) to the effect that compensation payable in terms of a compensation order made where the offence involves the misappropriation of property is to be paid first out of any sums applied towards the satisfaction of the confiscation order.

##### *Supervision of administrators*

5-(1) The accountant of court shall supervise the performance by administrators of the functions conferred on them by this Act; and in particular an administrator proposing to exercise functions conferred by any of paragraphs 2(1)(c) to (p) above shall first obtain the consent of the accountant of court to such exercise.

(2) If it appears to the accountant of court that an administrator has, without reasonable cause, failed to perform a duty imposed on him by any

provision of section 13 of this Act or of this Schedule, he shall report the matter to the court which, after giving the administrator an opportunity to be heard as regards the matter, may remove the administrator from office, censure him or make such other order as the circumstances of the case may appear to the court to require.

#### EXPLANATORY NOTES

##### *Paragraph 5*

This paragraph corresponds to section 17 of the 1987 Act.

##### *Sub-paragraph (1)*

In the performance of his functions an administrator is subject to the supervision of the Accountant of Court. He must obtain the Accountant's consent before exercising functions conferred by paragraph 2(1)(c) to (p).

##### *Sub-paragraph (2)*

The court referred to in this sub-paragraph is that which appointed the administrator.

#### *Accounts and remuneration of administrator*

6.-(1) The administrator shall keep such accounts in relation to his intromissions with the property as regards which he is appointed as the court may require and shall lodge these accounts with the accountant of court at such times as may be fixed by the court in that regard; and the accountant of court shall audit the accounts and issue a determination as to the amount of outlays and, on the basis mentioned in sub-paragraph (3) below, remuneration payable to the administrator in respect of those intromissions.

(2) Not later than two weeks after the issuing of a determination under sub-paragraph (1) above, the administrator or the Lord Advocate may appeal against it to the court.

(3) The basis for determining the amount of remuneration payable to the administrator shall be the value of the work reasonably undertaken by him, regard being had to an extent of the responsibilities involved.

(4) The accountant of court may authorise the administrator to pay without taxation an account in respect of legal services incurred by the administrator.

#### EXPLANATORY NOTES

##### *Paragraph 6*

This paragraph corresponds to section 18 of the 1987 Act.



*Effect of appointment of administrator on diligence*

7. Without prejudice to section 25 of this Act-
- (a) no arrestment or poinding of property executed on or after an appointment as regards the property under paragraph 1 above shall be effectual to create a preference for the arrester or poinder and any such property so arrested or poinded, or the proceeds of sale thereof, shall be handed over to the administrator;
  - (b) no poinding of the ground in respect of property on or after such appointment shall be effectual in a question with the administrator except for the interest on the debt of a secured creditor, being interest for the current half-yearly term and arrears of interest for one year immediately before the commencement of that term;
  - (c) it shall be incompetent on or after such appointment for any other person to raise or insist in an adjudication against the property or to be confirmed as executor-creditor on that property; and
  - (d) no inhibition on property which takes effect on or after such appointment shall be effectual to create a preference for the inhibitor in a question with the administrator.

EXPLANATORY NOTES

*Paragraph 7*

This paragraph, corresponding to section 19 of the 1987 Act, regulates the position where, on or after the appointment of an administrator, diligence is effected in respect of the property as regards which he has been appointed.

*Further provision as to administrators*

- 8.-(1) Where an administrator takes any action-
- (a) in relation to property as regards which he has not been appointed, being action which he would be entitled to take if he had been so appointed;
  - (b) believing, and having reasonable grounds for believing, that he is entitled to take that action in relation to that property;

he shall not be liable to any person in respect of any loss or damage resulting from his action except in so far as the loss or damage is caused by his negligence.

- (2) Any amount due in respect of the remuneration and expenses of

an administrator appointed under this Schedule shall, unless in a case where a confiscation order has been made there are sums available to be applied in payment of it under paragraph 4(4)(b) above, be paid by the Lord Advocate.

(3) Any disposal of property under paragraph 1 above to a person taking in good faith shall vest the ownership of the property in that person.

#### EXPLANATORY NOTES

##### *Paragraph 8*

This paragraph corresponds to section 20 of the 1987 Act.

##### *Sub-paragraph (1)*

Where an administrator takes action in relation to property as regards which he has not been appointed, having reasonable grounds for believing that he is entitled to do so, he is only liable for any loss or damage caused by his negligence.

##### *Sub-paragraph (2)*

This sub-paragraph preserves an administrator's entitlement to payment of his remuneration and expenses. See note to paragraph 4(4) above.

##### *Sub-paragraph (3)*

This sub-paragraph corresponds to section 20(3) of the 1987 Act, a new provision added by Schedule 3 to the Bill.

#### *Discharge of administrator*

9. After an administrator has lodged his final accounts under paragraph 6(1) above, he may apply to the accountant of court to be discharged from office; and such discharge, if granted, shall have the effect of freeing him from all liability (other than liability arising from fraud) in respect of any act or omission of his in exercising the functions conferred on him by this Act.

#### EXPLANATORY NOTES

##### *Paragraph 9*

This paragraph corresponds to section 21 of the 1987 Act.

#### *Compensation*

10.-(1) Where the court, on an application made to it by a person other than the accused or the recipient of a gift caught by Part I of this Act, is satisfied on the balance of probabilities that in relation to any property realised under paragraph 1 above he was the owner of, or a person otherwise having an interest in, the property immediately before such

realisation, it shall make an order directing the Crown to pay to that person compensation of an amount equal to the consideration received for the property or, as the case may be, interest or the value of any such consideration at the time of such realisation, or, if no consideration was received, an amount equal to the value of the property or interest at the time of the realisation.

(2) An application under this paragraph shall be made not later than three years after the conclusion of the proceedings in respect of which the confiscation order was made.

(3) Subsection (6) of section 22 of this Act shall apply for the purpose of determining for the purposes of this paragraph whether proceedings are concluded as it applies for the purposes of that section.

#### EXPLANATORY NOTES

##### *Paragraph 10*

This paragraph implements Recommendation 59(2) to (6) and corresponds to section 26(5) and (6) of the 1987 Act, new provisions added by Schedule 3 to the Bill. It provides for the payment of compensation to a person whose property has been realised, other than the accused or the recipient of a caught gift. The entitlement to compensation of the accused or the recipient of a caught gift is regulated by clause 14 of the Bill which corresponds to sections 26(1) to (4) and (6) of the 1987 Act.

##### *Rules of court as regards accountant of court's supervision etc of administrators*

1988 c.36. **11.** Without prejudice to section 5 of the Court of Session Act 1988 (power to regulate procedure etc by Act of Sederunt), provision may be made by rules of court as regards (or as regards any matter incidental to) the accountant of court's powers and duties under this Act in relation to the functions of administrators.

#### EXPLANATORY NOTES

##### *Paragraph 11*

This paragraph corresponds to section 22 of the 1987 Act. For the rules made under section 22 see paragraph 9.40, final footnote.

##### *Power to facilitate realisation*

**12.** (1) Without prejudice to any enactment or rule of law in respect of the recording of deeds relating to heritable property or the registration of interests therein, the court, to facilitate realisation under paragraph 1 above, may-

- (a) order any person (in this paragraph referred to as "A") holding an interest in property, not being such person (in this paragraph

referred to as "B") as is mentioned in paragraph (a) or (b) of section 3(1) or section 15 of this Act, to make such payment to an administrator appointed to realise estate comprising an interest of B in that property as the court may direct and may, subject to such payment being made-

- (i) authorise the administrator to transfer B's interest to A or to discharge it in favour of A; or
- (ii) itself by order transfer or discharge B's interest; or

(b) by order-

- (i) transfer A's interest to B; or
- (ii) discharge it in favour of B,

on the administrator making such payment to A out of that estate in respect of A's interest as the court may direct.

(2) The court may make such incidental provision in relation to any exercise of powers conferred on it by sub-paragraph (1) above as it considers appropriate; but it shall not exercise those powers without giving such persons as hold an interest in the property reasonable opportunity to make representations to it in that regard.

#### EXPLANATORY NOTES

##### *Paragraph 12*

This paragraph corresponds to section 24 of the 1987 Act.

## SCHEDULE 2

### SEQUESTRATION ETC OF PERSONS HOLDING REALIABLE OR FORFEITABLE PROPERTY

#### *Sequestration of person holding realisable or forfeitable property*

1.-(1) Where the estate of a person who holds realisable or forfeitable property is sequestrated-

- (a) Property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the date of sequestration (within the meaning of section 12(4) of the 1985 Act) and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before such date of sequestration; and
- (b) any proceeds of property realised by virtue of paragraph 1 of Schedule 1 to this Act for the time being in the hands of an administrator appointed under that paragraph,

is excluded from the debtor's estate for the purposes of that Act.

(2) Where an award of sequestration has been made, the powers conferred on the court by sections 21 to 24 and 27 to 29 of this Act or on an administrator appointed under paragraph 1 of the said Schedule 1 shall not be exercised in relation to-

- (a) property comprised in the whole estate of the debtor (within the meaning of section 31(8) of the 1985 Act); or
- (b) any income of the debtor which has been ordered, under subsection (2) of section 32 of that Act, to be paid to the permanent trustee or any estate which, under subsection (10) of section 31 of that Act or subsection (6) of the said section 32 of that Act, vests in the permanent trustee,

and it shall not be competent to submit a claim in relation to the confiscation order to the permanent trustee in accordance with section 48 of that Act.

(3) Nothing in the 1985 Act shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

(4) Where, during the period before sequestration is awarded, an interim trustee stands appointed under the proviso to section 13(1) of the 1985 Act and any property in the debtor's estate is subject to a restraint order, the powers conferred on the interim trustee by virtue of that Act do not apply to property for the time being subject to the restraint order.

(5) Where the estate of a person is sequestrated and he has directly or indirectly made a gift caught by Part I of this Act-

(a) no decree shall, at any time when proceedings as regards an offence to which Part I of this Act applies have been instituted against him and have not been concluded or when property of the person to whom the gift was made is subject to a restraint order, be granted under section 34 or 36 of the 1985 Act (gratuitous alienations and unfair preferences) in respect of the making of the gift; and

(b) any decree granted under either of the said sections 34 and 36 after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

3 & 4 Geo. 5. C.  
20.

(6) In any case in which, notwithstanding the coming into force of the 1985 Act, the Bankruptcy (Scotland) Act 1913 applies to a sequestration, sub-paragraph (2) above shall have effect as if for paragraphs (a) and (b) thereof there were substituted the following paragraphs-

"(a) property comprised in the whole property of the debtor which vests in the trustee under section 97 of the Bankruptcy (Scotland) Act 1913;

(b) any income of the bankrupt which has been ordered, under subsection (2) of section 98 of that Act, to be paid to the trustee or any estate which, under subsection (1) of that section, vests in the trustee,"

and sub-paragraph (3) above shall have effect as if, for the reference in it to the 1985 Act, there were substituted a reference to the said Act of 1913.

## EXPLANATORY NOTES

### *Schedule 2*

This Schedule, which is introduced by clause 35, implements Recommendations 57(2) and 98 (see paragraphs 9.42-9.46, 16.11). It deals with the inter-relationship between procedures under restraint orders or confiscation orders on the one hand and, on the other, the law relating to the sequestration, bankruptcy, winding-up or receivership of persons or companies holding realisable or forfeitable property. It is also concerned with the liability of insolvency practitioners who deal with property which is subject to a restraint order. Paragraphs 1 to 5 of this Schedule are derived from sections 33 to 37 of the 1987 Act as amended by Schedule 3 to the Bill. In the following notes, references to these sections are to their terms as so amended. The effect of the amendments is shown in Appendix B.

Most of the provisions of this Schedule apply to both confiscation and forfeiture proceedings. Where any provision applies to only one type of proceedings, there is a note to that effect below.

*Paragraph 1*

This paragraph corresponds to section 33 of the 1987 Act.

*Sub-paragraph (1)*

This sub-paragraph deals with the sequestration of a holder of realisable or forfeitable property which is affected by a restraint order before the date of sequestration. The property, and any proceeds of property which has been realised, is excluded from the holder's estate for the purposes of the Bankruptcy (Scotland) Act 1985. For this rule to apply in relation to heritable property in Scotland, however, the restraint order must have been recorded in the appropriate property register before the date of sequestration.

*Sub-paragraph (2)*

This sub-paragraph applies where the sequestration of the holder of the property occurs before a restraint order is made or an administrator is appointed in relation to the property. In such a case the powers conferred on the court or the administrator cannot be exercised in relation to the categories of property mentioned in sub-sub-paragraphs (a) and (b). Further, a claim cannot be submitted under section 48 of the 1985 Act as a means of securing satisfaction of a confiscation order.

*Sub-paragraph (5)*

This sub-paragraph applies only in confiscation proceedings where the accused is sequestered after making a caught gift. The gift cannot be restored to the accused's estate as a gratuitous alienation under section 34 of the 1985 Act or as an unfair preference under section 36 of that Act so long as the criminal proceedings against him have not been concluded or the recipient's property is subject to a restraint order. Any decree granted under section 34 or 36 after the conclusion of the proceedings must take into account any realisation of property held by the recipient.

*Sub-paragraph (6)*

This sub-paragraph contains transitional provisions.

*Bankruptcy in England and Wales of person holding realisable or forfeitable property*

2.-(1) Where a person who holds realisable or forfeitable property is adjudged bankrupt-

- (a) property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the order adjudging him bankrupt and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the order adjudging him bankrupt was made; and
- (b) any proceeds of property realised by virtue of paragraph 1 of

Schedule 1 to this Act for the time being in the hands of an administrator appointed under that paragraph,

is excluded from the bankrupt's estate for the purposes of Part IX of the Insolvency Act 1986.

1986 c. 45.

(2) Where a person has been adjudged bankrupt, the powers conferred on the court by sections 21 to 24 and 27 to 29 of this Act or on an administrator appointed under paragraph 1 of the said Schedule 1 shall not be exercised in relation to-

- (a) property for the time being comprised in the bankrupt's estate for the purposes of the said Part IX;
- (b) property in respect of which his trustee in bankruptcy may (without leave of the court) serve a notice under section 307, 308 or 308A of the Insolvency Act 1986 (after-acquired property and tools, clothes, etc, exceeding value of reasonable replacement and certain tenancies); and
- (c) property which is to be applied for the benefit of creditors of the bankrupt by virtue of a condition imposed under section 280(2)(c) of the Insolvency Act 1986.

(3) Nothing in the Insolvency Act 1986 shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

(4) Where, in the case of a debtor, an interim receiver stands appointed under section 286 of the Insolvency Act 1986 and any property of the debtor is subject to a restraint order the powers conferred on the receiver by virtue of that Act do not apply to property for the time being subject to the restraint order.

(5) Where a person is adjudged bankrupt and has directly or indirectly made a gift caught by Part I of this Act-

- (a) no order shall, at any time when proceedings for an offence to which Part VI of the Criminal Justice Act 1998 applies have been instituted against him and have not been concluded or when property of the person to whom the gift was made is subject to a restraint order, be made under section 339 or 423 of the Insolvency Act 1986 (avoidance of certain transactions) in respect of the making of the gift, and
- (b) any order made under either of those sections after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

1988 c.33.

(6) In any case in which a petition in bankruptcy was presented, or a receiving order or adjudication in bankruptcy was made, before



the date on which the Insolvency Act 1986 came into force, subparagraphs (2) to (5) above have effect with the following modifications-

4 & 5 Geo. 5. C.  
59.

- (a) for references to the bankrupt's estate for the purposes of Part IX of that Act there are substituted references to the property of the bankrupt for the purposes of the Bankruptcy Act 1914;
- (b) for references to the said Act of 1986 and to sections 280(2)(c), 286, 339, and 423 of that Act there are respectively substituted references to the said Act of 1914 and to sections 26(2), 8, 27 and 42 of that Act;
- (c) the references in subsection (4) to an interim receiver appointed as there mentioned include, where a receiving order has been made, a reference to the receiver constituted by virtue of section 7 of the said Act of 1914, and
- (d) subsection (2)(b) is omitted.

#### EXPLANATORY NOTES

##### *Paragraph 2*

This paragraph, which corresponds to section 34 of the 1987 Act, contains provisions analogous to those in paragraph 1 where a holder of realisable or forfeitable property is adjudged bankrupt in England and Wales.

##### *Sub-paragraph (5)*

This sub-paragraph applies only in confiscation proceedings.

##### *Winding up of company holding realisable or forfeitable property*

3.-(1) Where realisable or forfeitable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for the voluntary winding up, the functions of the liquidator (or any provisional liquidator) shall not be exercisable in relation to-

- (a) property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the relevant time and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the relevant time; and
- (b) any proceeds of property realised by virtue of paragraph 1 of Schedule 1 to this Act for the time being in the hands of an administrator appointed under that paragraph.

(2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the court by sections 21 to 24 and 27 to 29 of this Act or on an administrator appointed under paragraph 1 of the said Schedule 1 shall not be exercised in relation to any realisable or forfeitable property held by the company in relation to which the functions of the liquidator are exercisable-

- (a) so as to inhibit the liquidator from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
- (b) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

(3) Nothing in the Insolvency Act 1986 shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

(4) For the purposes of the application of Part IV and V of the Insolvency Act 1986 (winding up of registered companies and winding up of unregistered companies) to a company which the court has jurisdiction to wind up, a person is not a creditor in so far as any sum due to him by the company is due in respect of a confiscation order (whether under this Act or under and within the meaning of section 1 of the Drug Trafficking Offences Act 1986 or section 1 of the 1987 Act or any corresponding provision in Northern Ireland).

1986 c. 32.

(5) Where an order for the winding up of a company has been made or a resolution has been passed by a company for its voluntary winding up and before the relevant time the company has directly or indirectly made a gift caught by Part I of this Act-

- (a) no order or, as the case may be, decree shall, at any time when proceedings as regards an offence to which Part I of this Act applies have been instituted against the company and have not been concluded or when property of the person to whom the gift was made is subject to a restraint order, be made under section 238 or 239 of the Insolvency Act 1986 (transactions at an undervalue and preferences) or granted under section 242 or 243 of that Act (gratuitous alienations and unfair preferences) in respect of the making of the gift; and
- (b) any order made under either of the said section 238 or 239 or decree granted under either of the said sections 242 or 243 after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

(6) In this paragraph-

"company" means any company which may be wound up under the Insolvency Act 1986; and

"the relevant time" means-

- (a) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up;
- (b) where such an order has been made and, before the presentation of the petition for the winding up of the company by the court, such a resolution has been passed by the company, the time of the passing of the resolution; and
- (c) in any other case where such an order has been made, the time of the making of the order.

(7) In any case in which a winding up of a company commenced, or is treated as having commenced, before the date on which the Insolvency Act 1986 came into force, sub-paragraphs (2) to (6) above have effect with the substitution for references to that Act of references to the Companies Act 1985.

1985 c. 6.

## EXPLANATORY NOTES

### *Paragraph 3*

This paragraph corresponds to section 35 of the 1987 Act and contains provisions analogous to those in paragraphs 1 and 2 which apply where realisable or forfeitable property is held by a company.

### *Sub-paragraph (1)*

Unlike the position in paragraphs 1(1) and 2(1), where the property under restraint is excluded from the holder's estate, the property here remains the company's but the functions of the liquidator may not be exercised in relation to it.

### *Sub-paragraph (2)*

In paragraphs 1(2) and 2(2) the powers conferred on the court or the administrator are not to be exercised at all. Here, on the other hand, the exercise of the powers is prohibited if it will inhibit the liquidator from exercising his functions for the purpose of distributing property to the company's creditors, or will prevent the payment of expenses properly incurred in the winding-up.

### *Sub-paragraph (4)*

This provision corresponds to that at the end of paragraph 1(2).

*Sub-paragraph (5)*

This provision corresponds to section 35(4A) of the 1987 Act, a new provision introduced by Schedule 3 (see paragraph 9.44). It matches paragraphs 1(5) and 2(5).

*Property subject to floating charge*

4.-(1) Where any property held subject to a floating charge by a company is realisable or forfeitable property and a receiver has been appointed by, or on the application of, the holder of the charge, the powers of the receiver in relation to the property so held shall not be exercisable in relation to-

- (a) so much of it, not being heritable property situated in Scotland, as is for the time being subject to a restraint order made before the appointment of the receiver and so much of it, being heritable property situated in Scotland, as is for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the such appointment; and
- (b) any proceeds of property realised by virtue of paragraph 1 of Schedule 1 to this Act for the time being in the hands of an administrator appointed under that paragraph.

(2) Where, in the case of a company, such an appointment has been made, the powers conferred on the court by sections 21 to 24 of this Act or on an administrator appointed under paragraph 1 of the said Schedule 1 shall not be exercised in relation to any realisable property held by the company in relation to which the powers of the receiver are exercisable-

- (a) so as to inhibit the receiver from exercising his powers for the purpose of distributing any property held by the company to the company's creditors; or
- (b) so as to prevent the payment out of any property of expenses (including the remuneration of the receiver) properly incurred in the exercise of the receiver's powers in respect of the property.

(3) Nothing in the Insolvency Act 1986, shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

(4) In this paragraph-

"company" has the same meaning as in paragraph 3 above; and

"floating charge" includes a floating charge within the meaning given by section 462 of the Companies Act 1985 (power of incorporated company to create floating charge).

(5) In any case in which a receiver was appointed as is mentioned in

sub-paragraph (1) above before the date on which the Insolvency Act 1986 came into force, sub-paragraphs (2) to (4) above have effect with the substitution for references to that Act of references to the Companies Act 1985.

## EXPLANATORY NOTES

### *Paragraph 4*

This paragraph corresponds to section 36 of the 1987 Act and makes provision for a case where property held subject to a floating charge is realisable or forfeitable property. Sub-paragraphs (1), (2) and (3) are analogous to sub-paragraphs (1), (2) and (3) of paragraphs 1, 2 and 3.

### *Insolvency practitioners dealing with property subject to restraint order*

5.-(1) Without prejudice to the generality of any enactment contained in the Insolvency Act 1986 or in the 1985 Act, where-

- (a) any person acting as an insolvency practitioner seizes or disposes of any property in relation to which his functions are, because that property is for the time being subject to a restraint order, not exercisable; and
- (b) at the time of the seizure or disposal he believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of a court order or otherwise) to seize or dispose of that property,

he shall not be liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as the loss or damage is caused by the insolvency practitioner's negligence; and the insolvency practitioner shall have a lien on the property, or the proceeds of its sale, for such of his expenses as were incurred in connection with the liquidation, sequestration or other proceedings in relation to which the seizure or disposal purported to take place and for so much of his remuneration as may reasonably be assigned for his actings in connection with those proceedings.

(2) Any person who, acting as an insolvency practitioner, incurs expenses-

- (a) in respect of such realisable property as is mentioned in sub-paragraph (1)(a) above and in so doing does not know and has no reasonable grounds to believe that the property is for the time being subject to a restraint order; or
- (b) other than in respect of such realisable property as is so mentioned, being expenses which, but for the effect of a restraint order, might have been met by taking possession of and realising

the property,

shall be entitled (whether or not he has seized or disposed of that property so as to have a lien under sub-paragraph (1) above) to payment of those expenses under paragraph 4(2) or (4)(a) of Schedule 1 to this Act.

(3) In the foregoing provisions of this paragraph, the expression "acting as an insolvency practitioner" shall be construed in accordance with section 388 (interpretation) of the said Act of 1986 except that for the purposes of such construction the reference in subsection (2)(a) of that section to a permanent or interim trustee in a sequestration shall be taken to include a reference to a trustee in a sequestration and subsection (5) of that section shall be disregarded; and the expression shall also comprehend the official receiver acting as receiver or manager of the property.

#### EXPLANATORY NOTES

##### *Paragraph 5*

This paragraph corresponds to section 37 of the 1987 Act.

##### *Sub-paragraph (1)*

This sub-paragraph applies to an insolvency practitioner dealing in good faith with either realisable or forfeitable property which is subject to a restraint order. The first part of the sub-paragraph confers on him protection similar to that conferred on an administrator by paragraph 8(1) of Schedule 1. Under the second part he has a lien on the property or the proceeds of its sale for his expenses incurred and his remuneration due in respect of his actings.

##### *Sub-paragraph (2)*

This sub-paragraph applies only to confiscation proceedings. It makes further provision for the entitlement to expenses of an insolvency practitioner who has dealt with property in ignorance of the fact that it was affected by a restraint order. He is entitled to first call on sums in the hands of the administrator (Schedule 1, paragraph 4(2)) or the sheriff clerk (*ibid*, paragraph 4(4)(a)).

##### *Interpretation*

1985 c. 66.           **6.-(1)** In this Schedule "the 1985 Act" means the Bankruptcy (Scotland) Act 1985.

(2) References in this Schedule to the conclusion of proceedings, except for the purposes of paragraph 2(5) above, shall be construed-

(a) as regards property subject to a restraint order under section 21(1)(a) of this Act, in accordance with section 22(6) of this Act; and

(b) as regards property subject to a restraint order under section

21(1)(b) of this Act, in accordance with section 23(5) of this Act.

(3) References in this Schedule to property held by a person include a reference to property vested in the interim or permanent trustee in his sequestration or in his trustee in bankruptcy or liquidation.

#### EXPLANATORY NOTES

*Paragraph 6*

*Sub-paragraph (3)*

This sub-paragraph corresponds to section 47(4)(c) of the 1987 Act.

**AMENDMENTS TO THE CRIMINAL JUSTICE (SCOTLAND) ACT  
1987**

1987 c. 41.           **1.**     The Criminal Justice (Scotland) Act 1987 shall be amended as follows.

EXPLANATORY NOTES

*Schedule 3*

This Schedule, introduced by clause 39(3), sets out the amendments made to Part I of the Criminal Justice (Scotland) Act 1987. The object of the amendments is to make the provisions of Part I of the 1987 Act correspond, as far as appropriate, to the provisions of the Bill. The effect of the amendments is shown in Appendix B (see paragraphs 20.4-20.6).

Where a provision inserted in the 1987 Act by this Schedule corresponds to a provision in the Bill, that is indicated below in the note to the appropriate paragraph. In such cases reference may be made to the note to the corresponding provision.

- 2.**     In section 1-
- (a) in subsection (1)-
- (i)    for the words from "High Court" to "pronounced)" there shall be substituted the words "High Court or sheriff court (in this section and sections 2 to 7A of this Act referred to as "the court") of an offence to which this section relates the court, on the application of the prosecutor, may", and in the remainder of that subsection for the word "Court" where it appears there shall be substituted the word "court"; and
- (ii)   in paragraph (b), for the word "property" where it first appears there shall be substituted the word "amount" and for the words "the value of that property" there shall be substituted the words "that amount";
- (b) in subsection (2), after the word "following" there shall be inserted the words "offences when prosecuted either on indictment or on summary complaint before the sheriff if the offence is punishable by a fine in excess of level 5 or by imprisonment for a period of more than 3 months or by both such fine and imprisonment";
- (c) after subsection (2) there shall be inserted the following subsections-

"(2A) Any application under this section shall be



made-

- (a) in proceedings on indictment, when the prosecutor moves for sentence or, if the offender 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.

(2B) A confiscation order shall not be made unless the court orders some other disposal (including a probation order or an absolute discharge) in respect of the offender.

(2C) 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 person;
- (b) making any order involving any other payment by him;
- (c) making any order under section 15 of the Proceeds of Crime (Scotland) Act 1994 or an order for forfeiture under any other enactment.

(2D) 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;
- (b) making any order involving any other payment by him;
- (c) making any suspended forfeiture order under section 15 of the Proceeds of Crime(Scotland) Act 1994 or an order for forfeiture under any other enactment

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.

(2E) Where a court makes both a confiscation order and a compensation order under section 58 of the 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."; and

- (d) in subsection (5) for the words "High Court" and "Court" where they occur there shall be substituted the word "court".

#### EXPLANATORY NOTES

##### *Paragraph 2*

##### *Sub-paragraph (a)*

This provision and sub-paragraph (b) implement Recommendation 3 (paragraphs 3.5, 3.6) by extending the power to make a confiscation order under Part I of the 1987 Act to the sheriff court in solemn procedure and in summary procedure where the offence concerned is punishable by a fine in excess of level 5 on the standard scale or by imprisonment for more than three months or by both such fine and imprisonment.

This provision also amends section 1(1)(b) to correspond with section 5(4) of the Act, which refers to "the amount that might be realised".

##### *Sub-paragraph (b)*

See note to sub-paragraph (a).

##### *Sub-paragraph (c)*

Subsection (2A) implements Recommendation 28(3) (paragraph 6.4) and matches clause 1(6).

Subsection (2B) implements Recommendation 21(2) (paragraph 5.2) and matches clause 1(3).

Subsection (2C) implements Recommendation 23(2) (paragraphs 5.5-5.7) and matches clause 5(1).

Subsection (2D) implements Recommendation 24(2) (paragraphs 5.8-5.11) and matches clause 5(2).

Subsection (2E) implements Recommendation 26(2) (paragraphs 5.17-5.23) and matches clause 5(4).

##### *Sub-paragraph (d)*

This amendment and other like amendments are consequential on the extension to the sheriff court of power to make a confiscation order (see the note to paragraph 2(a)).

3. For section 2 there shall be substituted the following section-

"2.-(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; and
  - (c) no suspended forfeiture order nor an order for forfeiture under any other enactment shall be made in respect of 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 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."

#### EXPLANATORY NOTES

##### *Paragraph 3*

This amendment implements Recommendation 36(5) (paragraphs 6.24-6.27). The substituted section 2 matches clause 7.

4. In section 3-

(a) in each of subsections (2) and (4) for the word "Court" where it appears there shall be substituted the word "court"; and

(b) at the end of paragraph (a)(ii) of that subsection there shall be added the words "or being served with the complaint (as the case may be)".

## EXPLANATORY NOTES

### *Paragraph 4*

#### *Sub-paragraph (b)*

This amendment and other like amendments are consequential on confiscation being competent in summary proceedings in the sheriff court (see the note to paragraph 2(a)).

5. In section 4-

- (a) in each of subsections (1), (2) and (4) for the word "Court" where it appears there shall be substituted the word "court";
- (b) in each of subsections (1) and (4) after the words "section 150" there shall be inserted the words "or, as the case may be, section 354";
- (c) at the end there shall be added the following subsections-

"(6) Where-

- (a) any allegation in the statement lodged under subsection (1) above is challenged by the person, or
- (b) the basis of the non-acceptance by the person of any such allegation is challenged by the prosecutor,

a hearing shall be arranged before the trial judge or, if he is not available to preside at such a hearing within a reasonable time, before another judge, to consider the matters being challenged.

(7) In subsection (6) above "another judge" means, if the trial judge was-

- (a) a judge of the High Court of Justiciary, another judge of that Court;
- (b) a sheriff, another sheriff of the sheriffdom concerned.

(8) In any hearing under subsection (6) above, the burden of proof shall be on the prosecutor who shall be required to establish his case beyond reasonable doubt."

## EXPLANATORY NOTES

### *Paragraph 5*

#### *Sub-paragraph (c)*

Subsections (6) and (7) implement Recommendation 35(1) (paragraphs 6.21, 6.22) and match clause 6(6) and (7).

Subsection (8) follows clause 1(7) in prescribing the criminal standard of proof (paragraphs 6.5, 6.13).

#### 6. In section 5-

##### (a) for subsections (1) to (3) there shall be substituted the following-

"(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 section 1 of this Act relates; or
    - (ii) in respect of whom a restraint order has been made by virtue of section 8(4) 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 an implicative gift;
  - (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) For the purposes of this section proceedings for an offence are instituted against a person-

(a) on his arrest without warrant;

(b) when he is charged with the offence without being arrested;

(c) when a warrant to arrest him is granted;

(d) when a warrant to cite him is granted;

(e) in summary proceedings, on the first calling of the case; or

(f) when a petition is intimated to him or an indictment or a complaint is served on him,

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

(b) in subsection (4), for the words "realisable property owned" there shall be substituted the words "his realisable property";

(c) in subsection (5)-

(i) for the words "High Court" there shall be substituted the word "court";

(ii) after the words "regard to the" there shall be inserted the word "likely";

(iii) after paragraph (a) there shall be inserted the following paragraph-

"(aa) of realisable property held by 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 section 33 or 34 of this Act"; and

(iv) at the end there shall be added the words "and in this subsection, "money" includes cheques, banknotes, postal orders, money orders and foreign currency";

- (d) in subsection (7) for the word "Court" there shall be substituted the word "court"; and
- (e) after subsection (7) there shall be inserted the following subsection-

"(7A) Where the court is satisfied, on the application of a person in receipt of an implicative gift made before or after a confiscation order has been made-

- (a) that the person received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the giver was in any way concerned in drug trafficking; and
- (b) that he is not, and has never been, associated with the giver in drug trafficking; 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 an implicative gift 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 Part of this Act and, if a confiscation order has already been made, varying that order accordingly, where necessary.

(7B) 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 (7A) above.

(7C) The procedure in an appeal under this section shall be the same as the procedure in an appeal against sentence."

#### EXPLANATORY NOTES

##### *Paragraph 6*

##### *Sub-paragraph (a)*

Subsections (1) and (2) implement Recommendation 11 (paragraph 4.13) and match clause 3(1) and (2).

Subsection (3) implements in part Recommendation 49(4) (paragraph 9.24) and matches clause 38(3).



*Sub-paragraph (c)*

This amendment is consequent on the extension of the definition of "realisable property" by subsection (1)(c) to include property which need not necessarily belong to the person.

*Sub-paragraph (d)*

Paragraph (aa) implements in part Recommendation 13(4) (paragraph 4.14) and matches clause 3(5).

The definition of "money" likewise implements in part Recommendation 13(4) and is the same as that in clause 3(6).

*Sub-paragraph (f)*

These subsections implement Recommendation 19(5) (paragraphs 4.28-4.30) and match clause 4(6) to (8).

7. In section 6-

(a) In subsection (1), in paragraph (a) for the words "the warrant to arrest and commit was granted" there shall be substituted the words "the proceedings were commenced within the meaning of section 5(3) of this Act"; and

(b) for subsections (2) and (3) there shall be substituted the following-

"(2) In assessing the value of an implicative gift, the court shall, subject to subsection (3) and (3A) 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 of the value of which is significantly less than the value of that interest 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.

(3A) Where an implicative gift 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.

(3B) In subsection (3A) above, "money" includes cheques, banknotes, postal orders, money orders and foreign currency."

#### EXPLANATORY NOTES

##### *Paragraph 7*

##### *Sub-paragraph (b)*

Subsection (2) implements in part Recommendation 17(3) (paragraphs 4.23, 4.24) and matches clause 4(2).

Subsection (3) implements Recommendation 16(2) (paragraph 4.22) and matches clause 4(3).

Subsection (3A) also implements in part Recommendation 17(3), and matches clause 4(4).

Subsection (3B), like clause 4(4), repeats the definition of "money" inserted in section 5(5) by paragraph 6 above.

8. After section 6 there shall be inserted the following sections-

"Increase in value of proceeds of drug trafficking or realisable property.

6A.-(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 value of the proceeds of the person's drug trafficking, or the amount that might be realised, is greater than-

- (a) the value of the proceeds of the person's drug trafficking; 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 to court may be satisfied as mentioned in subsection (1) above shall include-

- (a) the value of the proceeds of the person's drug trafficking was greater than was taken into account when the confiscation order was made or has increased since the order was made; or
- (b) further proceeds of drug trafficking have 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) the amount, or part of the amount, of a gift which was disregarded under section 5(7) of this Act could now be realised.

(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-
- (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 value of the proceeds of drug trafficking 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 15(1) of the Criminal Justice (International Co-operation) Act 1990) under the earlier order.

(5) Section 4 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 moved for a confiscation order under section 1 of this Act.

(6) The assumptions mentioned in section 3(2) of this Act shall not apply for the purposes of this section.

Confiscation orders where proceeds of crime discovered at later date.

**6B.**-(1) This section applies where no confiscation order has been made in relation to an offence under section 1 or 6A of this Act.

(2) Where the court, on an application made to it by the prosecutor under this section, is satisfied beyond reasonable doubt-

- (a) that a person convicted of an offence to which this Part of this Act relates was in receipt of the proceeds of drug trafficking in respect of that offence;
- (b) that the information necessary to enable a confiscation order to be made on the date on which an application under section 1 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 within 6 years commencing with 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 order under section 15 of the Proceeds of Crime (Scotland) Act 1994 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) In determining such sum the court may take into account any payment or other reward received by the offender on or after the date of conviction, but only if the prosecutor satisfies the court beyond reasonable doubt that it was received by the offender in connection with drug trafficking carried on by the offender or another on or before that date.

(6) Section 4 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 1 of this Act.

(7) Section 1(2B), (2C), (2D) and (2E) of this Act shall not apply in relation to a confiscation order made in pursuance of this section.

(8) The assumptions mentioned in section 3(2) of this Act shall not apply for the purposes of this section.

(9) Where the court makes a confiscation order in pursuance of this section and a compensation order has been made under section 58 of the 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.

(10) In this section "the court " means the court which had jurisdiction in respect of the offence concerned to make a confiscation order under section 1 of this Act."

#### EXPLANATORY NOTES

##### *Paragraph 8*

Section 6A implements Recommendation 40(2) (paragraph 7.11) and corresponds to clause 8.

Section 6B implements Recommendation 42(5) (paragraph 7.18) and matches clause 10.

#### 9. In section 7-

##### (a) in subsection (1)-

- (i) after "203" there shall be inserted the words "or, as the case may be, 402 and 412";
- (ii) for the words from "as applied" to "below shall" there shall be substituted the words "the provisions of that Act specified in subsection (2) below (or those provisions as applied by section 194 of that Act) shall";

##### (b) in subsection (2) after the words "section 398" there shall be inserted the words "but as if subsection (1)-

- (a) gave the prosecutor an opportunity to be heard at any enquiry thereunder; and
- (b) applied whether the offender was in prison or not;"

#### EXPLANATORY NOTES

##### *Paragraph 9*

##### *Sub-paragraph (b)*

The words inserted in subsection (2) implement in part Recommendation 43(2) (paragraph 8.9) and also appear in clause 11(2)(c).

#### 10. After section 7 there shall be inserted the following section-

"Disposal of family home.

**7A.** Section 36 of the Proceeds of Crime (Scotland) Act 1994 shall apply in respect of a person's family home if a confiscation order has been made in relation to that person as it applies in respect of a person's family home if a confiscation order has been made in relation to that person under section 1(1) of that Act but as if for subsection (1) there were substituted the following

subsection-

- "(1) This section applies where a confiscation order has been made in relation to any person and the prosecutor has not satisfied the court beyond reasonable doubt that the person's family home has been acquired by means of the proceeds of drug trafficking."

#### EXPLANATORY NOTES

##### *Paragraph 10*

Section 7A implements Recommendation 14(2) (paragraphs 4.15-4.18) and corresponds to clause 36.

**11.** For sections 8 and 9 there shall be substituted the following-

"Restraint orders.

**8.-(1)** The court may, on the application of the prosecutor, make an order (in this Part of this Act referred to as a "restraint order") in the circumstances mentioned in either subsection (3) or (4) below interdicting-

- (a) any person named in the order from dealing with his realisable property; or
- (b) that person and any person named in the order as appearing to the court to have received from him an implicative gift 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).

**(2)** A restraint order may contain conditions and exceptions to which the interdict shall be subject and in particular-

- (a) may make provision 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) For the purposes of this subsection, the circumstances are-

- (a) proceedings have been instituted against an accused in Scotland for an offence to which section 1 of this Act relates;
- (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.

(4) 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 6A or, as the case may be, section 6B 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.

(5) Where the court has made a restraint order in the circumstances mentioned in subsection (4)(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.

(6) When proceedings for the offence or, as the case may be, proceedings on an application under section 6A or 6B 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.

(7) 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.

(8) Where a restraint order is made in relation to heritable property situated in Scotland, or such an order is recalled, the prosecutor shall forthwith record a certified copy of the order or, as the case may be, recalling order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(9) For the purposes of this Part of this Act, 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.

(10) In this section and sections 9 to 12 of this Act, "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.

(11) For the purposes of this section, proceedings on an application under section 6A or 6B 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).

(12) References in this section to the institution of proceedings for an offence against a person shall be construed in accordance with section 5(3) of this Act.

Variation and recall of restraint orders.

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

- (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 of a person named in a restraint order as having received an implicative gift, 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.

(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 12(1) of this Act, the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted."

#### EXPLANATORY NOTES

##### *Paragraph 11*

The new sections 8 and 9 implement Recommendations 49(4) and 52(2) (paragraphs 9.6-9.30).

The provisions of section 8 correspond to the provisions of the Bill as follows:

section 8(1)	clause 21(1)(a)
8(2)	21(2)
8(3)	22(2)
8(4)	22(3)
8(5)	22(4)
8(6)	22(5)
8(7)	21(3)
8(8)	21(5), 22(6)
8(9)	21(4)
8(10)	21(8)
8(11)	22(8)
8(12)	38(3)

The provisions of section 9 correspond to those of clause 24.

**12.** In section 11 for subsections (1) to (5) there shall be substituted the following-

"(1) On the application of the prosecutor, the court may, in respect of-

- (a) heritable property in Scotland affected by a restraint order (whether such property generally or particular such property) make an order inhibiting any person interdicted by the order or,

in relation to that property, under section 12 of this Act; and

- (b) moveable property so affected (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 certified copy of an order under subsection (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the prosecutor against the person named in the order had been duly signeted, executed and recorded as aforesaid.

(3) An order under subsection (1)(a) above so far as it inhibits a person may be recalled or restricted by an order of the court, and an order under this subsection shall take effect (on the recording of a certified copy of the order made under this subsection in the Register of Inhibitions and Adjudications) as from the date of its making.

(4) Without prejudice to the effect of recording a certified copy under subsection (2) or (3) above, the prosecutor shall take all reasonable steps to intimate the making of an order under subsection (1) or (3) above to persons affected thereby.

(5) A warrant under subsection (1)(b) 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.

(5A) The fact that a certified copy of an order has been recorded under subsection (2) above or an arrestment has been executed under subsection (5) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Act in respect of that property.

(5B) No inhibition to which a certified copy recorded under subsection (2) above relates, or arrestment executed under subsection (5) above, shall have effect once, or in so far as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall-

- (a) apply to the court for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and
- (b) transmit a certified copy of any order recalling or restricting the inhibition to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register."

## EXPLANATORY NOTES

### *Paragraph 12*

This amendment implements in part Recommendation 55(2) (paragraphs 9.34-9.36). The new provisions match clause 25(1) to (7).

13. In section 12-
  - (a) in subsection (1) for the words "Court of Session" there shall be substituted the word "court"; and
  - (b) for subsection (3) there shall be substituted the following-

"(3) Without prejudice to the time when it become effective, an interdict under subsection (1) above shall be intimated to every person affected by it."

## EXPLANATORY NOTES

### *Paragraph 13*

#### *Sub-paragraph (b)*

The new section 12(3) corresponds to clause 25(10).

14. In section 13-
  - (a) for the words "Lord Advocate" there shall be substituted the word "prosecutor";
  - (b) for the words "Court of Session" where they appear there shall be substituted the word "court"; and
  - (c) for the word "Court" where it appears other than as mentioned in paragraph (b) above there shall be substituted the word "court".
15. In section 14-
  - (a) in subsection (1)-
    - (i) in the proviso to paragraph (j) after the words "of his" there shall be inserted the words "(within the meaning of section 74 of the 1985 Act)"; and
    - (ii) in paragraphs (n) and (o) for the words "Court of Session" and "Court" where they occur there shall be substituted the word "court"; and

- (b) in subsection (3), for the words "Court of Session" where they occur there shall be substituted the word "court".

#### EXPLANATORY NOTES

##### *Paragraph 15*

##### *Sub-paragraph (a)(i)*

This provision defines the meaning of "associate" in section 14(1)(j) and matches Schedule 1, paragraph 2(1)(j). See the notes to Schedule 5 on the repealed provision in section 47(1) of the 1987 Act.

#### 16. In section 16-

- (a) in subsections (1) and (2) for the words "Court of Session" where they occur there shall be substituted the word "court";
- (b) in subsection (1) for the words "such expenses as are payable" there shall be substituted the words "any expenses to the payment of which a person is entitled"; and
- (c) in subsection (3)-
  - (i) paragraph (c) there shall be inserted the following paragraph-

"(d) next, in accordance with any direction given by the court under section 1(2E) or 6B(9) of this Act,";
  - (ii) for the words "of the 1975 Act (fines payable to H.M. Exchequer)" there shall be substituted the words "or 412 of the 1975 Act (destination of fines)".

#### EXPLANATORY NOTES

##### *Paragraph 16*

##### *Sub-paragraph (c)(i)*

This provision corresponds to Schedule 1, paragraph 4(4)(d).

17. In section 17, in subsection (2), for the words "Court of Session" and "Court" where they occur there shall be substituted the word "court".

18. In section 18 for the words "Court of Session" and "Court" where they occur there shall be substituted the word "court".

19. In section 20, at the end there shall be added the following subsection-

- "(3) Any disposal of property under section 13 of this Act to a person

taking in good faith shall vest the ownership of the property in that person."

#### EXPLANATORY NOTES

##### *Paragraph 19*

This amendment is necessitated by the terms of the new section 5(1)(c) which is substituted by paragraph 6. Because realisable property may include property which does not vest in the holder, it is necessary to provide that ownership vests in a person to whom the property is disposed of under section 13 if he takes it in good faith. There is a corresponding provision in Schedule 1, paragraph 8(3).

**20.** In section 23-

- (a) for the words "Court of Session" where they appear there shall be substituted the word "court";
- (b) in subsection (1) for the words "11(1) to (5)" there shall be substituted "9, 11";
- (c) in subsection (3) for the words "for the time being of that gift" there shall be substituted the words "of the gift as assessed in pursuance of section 6(2), (3) or (3A) of this Act"; and
- (d) in subsection (7) for the words "section 11(6)" there shall be substituted the words "section 28A".

#### EXPLANATORY NOTES

##### *Paragraph 20*

##### *Sub-paragraph (b)*

This amendment makes section 23(3) correspond with clause 13(3) and specifies how the value of the gift is to be assessed.

**21.** In section 24 for the words "Court of Session" there shall be substituted the word "court" and thereafter for the word "Court" where it appears there shall be substituted the word "court".

**22.** For section 25 there shall be substituted the following section-

"Realisable property inadequate to meet payments under confiscation order.

**25.-(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 offender or the prosecutor, that the value of the realisable property is inadequate to meet any outstanding amount payable (including any interest payable by virtue of section 15(1) of the Criminal Justice (International Co-operation) Act 1990) 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 5(5)(aa) of this Act, take into account the extent to which property held by a person whose estate has been sequestrated or who has been adjudged bankrupt is subject to, as the case may be, sequestration or bankruptcy procedure by virtue of section 33 or 34 of this Act; and

(b) may disregard any inadequacy which appears to it to be attributable, wholly or partly, to anything done by the offender 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.

(4) Section 4 of this Act (except subsection (8) thereof) 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 moved for a confiscation order under section 1 of this Act."

## EXPLANATORY NOTES

### *Paragraph 22*

The new section 25 implements Recommendation 41(5) (paragraph 7.12-7.15) and matches clause 9.



23. In section 26-

(a) in subsection (1)-

(i) for paragraph (b) there shall be substituted the following paragraph-

"(b) where he is convicted of one or more such offences-

(i) 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,";

(ii) for the words "Court of Session" there shall be substituted the word "court"; and

(iii) for the words from "; but this subsection" to the end there shall be substituted the words "if, having regard to all the circumstances, it considers it appropriate to do so.";

(b) after subsection (1) there shall be inserted the following-

"(1A) 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 (2) below."

(c) in subsections (2) and (3) for the words "Court of Session" where they occur there shall be substituted the word "court";

(d) in subsection (2) after the figure "8" there shall be inserted the figure "9";

(e) in subsection (4)-

(i) for the words "this section " there shall be substituted the words "subsection (1) above";

(ii) at the end there shall be added the following "and

"(e) an officer of the Commissioners of Inland Revenue, by those Commissioners.";

and

(f) after subsection (4) there shall be added the following subsections-

"(5) Where the court, on an application made to it by a person other than the accused or the recipient of a gift caught by Part I of this Act, is satisfied on the balance of probabilities that in relation to any property realised under section 13 of this Act he was the owner of, or a person otherwise having an interest in, the property immediately before such realisation, it shall make an order directing the Crown to pay to that person compensation of an amount equal to the consideration received for the property or, as the case may be, interest or the value of any such consideration at the time of such realisation, or, if no consideration was received, an amount equal to the value of the property or interest at the time of the realisation.

(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.

#### EXPLANATORY NOTES

##### *Paragraph 23*

##### *Sub-paragraphs (a) to (d)*

These amendments implement Recommendation 59(1) (see paragraphs 10.4-10.7) and make subsections (1) to (4) of section 26 correspond to subsections (1) to (5) of clause 14.

##### *Sub-paragraph (e)*

These provisions implement Recommendation 59(7) (see paragraphs 10.8-10.10) and match Schedule 1, paragraph 10(1) and (2).

**24.** After section 28 there shall be inserted the following section-

"Inhibition and arrestment of Scottish property affected by order registered under s.27.

**28A.**-(1) On the application of the prosecutor, the Court of Session may, in respect of-

- (a) Heritable property in Scotland affected by a restraint order registered under section 27 of this Act (whether such property generally or particular such property) make an order inhibiting any person with an interest in that property;
- (b) moveable property so affected (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 certified copy of an order under subsection (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the prosecutor against the person named in the order had been duly signeted, executed and recorded as aforesaid.

(3) An order under subsection (1)(a) above so far as it inhibits a person may be recalled or restricted by an order of the court, and an order under this subsection shall take effect (on the recording of a certified copy of the order made under this subsection in the Register of Inhibitions and Adjudications) as from the date of its making.

(4) Without prejudice to the effect of recording a certified copy under subsection (2) or (3) above, the prosecutor shall take all reasonable steps to intimate the making of an order under subsection (1) or (3) above to persons affected thereby.

(5) A warrant under subsection (1)(b) 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.

(6) The fact that a certified copy of an order has been recorded under subsection (2) above or an arrestment has been executed under subsection (5) above in respect of property shall not prejudice the exercise of a receiver's powers under or for the purposes of section 8, 11 or 12 of the Drug Trafficking Offences Act 1986 in respect of that property.

(7) No inhibition to which a certified copy recorded under subsection (2) above relates, or arrestment executed under subsection (5) above, shall have effect once, or in so far as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall-

(a) apply to the court for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and

(b) transmit a certified copy of any order recalling or restricting the inhibition to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register.

(8) Any power of the Court of Session to recall, loose or restrict inhibitions or arrestments shall, in relation to an order containing an inhibition under subsection (1)(a) above or an arrestment proceeding upon a warrant under subsection (1)(b) 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 13 of the Drug Trafficking Offences Act 1986.

(9) For the purposes of this section "prosecutor" includes, where an order has been made by virtue of subsection (2) of section 7 of the Drug Trafficking Offences Act 1986 and the information mentioned in that subsection has not yet been laid, the person as regards whom the court which made the order was satisfied as is mentioned in subsection (3)(b) of the said section 7."

#### EXPLANATORY NOTES

##### *Paragraph 24*

This amendment implements Recommendation 107 (paragraph 18.4). Section 28A restates the effect of section 11(6) (which is repealed by Schedule 5) and matches clause 25.

25. In section 30(2) in the definition of "external confiscation" after the word "rewards" there shall be inserted the words "or property or other economic advantage".

#### EXPLANATORY NOTES

##### *Paragraph 25*

This amendment implements Recommendation 112 and provides a definition matching that in clause 31(2) (see paragraph 18.8).

26. In section 32(2) for the words "(9)(a), (10), (11) and (12)" there shall be substituted the words "(1)(b)(ii) and (iii), (3) and (5)".

#### EXPLANATORY NOTES

*Paragraph 26*

This amendment implements Recommendation 114 (paragraph 18.12).

27. In section 33-

(a) in subsection (1), for paragraph (a) there shall be substituted the following paragraph-

"(a) property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the date of sequestration (within the meaning of section 12(4) of the 1985 Act) and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before such date of sequestration;" and

(b) in subsection (2)-

(i) for the words "Court of Session" there shall be substituted the word "court"; and

(ii) for the words from "sections 8" to "27 and 28" there shall be substituted the words "sections 8, 9, 11 to 13, 16 and 24 and on the Court of Session by sections 27, 28 and 28A".

EXPLANATORY NOTES

*Paragraph 27*

*Sub-paragraph (a)*

This amendment implements in part Recommendation 57(1) (paragraph 9.43). Paragraph (a) matches Schedule 2, paragraph 1(1)(a).

28. In section 34-

(a) in subsection (1), for paragraph (a) there shall be substituted the following paragraph-

"(a) property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the order adjudging him bankrupt and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the order adjudging him bankrupt was made;" and

(b) in subsection (2)-

- (i) for the words "Court of Session" there shall be substituted the word "court"; and
- (ii) for the words from "sections 8" to "27 and 28" there shall be substituted the words "sections 8, 9, 11 to 13, 16 and 24 and on the Court of Session by sections 27, 28 and 28A".

EXPLANATORY NOTES

*Paragraph 28*

*Sub-paragraph (a)*

This amendment also implements Recommendation 57(1) in part. Paragraph (a) matches Schedule 2, paragraph 2(1)(a).

29. In section 35-

- (a) in subsection (1), for paragraph (a) there shall be substituted the following-

"(a) property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the relevant time and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the relevant time;"

- (b) in subsection (2)-

- (i) for the words "Court of Session" there shall be substituted the word "court"; and
- (ii) for the words from "sections 8" to "27 and 28" there shall be substituted the words "sections 8, 9, 11 to 13, 16 and 24 and on the Court of Session by sections 27, 28 and 28A"; and

- (c) after subsection (4) there shall be inserted the following subsection-

"(4A) Where an order for the winding up of a company has been made or a resolution has been passed by a company for its voluntary winding up and before the relevant time the company has directly or indirectly made an implicative gift-

- (a) no order or, as the case may be, decree shall, at any time when proceedings as regards an offence to which section 1 of this Act relates have been instituted against the company and have not been concluded or

when property of the person to whom the gift was made is subject to a restraint order, be made under section 238 or 239 or the Insolvency Act 1986 (transactions at an undervalue and preferences) or granted under section 242 or 243 of that Act (gratuitous alienations and unfair preferences) in respect of the making of the gift; and

- (b) any order made under either of the said sections 238 or 239 or decree granted under either of the said sections 242 and 243 after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made."

#### EXPLANATORY NOTES

##### *Paragraph 29*

##### *Sub-paragraph (a)*

This amendment also implements Recommendation 57(1) in part. Paragraph (a) matches Schedule 2, paragraph 3(1)(a).

##### *Sub-paragraph (c)*

Subsection (4A) further implements Recommendation 57(1) (paragraphs 9.44, 9.45) and matches Schedule 2, paragraph 3(5).

#### **30.** In section 36-

- (a) in subsection (1) for paragraph (a) there shall be substituted the following paragraph-

"(a) so much of it, not being heritable property situated in Scotland, as is for the time being subject to a restraint order made before the appointment of the receiver and so much of it, being heritable property situated in Scotland, as is for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the such appointment;" and

- (b) in subsection (2) for the words from "Court of Session" to "16 and 24" there shall be substituted the words "court by sections 8, 9, 11 to 13, 16 and 24 and on the Court of Session by sections 27, 28 and 28A".

#### EXPLANATORY NOTES

##### *Paragraph 30*

*Sub-paragraph (a)*

This amendment also implements Recommendation 57(1) in part (paragraph 9.43). Paragraph (a) matches Schedule 2, paragraph 4(1)(a).

31. After section 37 there shall be inserted the following-

*"Forfeiture of property where accused has died*

Forfeiture of  
property where  
accused has died.

37A.-(1) Section 37 of the Proceeds of Crime (Scotland) Act 1994 shall, subject to any necessary modifications, apply in respect of an offence to which Part I of this Act relates as it applies to an offence to which Part I of that Act applies.

(2) Without prejudice to subsection (1) above, in the application of subsection (2) of that section, in paragraph (b)(i) for the words "in connection with the commission of the offence" there shall be substituted the words "in connection with drug trafficking".

EXPLANATORY NOTES

*Paragraph 31*

This amendment implements Recommendation 125 (paragraph 19.22). Section 37A corresponds to clause 37.

32. In section 47-

(a) in subsection (1)-

(i) for the definition of "confiscation order" there shall be substituted the following definition-

" "confiscation order" means an order under section 1(1), 6A, 6B or 25 of this Act;"

(ii) after the definition of "confiscation order" there shall be inserted the following definition-

" "the court" means-

(a) for the purpose of sections 1 to 7A, the High Court of Justiciary or sheriff court;

(b) for the purposes of sections 8 to 26 and 33 to 37, the Court of Session or the sheriff court;"

(b) in subsection (5), in each of paragraphs (c) and (d) after the words "High Court" there shall be inserted the words "or, as the



case may be, the sheriff";

(c) at the end there shall be added the following subsection-

"(6) 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."

#### EXPLANATORY NOTES

*Paragraph 32*

*Sub-paragraph (c)*

Subsection (6) corresponds to clause 38(4).

## SCHEDULE 4

## MINOR AND CONSEQUENTIAL AMENDMENTS

*The Conveyancing (Scotland) Act 1924 (c.27)*

1. In section 44 of the Conveyancing (Scotland) Act 1924, after paragraph (a) of subsection (3) there shall be inserted the following paragraph-

- "(aa) Any inhibition to which a certified copy recorded under-
- (i) subsection (2) of section 11 or 28A of the Criminal Justice (Scotland) Act 1987;
  - (ii) paragraph 16(2) of the Schedule 4 to the Prevention of Terrorism (Temporary Provisions) Act 1989; or
  - (iii) subsection (2) of section 25 or 29 of the Proceeds of Crime (Scotland) Act 1994;

relates shall prescribe and be of no effect on the lapse of five years from the date of such recording."

## EXPLANATORY NOTES

*Schedule 4*

This Schedule, introduced by clause 39(4), provides for the consequential amendment of statutes other than the Criminal Justice (Scotland) Act 1987 which are affected by the provisions of the Bill.

*Paragraph 1*

This amendment is consequential on the implementation of Recommendation 55 by the introduction of a revised procedure (described in para 9.34) for inhibition relative to heritable property affected by a restraint order, and the substitution of that procedure for the procedure in the Acts of 1987 and 1989.

*The Trade Marks Act 1938 (c.22)*

2. In section 58B of the Trade Marks Act 1938, in subsection (6) for the words "section 223 or 436 of the Criminal Procedure (Scotland) Act 1975" there shall be substituted the words "Part II of the Proceeds of Crime (Scotland) Act 1994."

## EXPLANATORY NOTES

### *Paragraph 2*

This provision is consequential on the replacement of the general power to order forfeiture conferred by sections 223 and 436 of the 1975 Act with the new forfeiture procedure in Part II of the Bill.

#### *The Criminal Procedure (Scotland) Act 1975 (c.21)*

3.-(1) The Criminal Procedure (Scotland) Act 1975 shall be amended as follows.

(2) In section 231-

- (a) in subsection (1) after "1987" there shall be inserted the words "and section 7(4) of the Proceeds of Crime (Scotland) Act 1994";
- (b) in subsection (5) after "1987" there shall be inserted the words "and subsection (4) of section 7 of the said Act of 1994" and for the words "that section" there shall be substituted the words "the said section 2 or 7".

(3) In section 444, in subsection (1) at the beginning there shall be inserted the words "Subject to section 7(8) of the Proceeds of Crime (Scotland) Act 1994,".

## EXPLANATORY NOTES

### *Paragraph 3*

This provision introduces references to the rule in clause 7(4) as to postponed confiscation orders into sections 231 (intimation of intention to appeal in solemn procedure) and 444 (manner and time of appeal by stated case in summary procedure).

#### *The Community Service by Offenders (Scotland) Act 1978 (c.49)*

4. In section 1(7) of the Community Service by Offenders (Scotland) Act 1978, at the end there shall be added the following paragraph-

- "(d) making a suspended forfeiture order under section 15 of the Proceeds of Crime (Scotland) Act 1994 in respect of the offence."

## EXPLANATORY NOTES

### *Paragraph 4*

This amendment makes it clear that a court which makes a community service order may also make a suspended forfeiture order in respect of the offence.

#### *The Civil Jurisdiction and Judgments Act 1982 (c.27)*

5. In subsection (4A) of section 18 of the Civil Jurisdiction and Judgments act 1982-

- (a) after the words "Court of Session" there shall be inserted the words "or by the sheriff"; and
- (b) at the end there shall be added "or the Proceeds of Crime (Scotland) Act 1994".

#### EXPLANATORY NOTES

##### *Paragraph 5*

The effect of this amendment is that section 18 of the 1982 Act (enforcement of UK judgments in other parts of UK) does not apply as respects the enforcement in England and Wales of orders made by the Court of Session or the sheriff under or for the purposes of Part I of the Criminal Justice (Scotland) Act 1987 or this Bill.

##### *The Telecommunications Act 1984 (c.12)*

6. In Schedule 3 to the Telecommunications Act 1984, in paragraph 3(b) for the words "sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975" there shall be substituted the words "Part II of the Proceeds of Crime (Scotland) Act 1994."

#### EXPLANATORY NOTES

##### *Paragraph 6*

See the note to paragraph 2. The new provisions, like the 1975 Act provisions which they replace, do not apply where a person is convicted under the Wireless Telegraphy Act 1949.

##### *The Bankruptcy (Scotland) Act 1985 (c. 66)*

7.-(1) The Bankruptcy (Scotland) Act 1985 shall be amended as follows.

(2) In section 5(4) for the words "or by section 1(8) of the Drug Trafficking Offences Act 1986" there shall be substituted the words "by section 1(8) of the Drug Trafficking Offences Act 1986 or by section 38(1) of the Proceeds of Crime (Scotland) Act 1994".

(3) In section 7(1), in the definition of "confiscation order", for the words "or by section 1(8) of the said act of 1986" there shall be substituted the words "by section 1(8) of the said Act of 1986 or by section 38(1) of the Proceeds of Crime (Scotland) Act 1994".

## EXPLANATORY NOTES

### *Paragraph 7*

This provision adds section 38(1) to lists of provisions assigning a meaning to "confiscation order".

#### *The Drug Trafficking Offences Act 1986 (c. 32)*

8.-(1) The Drug Trafficking Offences Act 1986 shall be amended as follows.

(2) In section 2(5), at the end there shall be added the words "and the Proceeds of Crime (Scotland) Act 1994".

(3) In section 5(2)(c), for the words "section 223 or 436 of the Criminal Procedure (Scotland) Act 1975" there shall be substituted the words "Part II of the Proceeds of Crime (Scotland) Act 1994 (suspended forfeiture orders)".

(4) In section 8(8)-

(a) after the words "Criminal Justice (Scotland) Act 1987" there shall be added the words "and the Proceeds of Crime (Scotland) Act 1994"; and

(b) after the words "that Part" there shall be added the words "or, as the case may be, that Act".

(5) In section 19(2), in paragraph (b)(ii) for the words "11 (as applied by subsection (6) of that section), 27 or 28" there shall be substituted the words "27, 28 or 28A".

## EXPLANATORY NOTES

### *Paragraph 8*

#### *Sub-paragraph (2)*

In the 1986 Act, section 2(5) (assessing the proceeds of drug trafficking) as amended by the 1987 Act, section 45(7)(a), references to a confiscation order include a reference to a confiscation order within the meaning of Part I of the 1987 Act. This sub-paragraph adds a reference to confiscation orders within the meaning of this Bill.

#### *Sub-paragraph (3)*

See the note to paragraph 2.

#### *Sub-paragraph (4)*

This sub-paragraph adds to the 1986 Act, section 8(8) (seizure of property affected by a restraint order) as amended by the 1987 Act, section 45(7)(b)(i), a reference to a restraint order

within the meaning of this Bill and in relation to such an order gives "realisable property" the same meaning as in this Bill.

*Sub-paragraph (5)*

This amendment of the 1986 Act, section 19(2)(b)(ii) (compensation for loss in consequence of anything done in relation to realisable property by or in pursuance of order of Court of Session) as amended by the 1987 Act, section 45(7)(d), is consequential on the implementation of Recommendation 107 (paragraph 18.4) by the repeal of section 11(6) of the 1987 Act and its replacement by the insertion of the new section 28A.

*The Criminal Justice Act 1988 (c. 33)*

9.-(1) The Criminal Justice act 1988 shall be amended as follows.

(2) In section 74(2)(c) for the words "section 223 or 436 of the Criminal Justice (Scotland) Act 1975" there shall be substituted the words "Part II of the Proceeds of Crime (Scotland) Act 1994 (suspended forfeiture orders)".

(3) In section 77-

(a) in subsection (10) for the words "the High Court has made a restraint order" there shall be substituted the words "a restraint order has been made" and at the end of that subsection there shall be added the words-

"In this subsection, the reference to a restraint order includes a reference to a restraint order within the meaning of the Proceeds of Crime (Scotland) Act 1994 and, in relation to such an order, "realisable property" has the same meaning as in that Act"; and

(b) in subsection (11), for the words "court's directions" there shall be substituted the words "directions of the court which made the order".

(4) In section 89, in subsection (2), in paragraph (b), for the words "an order under this Part of this Act" there shall be substituted the words "-

(i) an order under this Part of this Act; or

(ii) an order of the Court of Session under section 27, 28 or 29 of the Proceeds of Crime (Scotland) Act 1994."

(5) In section 93E after the word "summarily" there shall be inserted the words "or an offence punishable on summary conviction by a fine of an amount greater than the amount corresponding to level 5 on the standard scale or by imprisonment for a period exceeding 3 months or by both such fine and imprisonment".

## EXPLANATORY NOTES

### *Paragraph 9*

#### *Sub-paragraph (2)*

See the note to paragraph 2.

#### *Sub-paragraph (3)*

The effect of these provisions, which correspond to section 8(8) and (9) of the 1986 Act as amended by section 45(7)(b) of the 1987 Act, is to empower a police or customs officer in England and Wales to seize realisable or forfeitable property which is subject to a restraint order made in terms of the Bill.

#### *Sub-paragraph (4)*

This provision corresponds to section 19(2)(b)(ii) of the 1986 Act as amended by section 45(7)(d) of the 1987 Act. It extends the power of the High Court of England and Wales to order payment of compensation.

#### *Sub-paragraph (5)*

This provision implements Recommendation 58 (paragraph 9.51) by adding the type of offence specified to the criminal conduct to which the offences created by sections 93A to 93D of the 1988 Act refer.

### *The Copyright, Designs and Patents Act 1988 (c.48)*

**10.**-(1) The Copyright, Designs and Patents Act 1988 shall be amended as follows.

(2) In section 108(6) for the words "section 223 or 436 of the Criminal Procedure (Scotland) Act 1975" there shall be substituted the words "Part II of the Proceeds of Crime (Scotland) Act 1994".

(3) In section 199(6) for the words "section 223 or 436 of the Criminal Procedure (Scotland) Act 1975" there shall be substituted the words "Part II of the Proceeds of Crime (Scotland) Act 1994".

## EXPLANATORY NOTES

### *Paragraph 10*

See the note to paragraph 2.

*The Road Traffic Offenders Act 1988 (c.53)*

11. After section 33 there shall be inserted the following section-

"Forfeiture of  
vehicles: Scotland.

**33A.-**(1) Where a person commits an offence to which this subsection applies by-

- (a) driving, attempting to drive, or being in charge of a vehicle; or
- (b) failing to comply with a requirement made under section 7 of the Road Traffic Act 1988 (failure to provide specimen for analysis or laboratory test) in the course of an investigation into whether the offender had committed an offence while driving, attempting to drive or being in charge of a vehicle, or
- (c) failing, as the driver of a vehicle, to comply with subsections (2) and (3) of section 170 of the Road Traffic Act 1988 (duty to stop and give information or report accident),

the court may, on an application under this section, make an order forfeiting the vehicle concerned; and any vehicle forfeited under this section shall be disposed of as the court may direct.

(2) Subsection (1) above applies-

- (a) both in relation to solemn and summary proceedings, to an offence which is punishable with imprisonment; and
- (b) to an offence of culpable homicide.

(3) An application under this section shall be at the instance of the prosecutor made when he moves for sentence (or, if the person has been remitted for sentence under section 104 of the Criminal Procedures (Scotland) Act 1975) made before sentence is pronounced.

(4) Where the court has made an order under this section for the forfeiture of a vehicle, the court or any justice may, if satisfied on information on oath-

- (a) that there is reasonable cause to believe that the vehicle is to be found in any place or premises; and



- (b) that admission to the place or premises has been refused or that a refusal of such admission is apprehended,

issue a warrant of search which may be executed according to law.

(5) In relation to summary proceedings, the reference in subsection (4) above to a justice includes a reference to the sheriff and to a magistrate.

(6) Part II of the Proceeds of Crime (Scotland) Act 1994 shall not apply in respect of a vehicle in relation to which this section applies."

#### EXPLANATORY NOTES

##### *Paragraph 11*

This provision implements Recommendation 65 (paragraph 12.14) by inserting a new section to preserve the effect of section 37 of the Road Traffic Act 1991 which added new subsections (1A) and (1B) to sections 223 and 436 of the Criminal Procedure (Scotland) Act 1975 (see paragraph 12.14). Section 37 of the 1991 Act and sections 223 and 436 of the 1975 Act are repealed by Schedule 5.

##### *The Prevention of Terrorism (Temporary Provisions) Act 1989 (c.4)*

12. In Schedule 4 for paragraph 16 there shall be substituted the following paragraph-

"16.-(1) On the application of the Lord Advocate, the Court of Session may, in respect of-

- (a) heritable property in Scotland affected by a restraint order (whether such property generally or particular such property) make an order inhibiting any person interdicted by the order; and
- (b) moveable property so affected (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 certified copy of an order under sub-paragraph (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the Lord Advocate against the person named in the order had been duly signetted, executed and recorded as aforesaid.

(3) An order under sub-paragraph (1)(a) above so far as it inhibits a

person may be recalled or restricted by an order of the Court of Session, and an order under this sub-paragraph shall take effect (on the recording of a certified copy of the order made under this sub-paragraph in the Register of Inhibitions and Adjudications) as from the date of its making.

(4) Without prejudice to the effect of recording a certified copy under sub-paragraph (2) or (3) above, the Lord Advocate shall take all reasonable steps to intimate the making of an order under sub-paragraph (1) or (3) above to persons affected thereby.

(5) A warrant under sub-paragraph (1)(b) 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.

(6) The fact that a certified copy of an order has been recorded under sub-paragraph (2) above or an arrestment has been executed under sub-paragraph (5) 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 Schedule in respect of that property.

(7) No inhibition to which a certified copy recorded under sub-paragraph (2) above relates, or arrestment executed under sub-paragraph (5) above, shall have effect once, or in so far as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the Lord Advocate shall-

- (a) apply to the Court of Session for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and
- (b) transmit a certified copy of any order mentioned in paragraph (a) of this sub-paragraph to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register."

#### EXPLANATORY NOTES

##### *Paragraph 12*

See the note to paragraph 1.

##### *The Criminal Justice (International Co-operation) Act 1990 (c.5)*

**13.** In section 9(6) for the words from "or an" to the end there shall be substituted the words "an offence to which Part VI of the Criminal Justice Act 1988 applies, an offence to which Part I of the Proceeds of Crime (Scotland) Act 1994 applies or an offence in respect of which a suspended forfeiture order may be made under section 15 of the said Act of 1994."

## EXPLANATORY NOTES

### *Paragraph 13*

This provision implements Recommendation 118 (paragraph 18.18) by extending the application of section 9 of the 1990 Act (enforcement of overseas forfeiture orders) to any offence which corresponds to or is similar to an offence to which Part I of the Bill applies or an offence in respect of which a suspended forfeiture order may be made.

*The Northern Ireland (Emergency Provisions) Act 1991 (c.24)*

**14.** In section 50(2), for paragraph (e) there shall be substituted the following paragraph-

"(e) Part II of the Proceeds of Crime (Scotland) Act 1994".

## EXPLANATORY NOTES

### *Paragraph 14*

See the note to paragraph 2. Paragraph (e) was added by section 44 of the Criminal Justice Act 1993.

## SCHEDULE 5

## Repeals

<i>Chapter</i>	<i>Short title</i>	<i>Extent of repeal</i>
1975 c.21	The Criminal Procedure (Scotland) Act 1975.	Section 223. Section 436.
1987 c.41	The Criminal Justice (Scotland) Act 1987.	<p>Section 1(3). Section 3(5).</p> <p>In section 5, in subsection (4) the words from "except that" to the end, in subsection (5), paragraph (b), subsection (6), in subsection (7) the words "notwithstanding subsections (5)(b) and (6) above" and subsection (8).</p> <p>In section 6, subsections (4) and (5).</p> <p>In section 7 after the words "section 411" the words "except the proviso to subsection (3)".</p> <p>Section 11(6).</p> <p>In section 12, in subsection (1), the words from "and the clerk of court" to the end.</p> <p>In section 14(1)(c) the words from "and, without" to the end of the paragraph.</p> <p>In section 23(6) the words from "and without" to "family" and the words "(other than an obligation having priority, within the meaning of section 5(8) of this Act)".</p> <p>In section 26, in subsection (2)(b) the word "substantial" and in subsection (4) after paragraph (c) the word "and".</p> <p>In section 30, in subsection (1), paragraph (b)(I) and paragraph (c) and the word "and" immediately preceding the said subsection (c).</p> <p>In section 47(1) the definition of "associate".</p>

<i>Chapter</i>	<i>Short title</i>	<i>Extent of repeal</i>
1988 c.33	The Criminal Justice Act 1988	Section 90 to 93. Section 95.
1990 c.	The Criminal Justice (International Co-operation) Act 1990.	Section 17.
1991 c.40	The Road Traffic Act 1991.	Section 37.

## EXPLANATORY NOTES

### *Schedule 5*

This Schedule sets out the enactments repealed by clause 39(5).

#### *Criminal Procedure (Scotland) Act 1975*

Sections 223(1) and (2) and 436(1) and (2) are in identical terms (see paragraph 11.6). They are replaced by the provisions of Part II of the Bill and by the provisions of Part III which are relevant to forfeitable property. See the note to Schedule 4, paragraph 11.

#### *Criminal Justice (Scotland) Act 1987*

The repealed provisions are in Part I of the 1987 Act. The effect of the repeals in this Schedule and of the new provisions inserted or substituted by Schedule 3 is shown in Appendix B to the report.

#### *Section 1(3)*

This provision is replaced by section 1(2C) (Schedule 3, paragraph 2).

#### *Section 3(5)*

This repeal implements Recommendation 35(1) (paragraphs 6.21-6.23). This subsection provides for the remit of a case from the High Court to the Court of Session for the decision of a difficult question of law or a question of fact of exceptional complexity. Under the procedure substituted by the new sections 4(6) to (8) (Schedule 3, paragraph 5) any matters in dispute are resolved by the court in which the trial took place.

#### *Section 5(4), (8)*

The repeal of these provisions implements Recommendation 20(2) by removing the requirement that in the assessment of the amount that might be realised deductions must be made in respect of "obligations having priority" (see paragraphs 4.31-4.33).

*Section 5(5)(b), (6)*

These provisions are replaced by new provisions as to the valuation of gifts in section 6(2) to (3B) (Schedule 3, paragraph 7).

*Section 5(7)*

This repeal is consequent on the repeal of subsections (5)(b) and (6).

*Section 6(4), (5)*

This repeal implements Recommendation 19(6): see paragraph 4.30.

*Section 7*

This repeal implements Recommendation 43(1)(c): see paragraphs 8.3 to 8.5.

*Section 11(6)*

The effect of section 11(6) is preserved in the new section 28A (Schedule 3, paragraph 24).

*Section 12(1)*

The effect of the repealed words is preserved in the new section 9(6) (Schedule 3, paragraph 11).

*Section 14(1)(c)*

This repeal is consequent on the repeal of section 3(5).

*Section 23(6)*

The repeal of the passage from "and without" to "family" implements Recommendation 14(3). New constraints on the disposal of the offender's family home are provided by the new section 7A (Schedule 3, paragraph 10). The court retains a general power to attach conditions and exceptions to a restraint order (section 9(1), replaced by the new section 8(2): Schedule 3, paragraph 11). Under that general power conditions and exceptions may be made, if necessary, for the protection of a person or his family. See paragraphs 4.15 to 4.19.

The repeal of the second passage is consequent on the repeal of section 5(8).

*Section 26(2)(b)*

This repeal implements Recommendation 59(1) (see para 10.7(vi)(c)). The word "substantial" was deleted from the corresponding section 19(2)(b) of the 1986 Act by the 1988 Act, Schedule 5, paragraph 12(c)(ii), and does not appear in the other corresponding provisions noted in paragraph 10.7, first footnote.

### *Section 30*

This repeal implements Recommendation 111 (paragraph 18.9).

### *Section 47(1)*

Section 47(1) provides that "associate" is to be construed in accordance with section 74 of the Bankruptcy (Scotland) Act 1985. The effect of the repeal is that the word "associated" in the new sections 5(7A)(b) and 9(2)(b) (Schedule 3, paragraphs 6, 11), as in clauses 4(6)(b) and 24(2)(b) of the Bill, has no statutory definition. See paragraph 4.29. The definition in section 74 of the 1985 Act is retained in section 14(1)(j) of the 1987 Act: see Schedule 3, paragraph 15.

### *Criminal Justice Act 1988*

#### *Sections 90 to 93*

This repeal implements Recommendation 108: see paragraph 18.4. Sections 90 to 93 are restated in clauses 27 to 29 of the Bill.

#### *Section 95*

This repeal implements Recommendation 109: see paragraph 18.5. Section 95 is restated in clause 30 of the Bill.

### *Criminal Justice (International Co-operation) Act 1990*

The repeal of section 17 (increase in realisable property: Scotland) implements Recommendation 40(2): see paragraphs 7.2 to 7.11. The topic is now provided for in clause 8 of the Bill and in the new section 6A of the 1987 Act (Schedule 3, paragraph 8).

### *Road Traffic Act 1991*

See the note to Schedule 4, paragraph 11.

# Appendix B

1. This Appendix sets out the text of Part I of the Criminal Justice (Scotland) Act 1987 as amended to 1 May 1994 and as proposed to be further amended by the draft Proceeds of Crime (Scotland) Bill in Appendix A. It has no official status.

2. The sources of the amendments to 1 May 1994 are given in notes at the end of each section. Words repealed by amendments made before 1 May 1994 are indicated by dots in the text. Amendments made by provisions of the Criminal Justice Act 1993 which were not yet in force on 1 May 1994 are included in the text but are marked with an asterisk in the notes.

3. The amendments proposed by the Bill are shown as follows. Words proposed to be inserted or substituted (by the amendments in Schedule 3 to the Bill) are shown in **bold** type. Words to be repealed (by Schedule 5) or to be repealed and replaced by substituted words (by the amendments in Schedule 3) are shown in *italic* type and struck through with a horizontal line. Where a section contains words which are to be inserted or substituted, the paragraph of Schedule 3 which effects the amendment is cited in a marginal note beneath the sidenote.

4. The following abbreviations are used in the notes:

1988 Act      Criminal Justice Act 1988, c 33

1989 Act      Prevention of Terrorism (Temporary Provisions) Act 1989, c 4

1990 Act      Criminal Justice (International Co-operation) Act 1990, c 5

1993 Act      Criminal Justice Act 1993, c 36

(Provisions of this Act marked with an asterisk are not yet in force.)

Bill              Draft Proceeds of Crime (Scotland) Bill.



# CRIMINAL JUSTICE (SCOTLAND) ACT 1987 (c. 41)

## PART I

As amended to 1 May 1994 and as proposed to be further amended by the Draft Proceeds of Crime (Scotland) Bill

### ARRANGEMENT OF SECTIONS

#### CONFISCATION OF PROCEEDS OF DRUG TRAFFICKING ETC.

##### *Confiscation orders*

##### Section

1. Confiscation orders.
2. Postponed confiscation orders.
3. Assessing the proceeds of drug trafficking.
4. Statements relating to drug trafficking.
5. Realisable property.
6. Implicative gifts.
- 6A. Increase in value of proceeds of drug trafficking or realisable property.**
- 6B. Confiscation orders where proceeds of crime discovered at later date.**
7. Application of provisions relating to fines to enforcement of confiscation orders.
- 7A. Disposal of family home.**

##### *Restraint orders and interdict*

~~8.—Cases in which restraint orders may be made.~~

**8. Restraint orders.**

~~9.—Restraint orders.~~

Section

9. **Variation and recall of restraint orders.**
10. Seizure of property affected by restraint order.
11. Inhibition and arrestment of property affected by restraint order or by interdict under section 12.
12. Interdict of person not subject to restraint order.

*Administrators*

13. Administrators.
14. Functions of administrators.
15. Money received by administrator.
16. Application of proceeds of realisation and other sums.
17. Supervision of administrators.
18. Accounts and remuneration of administrator.
19. Effect of appointment under section 13 on diligence.
20. Further provision as to administrators.
21. Discharge of administrator.
22. Rules of court as regards accountant of court's supervision etc. of administrators.

*Exercise of powers*

23. Exercise of powers by Court of Session or administrator.
24. Power to facilitate realisation.

*Variation of confiscation orders*

~~25. — *Variation of confiscation orders.*~~

25. **Realisable property inadequate to meet payments under confiscation order.**

## *Compensation*

### Section

26. Compensation.

### *Reciprocal arrangements for enforcement of confiscation orders*

27. Recognition and enforcement of orders under Drug Trafficking Offences Act 1986.
28. Provisions supplementary to section 27.
- 28A. Inhibition and arrestment of Scottish property affected by order registered under s.27.**
29. Enforcement of Northern Ireland orders.
30. Enforcement of other external orders.
- 30A. Registration of external confiscation orders.
31. Enforcement in England and Wales.
32. Order in Council as regards taking of action in designated country.

### *Sequestration etc. of estate comprising realisable property*

33. Sequestration of person holding realisable property.
34. Bankruptcy in England and Wales of person holding realisable property.
35. Winding up company holding realisable property.
36. Property subject to floating charge.
37. Insolvency practitioners dealing with property subject to restraint order.

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

- 37A. Forfeiture of property where accused has died.**

*Investigations and disclosure of information*

- 38. Order to make material available.
- 39. Authority for search.

Section

- 40. Interpretation of sections 38 and 39.
- 40A. Prosecution by order of the Commissioners of Customs and Excise.
- 41. Disclosure of information held by government departments.

*Offences*

- 42. Offence of prejudicing investigation.
- 42A. Acquisition, possession or use of proceeds of drug trafficking.
- 43. Offence of assisting another to retain the proceeds of drug trafficking.
- 43A. Failure to disclose knowledge or suspicion of money laundering.
- 43B. Tipping-off.
- 44. Offences relating to controlled drugs: fines.

*Minor amendments, service, notice and interpretation*

- 45. Minor amendments in relation to drug trafficking.
- 46. Service and notice for purposes of Part I.
- 46A. Extension of certain offences to Crown servants and exemptions for regulators etc.
- 47. Interpretation of Part I.

## PART I

(See Notes at beginning of this Appendix)

### CONFISCATION OF PROCEEDS OF CRIME

#### *Confiscation orders*

Confiscation orders.  
1975 c. 21.  
[Bill, Sch.3, para.2.]

1.-(1) Subject to the provisions of this Part of this Act, where a person is convicted in the ~~High Court of, or is under section 104(1) of the 1975 Act remitted to that Court for sentence as regards, an offence to which this section relates the Court may, on the application of the prosecutor made when he moves for sentence (or, if the case is one so remitted, made before sentence is pronounced),~~ **High Court or sheriff court (in this section and sections 2 to 7A of this Act referred to as "the court") of an offence to which this section relates, the court, on the application of the prosecutor, may make an order (in this Act referred to as a "confiscation order") requiring the person to pay such amount as the ~~Court~~ court considers appropriate, being an amount not exceeding-**

- (a) subject to paragraph (b) below, what it assesses to be the value of the proceeds of the person's drug trafficking; or
- (b) if the ~~Court~~ court is satisfied that the ~~property~~ amount that might be realised in terms of this Part of this Act at the time the confiscation order is made has a value less than that of the proceeds of the person's drug trafficking, what it assesses to be ~~the value of that property~~ **that amount.**

(2) This section relates to any of the following **offences when prosecuted either on indictment or on summary complaint before the sheriff if the offence is punishable by a fine in excess of level 5 or by imprisonment for a period of more than 3 months or by both such fine and imprisonment-**

- (a) an offence under section 4(2) (production, or being concerned in production, of controlled drug), 4(3) (supply of, or offer to supply, or being concerned in supply of, controlled drug), 5(3) (possession of controlled drug with intent to supply) or 20 (assisting in, or inducing commission of, certain drug related offences punishable under foreign law) of the Misuse of Drugs Act 1971;

1971 c.38.

- <sup>1</sup>(b) in connection with a prohibition or restriction on importation and exportation having effect by virtue of section 3 of the said Act of 1971, an offence under section 50(2) or (3) (improper importation), 68(2) (improper

exportation) or 170 (fraudulent evasion of duty etc.) of the Customs and Excise Management Act 1979;

<sup>2</sup>(bb) an offence under section 42A of this Act;

(c) an offence under section 43 of this Act;

<sup>3</sup>(cc) an offence under sections 12, 14 or 19 of the Criminal Justice (International Co-operation) Act 1990;

<sup>4</sup>(d) an offence of conspiring, inciting or attempting to commit an offence to which, by virtue of paragraph (a), (b), (c) or (cc) above, this section relates.

**(2A) Any application under this section shall be made-**

**(a) in proceedings on indictment, when the prosecutor moves for sentence or, if the offender is remitted for sentence under section 104 of the 1975 Act, before sentence is pronounced; and**

**(b) in summary proceedings following upon the conviction of the accused.**

**(2B) A confiscation order shall not be made unless the court orders some other disposal (including a probation order or an absolute discharge) in respect of the offender.**

**(2C) 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 person;**

**(b) making any order involving any other payment by him;**

**(c) making any order under section 15 of the Proceeds of Crime (Scotland) Act 1994 or an order for forfeiture under any other enactment.**

**(2D) 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;**

**(b) making any order involving any other payment by him;**

**(c) making any suspended forfeiture order under section 15 of the Proceeds of Crime (Scotland) Act 1994 or an**

order for forfeiture under any other enactment,

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.

(2E) Where a court makes both a confiscation order and a compensation order under section 58 of the 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.

*(3) — The Court shall take account of the provisions of any order made by it under subsection (1) above in determining the amount of any fine imposed on the person as regards the offence but not in determining any other matter as regards sentence.*

(4) For the purposes of any appeal or review, a confiscation order is a sentence.

(5) No enactment restricting the power of a court dealing with a person in a particular way from dealing with him also in any other way shall by reason only of the making of an order under subsection (1) above (or the postponement of a decision as regards making such an order) restrict the ~~High Court~~ **court** from dealing with a person in any way the ~~Court~~ **court** considers appropriate in respect of an offence to which this section relates.

(6) In this Part of this Act, "drug trafficking" means doing or being concerned in any of the following, whether in Scotland or elsewhere-

- (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the said Act of 1971;
- (b) transporting or storing such a drug where possession of it contravenes section 5(1) of that Act;
- (c) importing or exporting such a drug where the importation or exportation is prohibited by section 3(1) of that Act;
- (d) producing, supplying, transporting, storing, importing or exporting such a drug in contravention of a corresponding law ("corresponding law" having the meaning assigned by section 36(1) of that Act);

- 5(e) manufacturing or supplying a scheduled substance within the meaning of section 12 of the Criminal Justice (International Co-operation) Act 1990 where the manufacture or supply is an offence under that section;
- 6(f) acquiring, having possession of or using property in contravention of section 42A of this Act;
- (g) concealing or transferring the proceeds of drug trafficking in contravention of section 14 of the Act of 1990;
- (h) using any ship for illicit traffic in controlled drugs in contravention of section 19 of the Act of 1990;

and includes, whether in Scotland or elsewhere, entering into or being otherwise concerned in any arrangement whereby-

- (i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or
- (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment.

<sup>7</sup>(7) In paragraphs (e) to (g) of subsection (6) above, references to conduct in contravention of the enactments mentioned in those paragraphs include conduct which would contravene the enactments if it took place in Scotland.

## NOTES

1 "and exportation" inserted by 1988 Act, Sch 5, para 19.

2 Inserted by 1993 Act, s 24(13).

3 Inserted by 1990 Act, Sch 4, para 5(2)(a).

4 "(c) or (cc)" substituted by 1990 Act, Sch 4, para 5(2)(a).

5 Inserted by 1990 Act, Sch 4, para 5(2)(b).

6 Paras (f), (g) and (h) inserted by 1993 Act, s 24(14).

7 Inserted by 1993 Act, s 24(15).



~~Postponed confiscation orders.~~

~~1975 c.21.~~

~~2.-(1) The Court, if it considers that it requires further information before coming to any decision as regards making an order under section 1(1) of this Act, may subject to subsection (4) below postpone that decision for a period not exceeding six months after the date of conviction for the purpose of enabling that information to be obtained; but without prejudice to sections 179 and 219 of the 1975 Act may notwithstanding such postponement proceed, on the prosecutor's motion therefor, to sentence or to otherwise deal with the person in respect of the conviction:~~

~~Provided that no fine shall be imposed before the decision is taken.~~

~~(2) Where under subsection (1) above a decision has been postponed 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 that Act not within two weeks of the final determination of the proceedings but within two weeks of-~~

~~(a) in the case of an appeal against conviction where there has been no such sentence, the day of which the period of postponement commences;~~

~~(b) in any other case, the day on which such sentence is passed in open court.~~

~~(3) Notwithstanding any appeal of which intimation has been given by virtue of subsection (2) above, a person may appeal under the said section 228 against 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.~~

~~(4) If during the period of postponement-~~

~~(a) intimation is given by virtue of subsection (2) above by the person, the Court may, on the application of the prosecutor, extend that period to a date up to three months after the date of disposal of the appeal;~~

~~(b) the case is remitted under subsection (5) of section 3 of this Act, the Court may, on such application, extend that period to a date up to three months after the case is transmitted under that subsection by the Court of Session or, if there is an appeal against the decision of the Court of Session on such remit, the date of disposal of that appeal.~~

Postponed  
confiscation orders.  
[Bill, Sch.3, para.3]

**2.-(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.

1975 c.21.

(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; and
- (c) no suspended forfeiture order nor an order for forfeiture under any other enactment shall be made in respect of 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 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.

Assessing the  
proceeds of drug  
trafficking.  
[Bill, Sch.3, para.4.]

3.-(1) For the purposes of this Act-

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of section 1 of this Act) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking, and

(b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) Without prejudice to section 4 of this Act the ~~Court~~ court may, in making an assessment as regards a person under section 1(1) of this Act, make the following assumptions, except in so far as

any of them may be shown to be incorrect in that person's case-

- (a) that any property appearing to the ~~Court~~ **court-**
  - (i) to have been held by him at any time since his conviction, or
  - (ii) to have been transferred to him at any time since a date six years before his being indicted, **or being served with the complaint (as the case may be)**

was received by him, at the earliest time at which he appears to the ~~Court~~ **court** to have held it, as a payment or reward in connection with drug trafficking carried on by him.

- (b) that any expenditure of his since the date mentioned in paragraph (a)(ii) above was met out of payments received by him in connection with drug trafficking carried on by him, and
- (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

1990 c.5.

1(3) Subsection (2) above does not apply if the only offence by virtue of which the assessment is being made is an offence under section 42A or 43 of this Act or section 14 of the Criminal Justice (International Co-operation) Act 1990.

(4) The ~~Court~~ **court** shall, in making an assessment as regards a person under section 1(1) of this Act, leave out of account any of his proceeds of drug trafficking that are shown to the court to have been taken into account in a case where a confiscation order (whether under this Act or under and within the meaning of-

1986 c.32.

- (a) section 1 of the Drug Trafficking Offences Act 1986; or
- (b) any corresponding provision in Northern Ireland),

has previously been made against him.

~~(5) Where in making an assessment as regards a person under section 1(1) of this Act the Court at any stage is of the opinion that a difficult question of law or a question of fact of exceptional complexity is involved, it may of its own accord, or on the application of the prosecutor or of the person (or on their joint application), remit the case to the Court of Session for a decision as regards that question, and the Court of Session shall on deciding the question transmit the case to the High Court.~~

## NOTES

<sup>1</sup> "42A or" inserted by 1993 Act, s 17(2).

Words from "or section 14" to "1990" inserted by 1990 Act, Sch.4, para.5(3).

Statements relating to  
drug trafficking.  
1975 c.21.  
[Bill, Sch.3, para.5.]

4.-(1) Without prejudice to section 150 **or, as the case may be, section 354** of the 1975 Act, where the prosecutor has, as regards a person, moved for an order under section 1(1) of this Act the prosecutor may lodge with the clerk of court a statement as to any matters relevant to the assessment of the value of that person's proceeds of drug trafficking and if the person accepts to any extent any allegation in the statement the ~~Court~~ **court** may, for the purposes of that assessment, treat that acceptance as conclusive of the matters to which it relates.

(2) Where-

(a) a statement is lodged under subsection (1) above, and

(b) the ~~Court~~ **court** is satisfied that a copy of that statement has been served on the person,

the ~~Court~~ **court** may require the person to indicate, within such period as the ~~Court~~ **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.

(3) If the person fails in any respect to comply with a requirement under subsection (2) 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.

(4) Without prejudice to section 150 **or, as the case may be, section 354** of the 1975 Act, where-

(a) there is lodged with the clerk of court by the person 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~~ **court** may, for the purposes of that determination, treat that acceptance as conclusive of the matters to which it relates.

(5) No acceptance by the person under this section that any

payment or other reward was received by him in connection with drug trafficking carried on by him or another shall be admissible in evidence in any proceedings, whether in Scotland or elsewhere, in respect of an offence.

**(6) Where-**

- (a) any allegation in the statement lodged under subsection (1) above is challenged by the person, or**
- (b) the basis of the non-acceptance by the person of any such allegation is challenged by the prosecutor,**

a hearing shall be arranged before the trial judge or, if he is not available to preside at such a hearing within a reasonable time, before another judge, to consider the matters being challenged.

**(7) In subsection (6) above "another judge" means, if the trial judge was-**

- (a) a judge of the High Court of Justiciary, another judge of that Court;**
- (b) a sheriff, another sheriff of the sheriffdom concerned.**

**(8) In any hearing under subsection (6) above, the burden of proof shall be on the prosecutor who shall be required to establish his case beyond reasonable doubt.**

Realisable property.  
[Bill, Sch.3, para.6.]

~~5.(1) Subject to subsection (3) below, the following property is realisable in terms of this Part of this Act-~~

~~(a) the whole estate of a person suspected of, or charged with, an offence to which section 1 of this Act relates, being an offence in respect of which (either or both)-~~

~~(i) warrant to arrest and commit him has been granted;~~

~~(ii) a restraint order has been made against him; and~~

~~(b) the whole estate 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 an implicative gift,~~

~~if the proceedings as regards the offence have not been concluded.~~

~~<sup>1</sup>(2) In subsection (1) above, "the whole estate of a person" means his whole estate, wherever situated, ... and includes-~~

~~(a) any income or estate vesting in the holder of the realisable-~~

~~property, ... and~~

~~(b) the capacity to exercise, and to take proceedings for exercising, such powers in, over or in respect of any property as might have been exercised by the holder of the realisable property for his own benefit ...~~

~~(3) 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; or~~

~~(b) an order under-~~

~~(i) section 27 of the Misuse of Drugs Act 1971 (forfeiture orders), or~~

~~(ii) section 223 or 436 of the 1975 Act (forfeiture of property), or~~

~~(iii) section 43 of the Powers of Criminal Courts Act 1973 (deprivation orders), or~~

~~2(iiiia) section 13(2), (3) or (4) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (forfeiture orders),~~

~~(iv) any other statutory provision providing specifically for forfeiture in relation to an offence,~~

~~is in force in respect of the 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 section 1 of this Act relates; or**

**(ii) in respect of whom a restraint order has been made by virtue of section 8(4) 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 an implicative gift;**

**(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) For the purposes of this section proceedings for an offence are instituted against a person-

(a) on his arrest without warrant;

b) when he is charged with the offence without being arrested;

(c) when a warrant to arrest him is granted;

(d) when a warrant to cite him is granted;

(e) in summary proceedings, on the first calling of the case; or

(f) when a petition is intimated to him or an indictment or a complaint is served on him,

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

(4) Subject to subsection (7) below, for the purposes of section 1(1)(b) and 4(4)(a) of this Act, 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 ~~realisable property owned,~~ **his realisable property** and all implicative gifts which have been made, by him. ~~except that where there are obligations having priority at that time the amount that might be realised is the aforesaid total value less the total amount payable in pursuance of those obligations.~~

(5) In assessing, for the purposes of section 1(1)(b) of this Act, the value-

(a) of realisable property (other than money) owned by a person in respect of whom it proposes to make a



confiscation order, the ~~High Court~~ **court** shall have regard to the **likely** market value of the property at the date on which the order would be made; 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;

**(aa) of realisable property held by 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 section 33 or 34 of this Act;**

**and in this subsection, "money" includes cheques, banknotes, postal orders, money orders and foreign currency.**

~~(b) of an implicative gift, the court shall, subject to section 6(2) and (3) of this Act, take it to be-~~

~~(i) the value of the gift when received, adjusted to take account of subsequent changes in the value of money, or~~

~~(ii) where subsection (6) below applies, the value there mentioned,~~

~~whichever is the greater.~~

~~(6) If at the date on which the order would be made the recipient holds-~~

~~(a) the property which he received (not being cash), or~~

~~(b) property which, in whole or in part, directly or indirectly represents in his hands the property which he received,~~

~~the value referred to in subsection (5)(b)(ii) above is, subject to section 6(2) and (3) of this Act, the value at that date of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it represents the property which he received.~~

(7) Without prejudice to section 47(3) of this Act, the ~~Court~~ **court** may, ~~notwithstanding subsections (5)(b) and (6) above,~~ for the purposes of section 1(1)(b) of this Act disregard the amount (or part of the amount) of an implicative gift if it considers it improbable that such amount (or part) could be realised.

**(7A) Where the court is satisfied, on the application of a person in receipt of an implicative gift made before or after a**

confiscation order has been made-

- (a) that the person received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the giver was in any way concerned in drug trafficking; and
- (b) that he is not, and has never been, associated with the giver in drug trafficking; 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 an implicative gift 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 Part of this Act and, if a confiscation order has already been made, varying that order accordingly, where necessary.

(7B) 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 (7A) above.

(7C) The procedure in an appeal under this section shall be the same as the procedure in an appeal against sentence.

~~(8) — For the purposes of subsection (4) above, an obligation has priority at any time if it is an obligation of the person in respect of whom the confiscation order is made to-~~

~~(a) — pay an amount due in respect of-~~

~~(i) — a fine or order (not being a confiscation order or an order mentioned in sub-paragraph (ii) below) of a court, imposed or made on conviction of an offence, where the fine was imposed or order made before the confiscation order;~~

~~(ii) — a compensation order (within the meaning of the Criminal Justice (Scotland) Act 1980), made on conviction of an offence, where such order was made before, or in the same proceedings as, the confiscation order; or~~

~~(b) — pay any sum which would be included among-~~

1985 c.66.

~~(i) — the preferred debts (as defined in section 51(2) of the 1985 Act) were his estate being sequestrated in accordance with the provisions of that Act and were the date on which the confiscation order would be made the date of sequestration;~~

1986 c.45.

~~(ii) — the preferential debts (within the meaning given by section 386 of the Insolvency Act 1986) in the person's bankruptcy or winding up were that bankruptcy commencing on the date of the confiscation order or as the case may be were the winding up under an order of the court made on that date.~~

## NOTES

1 Words repealed by 1990 Act, Sch.4, para.5(4), and Sch.5.

2 Inserted by 1989 Act, Sch.8, para.9.

Implicative gifts.  
[Bill, Sch.3, para.7.]

6.-(1) Subject to subsection (4) below, in this Part of this Act references to an "implicative gift" are references to a gift (whether made before or after the commencement of section 1 of this Act)-

1(a) made not more than six years before the date on which, in respect of a person suspected of, or charged with, an offence to which section 1 of this Act relates, ~~the warrant to arrest and commit was granted,~~ **the proceedings were commenced within the meaning of section 5(3) of this Act,** or a restraint order was made (whichever first occurs); or

(b) made at any time if the gift was-

(i) of property received by the giver in connection with drug trafficking carried on by him or another, or

(ii) of property which, in whole or in part, directly or indirectly represented in the giver's hands property received by him in that connection.

~~(2) — For the purposes of subsection (1) above, the circumstances in which a person is to be treated as making a gift shall include those of a case where he transfers an interest in property to another person, directly or indirectly, for a consideration significantly less than the value of that interest at the time of transfer. In subsection (3) below the said consideration is referred to as "consideration A" (or as "A") and the said value as "consideration B" (or as "B").~~

~~(3) — In the case mentioned in subsection (2) above, section 5 of this Act shall apply as if the reference in sub-paragraph (i) of subsection (5)(b) of that section to “the value of the gift when received” were a reference to the amount by which consideration A is exceeded by consideration B and as if in sub-paragraph (ii) of the said subsection (5)(b) the reference to “the value there mentioned” were a reference to a value determined in accordance with the formula—~~

$$\frac{C(B-A)}{B}$$

~~B~~

~~Where C is what the value referred to in the said sub-paragraph (ii) would be had the gift been an outright gift.~~

**(2)** In assessing the value of an implicative gift, the court shall, subject to subsections (3) and (3A) 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 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.

(3A) Where an implicative gift 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.

(3B) In subsection (3A) above, "money" includes cheques, banknotes, postal orders, money orders and foreign currency.

~~(4) A gift made for a charitable purpose to a person who is not an associate of the giver, being a gift which having regard to all the circumstances it was reasonable to make, is not an implicative gift.~~

~~(5) In subsection (4) above, "charitable purpose" means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.~~

#### NOTE

<sup>1</sup> Words from "on which" to "first occurs)" substituted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, c 40, Sch.8, para 37.

Increase in value of proceeds of drug trafficking or realisable property. [Bill, Sch.3, para.8.]

6A.-(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 value of the proceeds of the person's drug trafficking, or the amount that might be realised, is greater than-

- (a) the value of the proceeds of the person's drug trafficking; 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 value of the proceeds of the person's drug trafficking was greater than was taken into account when the confiscation order was made or has increased since the order was made; or
- (b) further proceeds of drug trafficking have 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) the amount, or part of the amount, of a gift which was disregarded under section 5(7) of this Act could now be realised.

(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-

- (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 value of the proceeds of drug trafficking or the amount that might be realised;
- (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 15(1) of the Criminal Justice (International Co-operation) Act 1990) under the earlier order.

1990 c.5.

(5) Section 4 of this Act shall, subject to any necessary modifications, apply in relation to making a new confiscation order in pursuance of this section as it applies where the prosecutor has moved for a confiscation order under section 1 of this Act.

(6) The assumptions mentioned in section 3(2) of this Act shall not apply for the purposes of this section.

Confiscation orders  
where proceeds of  
crime discovered at  
later date.  
[Bill, Sch.3, para.8.]

**6B.-(1) This section applies where no confiscation order has been made in relation to an offence under section 1 or 6A of this Act.**

**(2) Where the court, on an application made to it by the prosecutor under this section, is satisfied beyond reasonable doubt-**

- (a) that a person convicted of an offence to which this Part of this Act relates was in receipt of the proceeds of drug trafficking in respect of that offence;**
- (b) that the information necessary to enable a confiscation order to be made on the date on which an application under section 1 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 within 6 years commencing with 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 order under section 15 of the Proceeds of Crime (Scotland) Act 1994 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) In determining such sum the court may take into account any payment or other reward received by the offender on or after the date of conviction, but only if the prosecutor satisfies the court beyond reasonable doubt that it was received by the offender in connection with drug trafficking carried on by the offender or another on or before that date.**

**(6) Section 4 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 1 of this Act.**

(7) Section 1(2B), (2C), (2D) and (2E) of this Act shall not apply in relation to a confiscation order made in pursuance of this section.

(8) The assumptions mentioned in section 3(2) of this Act shall not apply for the purposes of this section.

(9) Where the court makes a confiscation order in pursuance of this section and a compensation order has been made under section 58 of the 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.

(10) In this section "the court" means the court which had jurisdiction in respect of the offence concerned to make a confiscation order under section 1 of this Act.

Application of provisions relating to fines to enforcement of confiscation orders.  
1975 c. 21.  
1980 c. 43.  
1981/1675 (N.I. 26)  
[Bill, Sch.3, para.9.]

7.-(1) Sections 196 and 203 or, as the case may be, sections 402 and 412 of the 1975 Act and *as applied by section 194 of that Act, the provisions of that Act specified in subsection (2) below shall 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 Magistrates' Courts Act 1980 and Article 96 of the 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-  
section 396:

Provided that any allowance under that section (or section 397) 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;

section 397;

section 398; but as if subsection (1)-

(a) gave the prosecutor an opportunity to be heard at any enquiry thereunder; and



**(b) applied whether the offender was in prison or not;**

section 399:

Provided that any order of payment by instalments shall be without prejudice to such exercise as is above mentioned;

Section 400;

Section 401(2) and (3);

1986 c. 32.

Section 403, except that for the purposes of subsections (4) and (6) of that section "confiscation order" in subsection (1) above shall be construed as including such an order within the meaning of the Drug Trafficking Offences Act 1986 or of any corresponding provision in Northern Ireland;

Section 404;

section 406;

section 407:

Provided that 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:

Provided also that 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;

section 408;

1952 c. 61.

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 Prisons (Scotland) Act 1952 shall be construed as including a reference to an administrator appointed in relation to the confiscation order making such payment under this Act in respect of the person;

section 411: ~~except the proviso to subsection (3):~~

Provided that an order for recovery by civil diligence shall not be made under the section where an administrator is appointed

in relation to the confiscation order;

Schedule 7.

(3) Where in any proceedings an order has been made under section 1(1) of this Act 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.

(4) The reference in subsection (3) 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 has occurred before the warrant for imprisonment is issued for the default in relation to the order.

Disposal of family home.  
[Bill, Sch.3, para.10.]

**7A. Section 36 of the Proceeds of Crime (Scotland) Act 1994 shall apply in respect of a person's family home if a confiscation order has been made in relation to that person as it applies in respect of a person's family home if a confiscation order has been made in relation to that person under section 1(1) of that Act but as if for subsection (1) there were substituted the following subsection-**

**"(1) This section applies where a confiscation order has been made in relation to any person and the prosecutor has not satisfied the court beyond reasonable doubt that the person's family home has been acquired by means of the proceeds of drug trafficking."**

Restraint orders and interdict

*Cases in which restraint orders may be made.*

~~8.(1) Where-~~

~~(a) warrant to arrest and commit a person suspected of or charged with an offence to which section 1 of this Act relates has been granted and either-~~

~~(i) notice has been served on him calling upon him to appear at a trial diet in the High Court or at a diet of that Court fixed for the purposes of section 102 of the 1975 Act (whether or not the trial has commenced, provided that the proceedings as regards the offence have not been concluded); or~~

~~(ii) the Court of Session is satisfied that it is intended that~~

~~any trial diet in respect of the suspected offence (or as the case may be the offence with which he has been charged) shall proceed in the High Court; or~~

~~(b) the Court of Session is satisfied that a procurator fiscal proposes to petition within twenty-eight days for warrant to arrest and commit a person suspected of such an offence, that the suspicion is reasonable and that it is intended that any trial diet in respect of the suspected offence shall proceed in the High Court; or~~

~~(c) an interlocutor has been pronounced under section 104(1)(b) of the 1975 Act remitting a person to the High Court for sentence in respect of such an offence,~~

~~the Court of Session may, on the application of the Lord Advocate, make in respect of the person such order (in this Act referred to as a "restraint order") as is described in section 9 of this Act. Any such application shall be heard in chambers.~~

~~(2) Subject to subsection (3) below, the Court of Session may, at the instance of-~~

~~(a) the Lord Advocate, 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; and in particular may, on the application of a person named in a restraint order as having received an implicative gift, recall the order in relation to that person if satisfied-~~

~~(i) that he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the giver was in any way concerned in drug trafficking; and~~

~~(ii) that he is not, and has never been, an associate of the giver; and~~

~~(iii) that he would suffer hardship were the order not to be recalled.~~

~~(3) The Court of Session may, where it has recalled a restraint order under subsection (2) above, order that property of the person at whose instance it was recalled shall cease to be realisable.~~

~~(4) Rules of court may provide that any application under subsection (2) above shall be made within such period of the applicant receiving notice of the restraint order as may be specified in the rules; and in the period between such application and any decision of the Court as regards recalling that order the powers of any administrator appointed as~~

*regards property of the applicant shall be subject to the restriction that the administrator shall not realise the property.*

~~(5) Where, a restraint order having been made by virtue of~~

~~(a) paragraph (b) of subsection (1) above, the days mentioned in that paragraph expire without the petition having been presented; or~~

~~(b) paragraph (a), (b) or (c) of that subsection, the proceedings as regards the offence are concluded,~~

*the Lord Advocate shall forthwith apply to the Court of Session for recall of that order and the Court shall grant the application.*

Restraint orders.  
[Bill, Sch.3, para.11.]

**8.-(1) The court may, on the application of the prosecutor, make an order (in this Part of this Act referred to as a "restraint order") in the circumstances mentioned in either subsection (3) or (4) below interdicting-**

**(a) any person named in the order from dealing with his realisable property; or**

**(b) that person and any person named in the order as appearing to the court to have received from him an implicative gift 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).**

**(2) A restraint order may contain conditions and exceptions to which the interdict shall be subject and in particular-**

**(a) may make provision 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) For the purposes of this subsection, the circumstances are-
- (a) proceedings have been instituted against an accused in Scotland for an offence to which section 1 of this Act relates;
  - (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.
- (4) 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 6A or, as the case may be, section 6B 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.
- (5) Where the court has made a restraint order in the circumstances mentioned in subsection (4)(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.
- (6) When proceedings for the offence or, as the case may be, proceedings on an application under section 6A or 6B 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.
- (7) 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.

(8) Where a restraint order is made in relation to heritable property situated in Scotland, or such an order is recalled, the prosecutor shall forthwith record a certified copy of the order or, as the case may be, recalling order in the General Register of Sasines or, as the case may be, register it in the Land Register of Scotland.

(9) For the purposes of this Part of this Act, 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.

(10) In this section and sections 9 to 12 of this Act, "the court" means where, as regards the criminal proceedings concerned, 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.

(11) For the purposes of this section, proceedings on an application under section 6A or 6B 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).

(12) References in this section to the institution of proceedings for an offence against a person shall be construed in accordance with section 5(3) of this Act.

~~(a) the person in respect of whom it is made from dealing with his realisable property; or~~

~~(b) that person and any person named in the order as appearing to the Court of Session to have received from him an implicative gift 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); but, subject to subsection (5) below, the order may contain conditions and exceptions to which such interdict shall be subject.~~

~~(2) A restraint order shall provide for notice to be given to persons affected by the order.~~

~~(3) In subsection (1) above, the reference to "dealing with" property shall (without prejudice to the generality of the expression) be construed as including a reference-~~

~~(a) to making a payment in reduction of the amount of a debt; and~~

~~(b) to removing the property from Great Britain.~~

~~(4) If the restraint order is made by virtue of section 8(1)(b) of this Act, references in the foregoing provisions of this section to "realisable property" shall, in relation to any period before warrant to arrest and commit the person in respect of whom it was made is granted, be construed as references to property which would be realisable property had such warrant been granted immediately before the commencement of that period.~~

~~(5) Without prejudice to the generality of subsection (1) above, property in so far as it comprises reasonable legal expenses payable in relation to proceedings as regards the offence by virtue of which the restraint order has been made or as regards a confiscation order made on conviction thereof shall be excepted under that subsection from the interdict.~~

Variation and recall of restraint orders.  
[Bill, Sch.3, para.11.]

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

**(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 of a person named in a restraint order as having received an implicative gift, 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.

(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 12(1) of this Act, the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted.

Seizure of property  
affected by restraint  
order.

1986 c. 32.

10.-(1) A constable or a person commissioned by the Commissioners of Customs and Excise may, for the purpose of preventing realisable property of a person subject to a restraint order (whether under this Act or under and within the meaning of the Drug Trafficking Offences Act 1986) from being removed from Great Britain, seize the property.

(2) Property seized under subsection (1) above shall be dealt with in accordance with the directions of the court which made the



*Inhibition and arrestment of property affected by restraint order or by interdict under section 12.*

order.

~~11. (1) On the application of the Lord Advocate, the Court of Session may, in respect of~~

~~(a) 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 12 of this Act;~~

~~(b) moveable realisable property so affected (whether such property generally or particular such property) grant warrant for arrestment if the property would be arrestable were the person entitled to it a debtor;~~

~~and, subject to the provisions of this Part of this Act, the warrant~~

~~(i) 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;~~

~~(ii) where granted under subsection (1)(a) above, shall have the effect of letters of inhibition and shall forthwith be registered by the Lord Advocate in the register of inhibitions and adjudications.~~

31 & 32 Vict. c.101

~~(2) Section 155 of the 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)(a) above as that section applies to an inhibition by separate letters or contained in a summons.~~

~~(3) In the application of section 158 of the said Act of 1868 (recall of inhibition) to such 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) That an inhibition or arrestment 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 or arrestment 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 such inhibition or arrestment 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 or arrestment accordingly; and~~

~~(b) ensure that recall, or restriction, of an inhibition on such application is reflected in the register of inhibitions and adjudications.~~

1986 c. 32.

~~(6) — The foregoing provisions of this section shall apply in relation to an order made under section 8 of the Drug Trafficking Offences Act 1986 and registered under section 28 of this Act (a "relevant order") as they apply to a restraint order; but as if—~~

~~1(a) — for any reference to the Lord Advocate there were substituted a reference to the prosecutor or, in a case where the order was made by virtue of subsection (2) of section 7 of that Act and the information in respect of the charge mentioned in that subsection has not yet been laid, to the person as regards whom the court which made the order was satisfied as is mentioned in subsection (3)(b) of that section;~~

~~(b) any reference to realisable property fell to be construed in accordance with section 5 of that Act (references in that section to the defendant, and to the time at which the proceedings were instituted against him, being in such case as is mentioned in paragraph (a) above taken to be, respectively, references to the person as regards whom the court which made the order was satisfied as is mentioned in subsection (2) of the said section 7 and to the time immediately before the order was made);~~

~~(c) for any reference to a restraint order there were substituted a reference to a relevant order;~~

~~(d) in subsection (1)(a), for the words "interdicted by the order or, in relation to that property, under section 12 of this Act" there were substituted the words "with an interest in that property";~~

~~(e) in subsection (1), for the words "Part of this Act" there were substituted the word "section";~~

~~(f) in subsection (1)(i), after the word "and" there were inserted the words "subject to subsection (3A) below";~~

~~(g) after subsection (3) there were inserted the following subsection—~~

~~"(3A) — Any power of the Court of Session to recall, loose or restrict inhibitions or arrestments shall, in relation to an inhibition or arrestment proceeding upon a warrant under this section 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 13 of the~~

~~Drug Trafficking Offences Act 1986.”; and~~

~~(h) in subsection (4)~~

~~(i) for the reference to an administrator there were substituted a reference to a receiver; and~~

~~(ii) for the words “this Part of this Act” there were substituted the words “section 8, 11 or 12 of the said Act of 1986”.~~

## NOTE

<sup>1</sup> "in respect of the charge" inserted by 1988 Act, Sch 5, para 20.

Inhibition and  
arrestment of  
property affected by  
restraint order or by  
interdict.  
[Bill, Sch.3, para.12.]

**11.-(1) On the application of the prosecutor, the court may, in respect of-**

- (a) heritable property in Scotland affected by a restraint order (whether such property generally or particular such property) make an order inhibiting any person interdicted by the order or, in relation to that property, under section 12 of this Act; and**
- (b) moveable property so affected (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 certified copy of an order under subsection (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the prosecutor against the person named in the order had been duly signetted, executed and recorded as aforesaid.**

**(3) An order under subsection (1)(a) above so far as it inhibits a person may be recalled or restricted by an order of the court, and an order under this subsection shall take effect (on the recording of a certified copy of the order made under this subsection in the Register of Inhibitions and Adjudications) as from the date of its making.**

**(4) Without prejudice to the effect of recording a certified copy under subsection (2) or (3) above, the prosecutor shall take all reasonable steps to intimate the making of an order under subsection (1) or (3) above to persons affected thereby.**

**(5) A warrant under subsection (1)(b) 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.

(5A) The fact that a certified copy of an order has been recorded under subsection (2) above or an arrestment has been executed under subsection (5) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Act in respect of that property.

(5B) No inhibition to which a certified copy recorded under subsection (2) above relates, or arrestment executed under subsection (5) above, shall have effect once, or in so far as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall-

- (a) apply to the court for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and
- (b) transmit a certified copy of any order recalling or restricting the inhibition to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register.

Interdict of person not subject to restraint order.  
[Bill, Sch.3, para.13.]

12.-(1) The ~~Court of Session~~ court may, where it has granted a restraint order, interdict a person not subject to that order from dealing with realisable property affected by it while it is in force; ~~and the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted.~~

(2) Subsection (2) of section 8 of this Act applies in relation to an interdict under subsection (1) above as the said subsection (2) applies in relation to a restraint order; and subsection (3) of section 9 thereof applies in relation to subsection (1) above as the said subsection (3) applies in relation to subsection (1) of the said section 9.

(3) Without prejudice to the time when it becomes effective, an interdict under subsection (1) above shall be intimated to every person affected by it.

#### Administrators

Administrators.  
[Bill, Sch.3, para.14.]

13.-(1) On the application of the ~~Lord Advocate~~ prosecutor the ~~Court of Session~~ court may as regards realisable property-

- (a) affected by a restraint order, appoint a person to manage, or otherwise deal with, the property; or
- (b) where a confiscation order has been made, appoint a person (or empower an appointee under paragraph (a) above) to realise the property,

in accordance with the ~~Court's~~ **court's** directions and may (whether on making the appointment or from time to time) require any person having possession of the property to give possession of it to the appointee (any such appointee being in this Act referred to as an "administrator").

(2) A requirement under subsection (1) above-

- (a) subject to paragraph (b) below, may relate to the property generally or to particular such property and may be subject to such exceptions and conditions as may be specified by the ~~Court~~ **court**;
- (b) shall relate to property mentioned in paragraph (b) of section 5(1) of this Act only if expressly stated so to do and then only in so far as the person in whom such property is vested is named in the requirement as being subject to it.

(3) On a requirement being imposed under subsection (1) above-

- (a) the clerk of court shall forthwith so notify-
  - (i) the person in respect of whom the restraint order, or as the case may be the confiscation order, has been made; and
  - (ii) any other person named in the requirement as being subject to it; and
- (b) any dealing of or with such person in relation to the property shall be of no effect in a question with the administrator unless whoever dealt with the person had, at the time when the dealing occurred, no knowledge of the appointment.

(4) The ~~Court of Session~~ **court**, at the instance of any person having an interest, may at any time-

- (a) vary or withdraw a requirement imposed under subsection (1) above; or
- (b) without prejudice to section 16 of this Act or to the

powers and duties of an administrator pending a decision under this paragraph, on cause shown, remove the administrator from office.

(5) On the death or resignation of the administrator, or on his removal from office under subsection (4)(b) above or section 17 of this Act, the ~~Court of Session~~ court shall appoint a new administrator. Such of the property (if any) as was, by virtue of section 14(3) of this Act, vested in the administrator who has died, resigned or been removed shall forthwith vest in the new administrator; and any requirement imposed under subsection (1) above shall, on the person subject to the requirement being notified in writing of the appointment by the appointee, apply in relation to the appointee instead of in relation to his predecessor.

(6) The administration of property by an administrator shall be deemed continuous notwithstanding any temporary vacancy in that office.

(7) Any appointment under this section shall be on such conditions as to caution as the accountant of court may think fit to impose; but the premium of any bond of caution or other security thereby required of the administrator shall be treated as part of his outlays in his actings as such.

(8) Without prejudice to section 17 of this Act, section 6 of the Judicial Factors (Scotland) Act 1889 (supervision of judicial factors) shall not apply in relation to an appointment under this section.

52 & 53 Vict. c. 39.

Functions of  
administrators  
[Bill, Sch.3, para.15.]

14.-(1) Subject to section 17 of this Act, an administrator-

- (a) shall be entitled to take possession of, and if appointed (or empowered) under paragraph (b) of section 13(1) of this Act shall as soon as practicable take possession of, the property as regards which he has been appointed and of any document which both-
  - (i) is in the possession or control of the person (in this section referred to as "A") in whom the property is vested (or would be vested but for an order made under subsection (3) of this section); and
  - (ii) relates to the property or to A's assets, business or financial affairs;
- (b) shall be entitled to have access to, and to copy, any document relating to the property or to A's assets, business or financial affairs and not in such possession or control as is mentioned in paragraph (a) above;

- (c) may bring, defend or continue any legal proceedings relating to the property; ~~and, without prejudice to the generality of this paragraph, may sist himself in any case in the Court of Session which has been remitted under section 3(5) of this Act if the restraint order by virtue of which the administrator has been appointed interdicts the person whose case has been so remitted from dealing with the property;~~
- (d) may borrow money in so far as it is necessary to do so to safeguard the property and may for the purposes of such borrowing create a security over any part of the property;
- (e) may, if the administrator considers that to do so would be beneficial for the management or realisation of the property-
- (i) carry on any business of A;
  - (ii) exercise any right of A as holder of securities in a company;
  - (iii) grant a lease of the property or take on lease any other property; or
  - (iv) enter into any contract, or execute any deed, as regards the property or as regards A's business;
- (f) may, where any right, option or other power forms part of A's estate, make payments or incur liabilities with a view to-
- (i) obtaining property which is the subject of; or
  - (ii) maintaining,
- the right, option or power;
- (g) may effect or maintain insurance policies as regards the property or A's business;
- (h) may, where A has an uncompleted title to any heritable estate, complete title thereto:
- Provided that completion of title in A's name shall not validate by accretion any unperfected right in favour of any person other than the administrator;
- (j) may sell, purchase or exchange property or discharge any security for an obligation due to A:

Provided that it shall be incompetent for the administrator or an associate of his (**within the meaning of section 74 of the 1985 Act**) to purchase any of A's property in pursuance of this paragraph;

- (k) may claim, vote and draw dividends in the sequestration of the estate (or bankruptcy or liquidation) of a debtor of A and may accede to a voluntary trust deed for creditors of such a debtor;
- (l) may discharge any of his functions through agents or employees:

Provided that the administrator shall be personally liable to meet the fees and expenses of any such agent or employee out of such remuneration as is payable to the administrator by virtue of section 18(1) and (3) of this Act;

- (m) may take such professional advice as he may consider requisite for the proper discharge of his functions;
- (n) may at any time apply to the ~~Court of Session~~ **court** for directions as regards the discharge of his functions;
- (o) may exercise any power specifically conferred on him by the ~~Court of Session~~ **court**, whether such conferral was at the time of his appointment or on his subsequent application to the ~~Court~~ **court** in that regard; and
- (p) may do anything incidental to the above powers and duties.

(2) Subject to the proviso to paragraph (j) of subsection (1) above-

- (a) a person dealing with an administrator in good faith and for value shall not require to determine whether the administrator is acting within the powers mentioned in that subsection; and
- (b) the validity of any title shall not be challengeable by reason only of the administrator having acted outwith those powers.

(3) The exercise of a power mentioned in any of paragraphs (c) to (k) above shall be in A's name except where and in so far as an order made by the ~~Court of Session~~ **court** under this subsection (either on its own motion or on the application of the administrator) has vested the property in the administrator (or in his predecessor



in that office).

Money received by administrator.

15.-(1) Subject to subsection (2) below, all money received by an administrator in the exercise of his functions shall be deposited by him, in the name (unless vested in the administrator by virtue of subsection (3) of section 14 of this Act) of the holder of the property realised, in an appropriate bank or institution.

(2) The administrator may at any time retain in his hands a sum not exceeding £200 or such other sum as may be prescribed by the Secretary of State by regulations made by statutory instrument.

1979 c. 37.

(3) In subsection (1) above, "appropriate bank or institution" means a bank or institution mentioned in section 2(1) of the Banking Act 1979 or for the time being specified in Schedule 1 to that Act.

Application of proceeds of realisation and other sums.  
[Bill, Sch.3, para.16.]

16.-(1) Subject to subsection (2) below, sums in the hands of an administrator which are-

- (a) proceeds of a realisation of property under section 13 of this Act, and
- (b) other property held by the person in respect of whom the confiscation order was made,

shall first be applied in payment of ~~such expenses as are payable~~ **any expenses to payment of which a person is entitled** under section 37(2) of this Act and then shall, after such payments (if any) as the ~~Court of Session~~ **court** may direct have been made out of those proceeds and sums, be applied on the person's behalf towards the satisfaction of the confiscation order.

(2) If, after the amount payable under the confiscation order has been fully paid, any such proceeds and sums remain in the hands of the administrator, he shall distribute them-

- (a) among such of those who held property which has been realised under this Act, and
- (b) in such proportions,

as the ~~Court of Session~~ **court** may, after giving such persons an opportunity to be heard as regards the matter, direct.

1(3) The receipt of any sum by a sheriff clerk on account of an amount payable under a confiscation order shall reduce the amount so payable, but the sheriff clerk shall apply the money-

- (a) first, in payment of any expenses to payment of which a person is entitled under section 37(2) of this Act but

which were not paid to him under subsection (1) above;

- (b) next, in payment of the administrator's remuneration and expenses;
- (c) next, in reimbursement of any sums paid by the Lord Advocate under section 20(2) of this Act;
- (d) next, in accordance with any direction given by the court under section 1(2E) or 6B(9) of this Act,**

1975 c. 21.

and the balance shall be payable and recoverable (or as the case may be disposed of) under section 203 ~~of the 1975 Act (fines payable to HM Exchequer)~~ **or 412 of the 1975 Act (destination of fines)** as applied by section 7 of this Act.

#### NOTE

<sup>1</sup> Words from "sheriff clerk" to "(c) next," substituted by 1988 Act, Sch 5, para 21.

Supervision of administrators.  
[Bill, Sch.3, para.17.]

**17.**-(1) The accountant of court shall supervise the performance by administrators of the functions conferred on them by this Act; and in particular an administrator proposing to exercise functions conferred by any of paragraphs (c) to (p) of subsection (1) of section 14 of this Act shall first obtain the consent of the accountant of court to such exercise.

(2) If it appears to the accountant of court that an administrator has, without reasonable cause, failed to perform a duty imposed on him by any provision of this Part of this Act, he shall report the matter to the ~~Court of Session~~ **court** which, after giving the administrator an opportunity to be heard as regards the matter, may remove the administrator from office, censure him or make such other order as the circumstances of the case may appear to the ~~Court~~ **court** to require.

Accounts and remuneration of administrator.  
[Bill, Sch.3, para.18.]

**18.**-(1) The administrator shall keep such accounts in relation to his intromissions with the property as regards which he is appointed as the ~~Court of Session~~ **court** may require and shall lodge these accounts with the accountant of court at such times as may be fixed by the ~~Court~~ **court** in that regard; and the accountant of court shall audit the accounts and issue a determination as to the amount of outlays and, on the basis mentioned in subsection (3) below, remuneration payable to the administrator in respect of those intromissions.

(2) Not later than two weeks after the issuing of a determination under subsection (1) above, the administrator or the

Lord Advocate may appeal against it to the ~~Court of Session~~ court.

(3) The basis for determining the amount of remuneration payable to the administrator shall be the value of the work reasonably undertaken by him, regard being had to the extent of the responsibilities involved.

(4) The accountant of court may authorise the administrator to pay without taxation an account in respect of legal services incurred by the administrator.

Effect of appointment under section 13 on diligence.

**19.**-(1) Without prejudice to section 11 of this Act-

- (a) no arrestment or poinding of realisable property executed on or after an appointment as regards the property under section 13 of this Act shall be effectual to create a preference for the arrester or poinder and any such property so arrested or poinded, or the proceeds of sale thereof, shall be handed over to the administrator;
- (b) no poinding of the ground in respect of realisable property on or after such appointment shall be effectual in a question with the administrator except for the interest on the debt of a secured creditor, being interest for the current half-yearly term and arrears of interest for one year immediately before the commencement of that term;
- (c) it shall be incompetent on or after such appointment for any other person to raise or insist in an adjudication against the realisable property or to be confirmed as executor-creditor on that property; and
- (d) no inhibition or realisable property which takes effect on or after such appointment shall be effectual to create a preference for the inhibitor in a question with the administrator.

Further provision as to administrators.  
[Bill, Sch.3, para.19.]

**20.**-(1) Where an administrator takes any action-

- (a) in relation to property which is not realisable property, being action which he would be entitled to take if it were such property,
- (b) believing, and having reasonable grounds for believing, that he is entitled to take that action in relation to that property,

he shall not be liable to any person in respect of any loss or damage resulting from his action except in so far as the loss or damage is

caused by his negligence.

(2) Any amount due in respect of the remuneration and expenses of an administrator so appointed shall, if no sum is available to be applied in payment of it under section 16(3)(b) of this Act, be paid by the Lord Advocate.

**(3) Any disposal of property under section 13 of this Act to a person taking in good faith shall vest the ownership of the property in that person.**

Discharge of administrator.

21. After an administrator has lodged his final accounts under section 18(1) of this Act, he may apply to the accountant of court to be discharged from office; and such discharge, if granted, shall have the effect of freeing him from all liability (other than liability arising from fraud) in respect of any act or omission of his in exercising the functions conferred on him by this Act.

Rules of court as regards accountant of court's supervision etc. of administrators.  
1933 c. 41.

22. Without prejudice to section 16(i) of the Administration of Justice (Scotland) Act 1933 (power, in relation to certain statutory powers and duties, to regulate procedure etc. by Act of Sederunt), provision may be made by rules of court as regards (or as regards any matter incidental to) the accountant of court's powers and duties under this Act in relation to the functions of administrators.

#### *Exercise of powers*

Exercise of powers by Court of Session or administrator.  
[Bill, Sch.3, para.20.]

23.-(1) The following provisions apply to the powers conferred on the ~~Court of Session~~ **court** by sections 8, 9, 11~~(1) to (5)~~, 12 to 13, 16 and 24 of this Act, or on an administrator appointed under subsection (1) of the said section 13.

(2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying a confiscation order the value for the time being of realisable property held by any person by the realisation of such property.

(3) In the case of a person who holds realisable property by virtue only of having received an implicative gift, the powers shall, so far as is reasonably attainable, be exercised so as to realise, interdict dealing with, or permit the seizure or taking possession of, property of a value no greater than the value ~~for the time being of that gift~~ **of the gift as assessed in pursuance of section 6(2), (3) or (3A)**

**of this Act.**

(4) The powers shall be exercised with a view to allowing any person other than one mentioned in paragraph (a) or (b) of section 5(1) of this Act 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) Subject to subsection (4) above ~~and without prejudice to the power of the Court of Session to make an exception under section 9(1) or 13(2)(a) of this Act for the protection of a person or his family,~~ in exercising those powers no account shall be taken of any obligation ~~(other than an obligation having priority, within the meaning of section 5(8) of this Act)~~ of a person holding realisable property if that obligation conflicts with the obligation to satisfy a confiscation order.

1986 c. 32.

(7) Subsections (2) to (6) of section 13 of the Drug Trafficking Offences Act 1986 (exercise of powers by High Court etc.) shall apply as regards the powers conferred on the Court of Session by sections 27 and 28, or by virtue of ~~section 11(6)~~ **section 28A**, of this Act as those subsections apply as regards the powers conferred on the High Court (within the meaning that expression has in relation to England and Wales) by the sections mentioned in subsection (1) of the said section 13.

Power to facilitate  
realisation.  
[Bill, Sch.3, para.21.]

**24.**-(1) Without prejudice to any enactment or rule of law in respect of the recording of deeds relating to heritable property or the registration of interests therein, the ~~Court of Session~~ **court**, to facilitate realisation under section 13 of this Act, may-

(a) order any person (in this section referred to as "A") holding an interest in property, not being such person (in this section referred to as "B") as is mentioned in paragraph (a) or (b) of section 5(1) of this Act, to make such payment to an administrator appointed to realise estate comprising an interest of B in that property as the ~~Court~~ **court** may direct and may, subject to such payment being made-

(i) authorise the administrator to transfer B's interest to A or to discharge it in favour of A; or

(ii) by order so transfer or discharge B's interest; or

(b) by order-

- (i) transfer A's interest to B; or
- (ii) discharge it in favour of B,

on the administrator making such payment to A out of that estate in respect of A's interest as the ~~Court~~ court may direct.

(2) The ~~Court~~ court may make such incidental provision in relation to any exercise of powers conferred on it by subsection (1) above as it considers appropriate; but it shall not exercise those powers without giving such persons as hold an interest in the property reasonable opportunity to make representations to it in that regard.

#### Variation of confiscation orders

Variation of confiscation order.

~~25. (1) If, on an application by a person in respect of whom a confiscation order has been made, the Court of Session is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under that order, the Court shall issue a certificate to that effect giving the Court's reasons for being so satisfied.~~

~~(2) — For the purposes of subsection (1) above the Court of Session—~~

~~(a) in the case of realisable property held by a person whose estate has been sequestrated, or who has been adjudged bankrupt in England and Wales or in Northern Ireland, shall take into account the extent to which any property held by him may be distributed among creditors; and~~

~~(b) may disregard any inadequacy in the realisable property if that inadequacy appears to the Court to be attributable wholly or partly to anything done by the person for the purpose of preserving such property from realisation under this Act.~~

~~(3) — Where a certificate has been issued under subsection (1) above, the person may apply to the High Court for the amount to be recovered under the order to be reduced.~~

~~(4) — The High Court shall, on an application under subsection (3) above—~~

~~(a) substitute for the amount to be recovered under the order such lesser amount as the High Court thinks just in all the circumstances of the case; and~~

~~(b) substitute for any period of imprisonment imposed under section 407 of the 1975 Act (or period of detention imposed~~

*under section 415(2) of that Act by virtue of the said section 407) in respect of the amount to be recovered under the order a shorter period, determined in accordance with subsection (1A) of the said section 407 (as it has effect by virtue of section 7 of this Act), in respect of the lesser amount.*

Realisable property inadequate to meet payments under confiscation order. [Bill, Sch.3, para.22.]

25.-(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 offender or the prosecutor, that the value of the realisable property is inadequate to meet any outstanding amount payable (including any interest payable by virtue of section 15(1) of the Criminal Justice (International Co-operation) Act 1990) 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 5(5)(aa) of this Act, take into account the extent to which property held by a person whose estate has been sequestered or who has been adjudged bankrupt, is subject to, as the case may be, sequestration or bankruptcy procedure by virtue of section 33 or 34 of this Act; and

(b) may disregard any inadequacy which appears to it to be attributable, wholly or partly, to anything done by the offender 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.

(4) Section 4 of this Act (except subsection (8) thereof) 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 moved for a confiscation order under section 1 of this Act.

*Compensation*

Compensation.  
[Bill, Sch.3, para.23.]

26.-(1) Subject to subsection (2) below, if proceedings are instituted against a person for an offence to which section 1 of this Act relates 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, the conviction or convictions concerned are quashed (and no conviction for any such offence is substituted);~~

**(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 of Session~~ court may, on an application by a person who held property which was realisable property, order compensation to be paid to the applicant; ~~but this subsection 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 that subsection.~~ **if, having regard to all the circumstances, it considers it appropriate to do so.**

**(1A) 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 (2) below.**

(2) The ~~Court of Session~~ 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 mentioned in subsection (4) below, and that, but for that default, the proceedings would not have been instituted or continued; and

(b) that the applicant has suffered *substantial* loss or damage in consequence of anything done in relation to the property under section 8, 9, 11, 12, 13 or 24 of this Act or by virtue of section 24A of the Drug Trafficking Offences Act 1986 (recognition and enforcement in England and Wales of orders and functions under this part of this



Act).

(3) The amount of compensation to be paid under this section shall be such as the ~~Court of Session~~ **court** thinks just in all the circumstances of the case.

(4) Compensation payable under ~~this section~~ **subsection (1) above** shall be paid, where the person in default was-

(a) a constable of a police force, by the police authority or joint police committee for the police area for which that force is maintained ("constable", "police force", "police authority", "joint police committee" and "police area" having the meanings assigned to these terms by the Police (Scotland) Act 1967);

1967 c. 77.

(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; ~~and~~

(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.**

(5) Where the court, on an application made to it by a person other than the accused or the recipient of a gift caught by Part I of this Act, is satisfied on the balance of probabilities that in relation to any property realised under section 13 of this Act he was the owner of, or a person otherwise having an interest in, the property immediately before such realisation, it shall make an order directing the Crown to pay to that person compensation of an amount equal to the consideration received for the property or, as the case may be, interest or the value of any such consideration at the time of such realisation, or, if no consideration was received, an amount equal to the value of the property or interest at the time of the realisation.

(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.

*Reciprocal arrangements for enforcement of confiscation orders*

Recognition and enforcement of orders

27.-(1) An order to which this section applies shall, subject to

under Drug  
Trafficking Offences  
Act 1986.

this section and section 28 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.

(2) A receiver's functions under or for the purposes of section 8, 11 or 12 of the Drug Trafficking Offences Act 1986 shall, subject to this section and section 28 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 11(3)(a) of the said Act of 1986 to have effect in the law of Scotland.

(5) The orders to which this section applies are orders of the High Court (within the meaning that expression has in relation to England and Wales)-

- (a) made under section 8, 11, 12 or 30 of the said Act of 1986,
- (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 section 8, 11 or 12 of that Act,

but not including an order in proceedings for enforcement of any such order.

(6) References in this section to an order under section 8 of the said Act of 1986 include references to a discharge under section 7(4) of that Act of such an order.

(7) In this section and in section 28 of this Act, "order" means any order, direction or judgment (by whatever name called).

Provisions  
supplementary to  
section 27.

(8) Nothing in any order of the High Court (within the meaning mentioned in subsection (5) above) under section 11(6) of the said Act of 1986 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.

28.-(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 27 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 27 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 orders 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 27 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 (within the meaning mentioned in section 27(5) of this Act).

1972 c. 59.

(4) The Court of Session shall have the like power to make an order under section 1 of the Administration of Justice (Scotland) Act 1972 (extended power to order inspection of documents etc.) in relation to proceedings brought or likely to be brought under the Drug Trafficking Offences Act 1986 in the High Court (within the meaning mentioned in section 27(5) of this Act) as if those proceedings had been brought or were likely to be brought in the Court of Session.

1986 c. 32.

(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 27 of this Act applies, or
- (b) assisting receivers performing functions there under or for the purposes of section 8, 11 or 12 of the said Act of 1986,

make such orders and do otherwise as seems to it appropriate.

1986 c. 32.

Inhibition and  
arrestment of Scottish  
property affected by  
order registered under  
s.27.  
[Bill, Sch.3, para.24.]

(6) A document purporting to be a copy of an order under or for the purposes of the Drug Trafficking Offences Act 1986 by the High Court (within the meaning mentioned in section 27(5) of this Act) and to be certified as such by a proper officer of that Court shall, in Scotland, be sufficient evidence of the order.

**28A.-(1) On the application of the prosecutor, the Court of Session may, in respect of-**

- (a) heritable property in Scotland affected by a restraint order registered under section 27 of this Act (whether such property generally or particular such property) make an order inhibiting any person with an interest in that property;
- (b) moveable property so affected (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 certified copy of an order under subsection (1)(a) above may be recorded in the Register of Inhibitions and Adjudications, and once so recorded shall have the same effect (as from the date of recording) as if letters of inhibition at the instance of the prosecutor against the person named in the order had been duly signetted, executed and recorded as aforesaid.

(3) An order under subsection (1)(a) above so far as it inhibits a person may be recalled or restricted by an order of the court, and an order under this subsection shall take effect (on the recording of a certified copy of the order made under this subsection in the Register of Inhibitions and Adjudications) as from the date of its making.

(4) Without prejudice to the effect of recording a certified copy under subsection (2) or (3) above, the prosecutor shall take all reasonable steps to intimate the making of an order under subsection (1) or (3) above to persons affected thereby.

(5) A warrant under subsection (1)(b) 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.

(6) The fact that a certified copy of an order has been recorded under subsection (2) above or an arrestment has been executed under subsection (5) above in respect of property shall not prejudice the exercise of a receiver's powers under or for the

purposes of section 8, 11 or 12 of the Drug Trafficking Offences Act 1986 in respect of that property.

(7) No inhibition to which a certified copy recorded under subsection (2) above relates, or arrestment executed under subsection (5) above, shall have effect once, or in so far as, the restraint order affecting the property in respect of which the order containing the inhibition has been made or the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall-

- (a) apply to the court for an order recalling or, as the case may be, restricting the inhibition or arrestment accordingly; and
- (b) transmit a certified copy of any order recalling or restricting the inhibition to the Keeper of the Register of Inhibitions and Adjudications for recording in the Register.

(8) Any power of the Court of Session to recall, loose or restrict inhibitions or arrestments shall, in relation to an order containing an inhibition under subsection (1)(a) above or an arrestment proceeding upon a warrant under subsection (1)(b) 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 13 of the Drug Trafficking Offences Act 1986.

(9) For the purposes of this section "prosecutor" includes, where an order has been made by virtue of subsection (2) of section 7 of the Drug Trafficking Offences Act 1986 and the information mentioned in that subsection has not yet been laid, the person as regards whom the court which made the order was satisfied as is mentioned in subsection (3)(b) of the said section 7.

Enforcement of  
Northern Ireland  
orders.

29.-(1) Her Majesty may by Order in Council provide that, for the purposes of sections 8 to 25 and 33 to 35 of this Act, 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 section 1 of this Act relates included a reference to any offence under the law of Northern Ireland (not being an offence to which that section relates) which appears to Her Majesty to correspond to such an offence; or
- (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 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 sections 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.

1(3A) An Order in Council under this section may, in particular, provide for section 18 of the Civil Jurisdiction and Judgments Act 1982 (enforcement of United Kingdom judgments in other parts of the United Kingdom) not to apply in relation to such orders as may be prescribed by the Order.

2(4) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

## NOTES

1 Inserted by 1993 Act, s 22(2).

2 Substituted by 1993 Act, s 21(3)(c).

Enforcement of other  
external orders.  
[Bill, Sch.3, para.25.]

130.-(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 ("a designated country") that, subject to such modifications as may be specified, this Part of this Act shall apply 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 in connection with the taking of action in the designated country with a view to satisfying a~~

~~confiscation order; and~~

- (ii) such provision as to evidence or proof of any matter for the purposes of this section and section 30A of this Act; and
- (iii) such incidental, consequential and transitional provision,

as appears to Her Majesty to be expedient. ~~and~~

~~(c) without prejudice to the generality of this subsection, direct that in such circumstances as may be specified proceeds which arise out of action taken in the designated country with a view to satisfying a confiscation order shall be treated as reducing the amount payable under the order to such extent as may be specified.~~

(2) In this Part of this Act-

"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 drug trafficking or their value; and

"modifications" includes additions, alterations and omissions.

(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 this Part of this Act in such a way as to confer power on a person to exercise a discretion.

<sup>2</sup>(5) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

## NOTES

<sup>1</sup> Section substituted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 63.

<sup>2</sup> Substituted by 1993 Act, s 21(3)(d).

Registration of  
external confiscation  
orders.

**130A.**-(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-

- (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.

NOTE

<sup>1</sup> Section inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 63.

Enforcement in  
England and Wales.

**31.** The following section shall be inserted before section 25 of the Drug Trafficking Offences Act 1986-

"Recognition and enforcement of orders and functions under Part I of the Criminal Justice (Scotland) Act 1987.

24A.-(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 for the purposes of Part I of the Criminal Justice (Scotland) Act 1987 to be used or realised for the payment of any amount payable under a confiscation order made under that Part of that Act; and
- (b) of securing that, where no confiscation order has been



made under that Part of that Act, property in England and Wales which is realisable property for the purposes of that Part of that Act 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.

(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 specified conditions-

(i) the functions of a person appointed under section 13 of the Criminal Justice (Scotland) Act 1987; and

(ii) such descriptions of orders made under or for the purposes of Part I of the Criminal Justice (Scotland) Act 1987 as may be specified;

shall have effect in the law of England and Wales;

(b) make provision-

(i) for the registration in the High Court of such descriptions of orders made under or for the purposes of that Part of that Act 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 that Part of that Act which are so

registered such powers as may be specified; and

- (c) make provision as to the proof in England and Wales of orders made under or for the purposes of that Part of that Act.

(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 not be made unless a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament."

Order in Council as regards taking of action in designated country.  
[Bill, Sch.3, para.26.]

32.-(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 or of a confiscation order as appears to Her Majesty to be expedient; and without prejudice to the generality of this subsection such provision may include a direction that in such circumstances as may be specified proceeds arising out of action taken in that 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.

(2) Subsections ~~(9)(a), (10), (11) and (12)~~ **(1)(b)(ii) and (iii), (3) and (5)** of section 30 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.

*Sequestration etc. of estate comprising realisable property*

Sequestration of person holding realisable property.  
[Bill, Sch.3, para.27.]

33.-(1) Where the estate of a person who holds realisable property is sequestrated-

~~(a) property for the time being subject to a restraint order made before the date of sequestration (within the meaning of section 12(4) of the 1985 Act); and~~

(a) **property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the date of sequestration (within the meaning of section 12(4) of the 1985 Act) and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before such date of sequestration; and**

(b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section,

is excluded from the debtor's estate for the purposes of that Act.

(2) Where an award of sequestration has been made, the powers conferred on the ~~Court of Session~~ **court** by sections 8, 9, 11 to 13, 16 **and 24, 27 and 28** **and on the Court of Session by sections 27, 28 and 28A** of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to-

(a) property comprised in the whole estate of the debtor (within the meaning of section 31(8) of the 1985 Act); or

<sup>1</sup>(b) any income of the debtor which has been ordered, under subsection (2) of section 32 of that Act, to be paid to the permanent trustee or any estate which, under subsection (10) of section 31 of that Act or subsection (6) of the said section 32 of that Act, vests in the permanent trustee,

and it shall not be competent to submit a claim in relation to the confiscation order to the permanent trustee in accordance with section 48 of that Act.

(3) Nothing in the 1985 Act shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

(4) Where, during the period before sequestration is awarded, an interim trustee stands appointed under the proviso to section 13(1) of the 1985 Act and any property in the debtor's estate is subject to a restraint order, the powers conferred on the interim trustee by virtue of that Act do not apply to property for the time being subject to the restraint order.

(5) Where the estate of a person is sequestrated and he has

directly or indirectly made an implicative gift-

- (a) no decree shall, at any time when proceedings as regards an offence to which section 1 of this Act relates have been instituted against him and have not been concluded or when property of the person to whom the gift was made is subject to a restraint order, be granted under section 34 or 36 of the 1985 Act (gratuitous alienations and unfair preferences) in respect of the making of the gift; and
- (b) any decree granted under either of the said sections 34 and 36 after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

3 & 4 Geo. 5 c. 20.

(6) In any case in which, notwithstanding the coming into force of the 1985 Act, the Bankruptcy (Scotland) Act 1913 applies to a sequestration, subsection (2) above shall have effect as if for paragraphs (a) and (b) thereof there were substituted the following paragraphs-

- "(a) property comprised in the whole property of the debtor which vests in the trustee under section 97 of the Bankruptcy (Scotland) Act 1913,
- (b) any income of the bankrupt which has been ordered, under subsection (2) of section 98 of that Act, to be paid to the trustee or any estate which, under subsection (1) of that section, vests in the trustee,";

and subsection (3) above shall have effect as if, for the reference in it to the 1985 Act, there were substituted a reference to the said Act of 1913.

1985 c. 66.

NOTE

<sup>1</sup> Words from "under subsection (10)" to "that Act" inserted by Housing Act 1988, c 50, Sch 17, para 81.

Bankruptcy in  
England and Wales of  
person holding  
realisable property.  
[Bill, Sch.3, para.28.]

**34.-(1)** Where a person who holds realisable property is adjudged bankrupt-

~~(a) property for the time being subject to a restraint order made before the order adjudging him bankrupt, and~~

**(a) property, other than heritable property situated in Scotland, for the time being subject to a restraint order made before the order adjudging him bankrupt and heritable property situated in Scotland for the time**

**being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the order adjudging him bankrupt was made; and**

- (b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section,

is excluded from the bankrupt's estate for the purposes of Part IX of the Insolvency Act 1986.

1986 c. 45.

(2) Where a person has been adjudged bankrupt, the powers conferred on the ~~Court of Session~~ court by sections 8, 9, 11 to 13, 16 and 24, ~~27 and 28~~ and on the Court of Session by sections 27, 28 and 28A of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to-

- (a) property for the time being comprised in the bankrupt's estate for the purposes of the said Part IX,

- <sup>1</sup>(b) property in respect of which his trustee in bankruptcy may (without leave of the court) serve a notice under section 307, 308 or 308A of the Insolvency Act 1986 (after-acquired property and tools, clothes, etc. exceeding value of reasonable replacement and certain tenancies), and

- (c) property which is to be applied for the benefit of creditors of the bankrupt by virtue of a condition imposed under section 280(2)(c) of the Insolvency Act 1986.

(3) Nothing in the Insolvency Act 1986 shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

(4) Where, in the case of a debtor, an interim receiver stands appointed under section 286 of the Insolvency Act 1986 and any property of the debtor is subject to a restraint order the powers conferred on the receiver by virtue of that Act do not apply to property for the time being subject to the restraint order.

(5) Where a person is adjudged bankrupt and has directly or indirectly made an implicative gift-

- (a) no order shall, at any time when proceedings for a drug trafficking offence have been instituted against him and have not been concluded or when property of the person to whom the gift was made is subject to a restraint order, be made under section 339 or 423 of the Insolvency Act

1986 (avoidance of certain transactions) in respect of the making of the gift, and

- (b) any order made under either of those sections after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

(6) In any case in which a petition in bankruptcy was presented, or a receiving order or adjudication in bankruptcy was made, before the date on which the Insolvency Act 1986 came into force, subsections (2) to (5) above have effect with the following modifications-

- (a) for references to the bankrupt's estate for the purposes of Part IX of that Act there are substituted references to the property of the bankrupt for the purposes of the Bankruptcy Act 1914,

4 & 5 Geo. 5 c. 59.

- (b) for references to the said Act of 1986 and to sections 280(2)(c), 286, 339, and 423 of that Act there are respectively substituted references to the said Act of 1914 and to sections 26(2), 8, 27 and 42 of that Act,

- (c) the references in subsection (4) to an interim receiver appointed as there mentioned include, where a receiving order has been made, a reference to the receiver constituted by virtue of section 7 of the said Act of 1914, and

- 2(d) subsection (2)(b) is omitted.

## NOTES

1 "308 or 308A" substituted, and "and certain tenancies" inserted, by Housing Act 1988, Sch 17, para 82.

2 "subsection (2)(b) is" substituted by 1988 Act, Sch 5, para 22.

Winding up company holding realisable property.  
[Bill, Sch.3, para.29.]

35.-(1)Where realisable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for the voluntary winding up, the functions of the liquidator (or any provisional liquidator) shall not be exercisable in relation to-

- ~~(a) the property for the time being subject to a restraint order made before the relevant time, and~~

- (a) property, other than heritable property situated in

**Scotland, for the time being subject to a restraint order made before the relevant time and heritable property situated in Scotland for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the relevant time; and**

- (b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section.

(2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the *Court of Session* **court** by sections 8, 9, 11 to 13, 16 **and 24, 27 and 28 and on the Court of Session by sections 27, 28 and 28A** of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable-

- (a) so as to inhibit the liquidator from exercising those functions for the purpose of distributing any property held by the company to the company's creditors, or
- (b) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

1986 c. 45.

(3) Nothing in the Insolvency Act 1986 shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

1986 c. 32.

(4) For the purposes of the application of Parts IV and V of the Insolvency Act 1986 (winding up of registered companies and winding up of unregistered companies) to a company which the Court of Session has jurisdiction to wind up, a person is not a creditor in so far as any sum due to him by the company is due in respect of a confiscation order (whether under this Act or under and within the meaning of section 1 of the Drug Trafficking Offences Act 1986 or any corresponding provision in Northern Ireland).

**(4A) Where an order for the winding up of a company has been made or a resolution has been passed by a company for its voluntary winding up and before the relevant time the company has directly or indirectly made an implicative gift-**

- (a) **no order or, as the case may be, decree shall, at any time when proceedings as regards an offence to which section 1 of this Act relates have been instituted against**

the company and have not been concluded or when property of the person to whom the gift was made is subject to a restraint order, be made under section 238 or 239 of the Insolvency Act 1986 (transactions at an undervalue and preferences) or granted under section 242 or 243 of that Act (gratuitous alienations and unfair preferences) in respect of the making of the gift; and

(b) any order made under either of the said sections 238 or 239 or decree granted under either of the said sections 242 and 243 after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

(5) In this section-

"company" means any company which may be wound up under the Insolvency Act 1986; and

"the relevant time" means-

(a) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up,

(b) where such an order has been made and, before the presentation of the petition for the winding up of the company by the court, such a resolution had been passed by the company, the time of the passing of the resolution, and

(c) in any other case where such an order has been made, the time of the making of the order.

(6) In any case in which a winding up of a company commenced, or is treated as having commenced, before the date on which the Insolvency Act 1986 came into force, subsections (2) to (5) above have effect with the substitution for references to that Act of references to the Companies Act 1985.

1985 c. 6.  
Property subject to  
floating charge.  
[Bill, Sch.3, para.30.]

36.-(1) Where any property held subject to a floating charge by a company is realisable property and a receiver has been appointed by, or on the application of, the holder of the charge, the powers of the receiver in relation to the property so held shall not be exercisable in relation to-

~~(a) so much of it as is for the time being subject to a restraint order made before the appointment of the receiver, and~~



- (a) so much of it, not being heritable property situated in Scotland, as is for the time being subject to a restraint order made before the appointment of the receiver and so much of it, being heritable property situated in Scotland, as is for the time being subject to a restraint order recorded in the General Register of Sasines or, as the case may be, registered in the Land Register of Scotland before the such appointment; and
- (b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section.

(2) Where, in the case of a company, such an appointment has been made, the powers conferred on the ~~Court of Session~~ court by sections 8, 9, 11 to 13, 16 and 24, ~~27 and 28~~ and on the Court of Session by sections 27, 28 and 28A of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to any realisable property held by the company in relation to which the powers of the receiver are exercisable-

- (a) so as to inhibit the receiver from exercising his powers for the purpose of distributing any property held by the company to the company's creditors, or
- (b) so as to prevent the payment out of any property of expenses (including the remuneration of the receiver) properly incurred in the exercise of the receiver's powers in respect of the property.

(3) Nothing in the Insolvency Act 1986, shall be taken as restricting, or enabling the restriction of, the exercise of the powers so conferred.

1986 c. 45.

(4) In this section-

"company" has the same meaning as in section 35 of this Act; and

"floating charge" includes a floating charge within the meaning given by section 462 of the Companies Act 1985 (power of incorporated company to create floating charge).

(5) In any case in which a receiver was appointed as is mentioned in subsection (1) above before the date on which the Insolvency Act 1986 came into force, subsections (2) to (4) above have effect with the substitution for references to that Act of references to the Companies Act 1985.

Insolvency

37.-(1) Without prejudice to the generality of any enactment

practitioners dealing with property subject to restraint order.

contained in the Insolvency Act 1986 or in the 1985 Act, where-

- (a) any person acting as an insolvency practitioner seizes or disposes of any property in relation to which his functions are, because that property is for the time being subject to a restraint order, not exercisable; and
- (b) at the time of the seizure or disposal he believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of a court order or otherwise) to seize or dispose of that property,

he shall not be liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as the loss or damage is caused by the insolvency practitioner's negligence; and the insolvency practitioner shall have a lien on the property, or the proceeds of its sale, for such of his expenses as were incurred in connection with the liquidation, sequestration or other proceedings in relation to which the seizure or disposal purported to take place and for so much of his remuneration as may reasonably be assigned for his actings in connection with those proceedings.

(2) Any person who, acting as an insolvency practitioner, incurs expenses-

- (a) in respect of such property as is mentioned in paragraph (a) of subsection (1) above and in so doing does not know and has no reasonable grounds to believe that the property is for the time being subject to a restraint order; or
- (b) other than in respect of such property as is so mentioned, being expenses which, but for the effect of a restraint order, might have been met by taking possession of and realising the property,

shall be entitled (whether or not he has seized or disposed of that property so as to have a lien under that subsection) to payment of those expenses under section 16(1) or (3)(a) of this Act.

<sup>1</sup>(3) In the foregoing provisions of this section, the expression "acting as an insolvency practitioner" shall be construed in accordance with section 388 (interpretation) of the said Act of 1986 except that for the purposes of such construction the reference in subsection (2)(a) of that section to a permanent or interim trustee in a sequestration shall be taken to include a reference to a trustee in a sequestration and subsection (5) of that section ... shall be disregarded; and the expression shall also comprehend the official receiver acting as receiver or manager of the property.

NOTE

*Forfeiture of property where accused has died*

Forfeiture of criminal property where accused has died.  
[Bill, Sch.3, para.31.]

**37A.-(1)** Section 37 of the Proceeds of Crime (Scotland) Act 1994 shall, subject to any necessary modifications, apply in respect of an offence to which Part I of this Act relates as it applies to an offence to which Part I of that Act applies.

(2) Without prejudice to subsection (1) above, in the application of subsection (2) of that section, in paragraph (b)(i) for the words "in connection with the commission of the offence" there shall be substituted the words "in connection with drug trafficking".

*Investigations and disclosure of information*

Order to make material available.

**38.-(1)** The procurator fiscal may, for the purpose of an investigation into drug trafficking, 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-

(a) produce it to a constable or person commissioned by the Commissioners of Customs and Excise for him to take away, or

(b) give a constable or person so commissioned access to it,

within such period as the order may specify.

This subsection is subject to section 41(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 carried on, or has derived financial or other rewards from, drug trafficking,

- (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.

1(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 or person commissioned as aforesaid to enter the premises to obtain access to the material.

- (6) 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.

(7) 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.
- (8) 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
- (c) may be made in relation to material in the possession of an authorised government department.

NOTE

<sup>1</sup> "or person commissioned as aforesaid" inserted by 1988 Act, Sch 5, para 23.

Authority for search.

**39.**-(1) The procurator fiscal may, for the purpose of an investigation into drug trafficking, 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, or person commissioned by the Commissioners of Customs and Excise, to enter and search the premises if the sheriff is satisfied-

- (a) that an order made under section 38 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 carried on, or has derived financial or other rewards from, drug trafficking, and
- (b) that the conditions in section 38(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 or person commissioned as aforesaid could secure immediate access to the material.

(4) The conditions referred to in subsection (2)(c) above are-

(a) that there are reasonable grounds for suspecting that a specified person has carried on, or has derived financial or other rewards from, drug trafficking, and

(b) that there are reasonable grounds for suspecting that there is on the premises material relating to the specified person or to drug trafficking 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 or person commissioned as aforesaid arriving at the premises could secure immediate entry to them.

(5) Where a constable or person commissioned as aforesaid 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.

Interpretation of sections 38 and 39.

40. In sections 38 and 39 of this Act-

"items subject to legal privilege" means-

(a) communications between a professional legal adviser

and his client, or

- b) communications made in connection with or in contemplation of legal proceedings and for the purposes of these proceedings,

being communications which would in legal proceedings be protected from disclosure by virtue of any rule of law relating to the confidentiality of communications; and

"premises" includes any place and, in particular, includes-

- (a) any vehicle, vessel, aircraft or hovercraft,
- (b) any offshore installation within the meaning of section 1 of the Mineral Workings (Offshore Installations) Act 1971, and
- (c) any tent or movable structure.

1971 c. 61.

Prosecution by order of the Commissioners of Customs and Excise.

**140A.**-(1) Summary proceedings for a specified offence may be instituted by order of the Commissioners and shall, if so instituted, be commenced in the name of an officer.

(2) In the case of the death, removal, discharge or absence of the officer in whose name any proceedings for a specified offence were commenced, those proceedings may be continued by another officer.

(3) Where the Commissioners investigate, or propose to investigate, any matter with a view to determining-

- (a) whether there are grounds for believing that a specified offence has been committed, or
- (b) whether a person should be prosecuted for a specified offence,

that matter shall be treated as an assigned matter within the meaning of the Customs and Excise Management Act 1979.

(4) Nothing in this section shall be taken-

- (a) to prevent any person (including any officer) who has power to arrest, detain or prosecute any person for a specified offence from doing so; or
- b) to prevent a court from proceeding to deal with a person brought before it following his arrest by an officer for a specified offence, even though the proceedings have not been instituted by an order made under subsection (1)

above.

(5) In this section-

"the Commissioners" means the Commissioners of Customs and Excise;

"officer" means a person commissioned by the Commissioners; and

"specified offence" means-

- (a) an offence under section 42, 42A, 43, 43A or 43B of this Act or section 14 of the Criminal Justice (International Co-operation) Act 1990 (concealing or transferring proceeds of drug trafficking);
- (b) attempting to commit, conspiracy to commit or incitement to commit, any such offence; or
- (c) any other offence of a kind prescribed in regulations made by the Secretary of State for the purposes of this section.

(6) Regulations under subsection (5) above shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

#### NOTE

<sup>1</sup> Section inserted by 1993 Act, s 20(2).

Disclosure of information held by government departments.

**41.**-(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 subsection (1) of section 8 of this Act are exercisable by virtue of paragraph (a) thereof, or
- (b) those powers are exercisable by virtue of paragraph (b) of subsection (1) of that section and the Court has made a restraint order which has not been recalled;

but, where the power to make an order under subsection (1) above



is exercisable by virtue only of paragraph (b) above, subsection (4) of section 9 of this Act shall for the purposes of this section apply in relation to that order as the said subsection (4) applies, for the purposes of that section, in relation to a restraint order made by virtue of paragraph (b) of subsection (1) of the said section 8.

(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 information that would facilitate the exercise of the powers conferred on the Court by section 8, 13 or 24 of this Act or on an administrator appointed under subsection (1) of the said section 13.

(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 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 drug trafficking.

(8) The persons referred to in subsection (7) above are-

(a) a constable,

(b) the Lord Advocate or any procurator fiscal, and

(c) a person commissioned by the Commissioners of Customs and Excise.

(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 drug trafficking.

(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 38(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) The person on whom an order under subsection (1) above 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.

## Offences

Offence of prejudicing investigation.

42.-(1) A person who, knowing or suspecting that an investigation into drug trafficking is taking place, does anything which is likely to prejudice the investigation is guilty of an offence.

(2) In proceedings against a person for an offence under subsection (1) above, it is a defence to prove-

- (a) that he did not know or suspect, or have reasonable grounds to suspect, that by acting as he did he was likely to prejudice the investigation, or
- (b) that he had lawful authority or reasonable excuse for acting as he did.

<sup>1</sup>(2A) Nothing in subsection (1) above makes it an offence for a professional legal adviser to disclose any information or other matter-

- (a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or
- (b) to any person-
  - (i) in contemplation of, or in connection with, legal proceedings; and
  - (ii) for the purpose of those proceedings.

(2B) Subsection (2A) above does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(3) A person guilty of an offence under subsection (1) above shall be liable-

- (a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both, and
- (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

## NOTE

<sup>1</sup> Subs (2A) and (2B) inserted by 1993 Act, s 26(2).

Acquisition,

<sup>1</sup>42A.-(1) A person is guilty of an offence if, knowing that

possession or use of proceeds of drug trafficking.

any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it.

(2) It is a defence to a charge of committing an offence under this section that the person charged acquired or used the property or had possession of it for adequate consideration.

(3) For the purposes of subsection (2) above-

(a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property; and

(b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of his use or possession of the property.

(4) The provision for any person of services or goods which are of assistance to him in drug trafficking shall not be treated as consideration for the purposes of subsection (2) above.

(5) Where a person discloses to a constable or to a person commissioned by the Commissioners of Customs and Excise a suspicion or belief that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, or discloses to a constable or a person so commissioned any matter on which such a suspicion or belief is based-

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise; and

(b) if he does any act in relation to the property in contravention of subsection (1) above, he does not commit an offence under this section if-

(i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable or person so commissioned, or

(ii) the disclosure is made after he does the act, but on his initiative and as soon as it is reasonable for him to make it.

(6) For the purposes of this section having possession of any property shall be taken to be doing an act in relation to it.

(7) In proceedings against a person for an offence under this

section, it is a defence to prove that-

- (a) he intended to disclose to a constable or a person so commissioned such a suspicion, belief or matter as is mentioned in subsection (5) above; but
- (b) there is reasonable excuse for his failure to make the disclosure in accordance with paragraph (b) of that subsection.

(8) In the case of a person who was in employment at the relevant time, subsections (5) and (7) above shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a constable or a person so commissioned.

(9) A person guilty of an offence under this section is liable-

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine or to both.

(10) No constable, person so commissioned or other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in connection with the enforcement, or intended enforcement, of any provision of this Act or of any other enactment relating to drug trafficking or the proceeds of such trafficking.

#### NOTE

<sup>1</sup> Section inserted by 1993 Act, s 17(1).

Offence of assisting another to retain the proceeds of drug trafficking.

**43.**-(1) Subject to subsection (3)(b) below, a person shall be guilty of an offence if, knowing or suspecting that another person (in this section referred to as "A") is a person who carries on, or has carried on, or has derived financial or other rewards from, drug trafficking, he enters into, or is otherwise concerned in, an arrangement whereby-

- (a) the retention or control, by or on behalf of A, of A's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to

nominees or otherwise); or

- (b) A's proceeds of drug trafficking-
  - (i) are used to secure that funds are placed at A's disposal, or
  - (ii) are used for A's benefit to acquire property by way of investment.

(2) In this section, references to proceeds of drug trafficking shall be construed as including any property which, whether in whole or in part, directly or indirectly constitutes such proceeds.

1(3) Where a person discloses to a constable or to a person commissioned by the Commissioners of Customs and Excise a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or discloses to a constable or a person so commissioned any matter on which such a suspicion or belief is based-

2(a) the disclosure shall not be treated as a breach of any restriction imposed by statute or otherwise on the disclosure of information; and

(b) if the disclosure relates to an arrangement entry into which, or concern in which, by the person would (but for this paragraph) contravene subsection (1) above, he does not commit an offence under that subsection if-

(i) the disclosure is made before, with the consent of the constable or as the case may be of the person so commissioned, he enters into, or becomes concerned in, that arrangement, or

(ii) though made after he enters into, or becomes concerned in, that arrangement, it is made on his own initiative and as soon as it is reasonable for him to do so.

(4) In proceedings against a person for an offence under subsection (1) above, it shall be a defence to prove-

(a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking; or

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in

subsection (1) above; or

(c) that-

- (i) he intended to disclose to a constable or to a person commissioned as aforesaid such a suspicion, belief or matter as is mentioned in subsection (3) above in relation to the arrangement, but
- (ii) there is reasonable excuse for his failure to make disclosure in accordance with paragraph (b) of that subsection.

3(4A) In the case of a person who was in employment at the relevant time, subsections (3) and (4) above shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a constable or a person commissioned as aforesaid.

(5) A person guilty of an offence under subsection (1) above shall be liable-

- (a) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine or to both; and
- (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

## NOTES

1 "discloses to a constable or a person so commissioned" inserted by 1993 Act, s 19(2)(a).

2 "statute or otherwise" substituted by 1993 Act, s 19(2)(b).

3 Inserted by 1993 Act, s 19(3).

Failure to disclose  
knowledge or  
suspicion of money  
laundering.

143A.-(1) A person is guilty of an offence if-

- (a) he knows, or suspects, that another person is engaged in drug money laundering,
- (b) the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, and
- (c) he does not disclose the information or other matter to a

constable or to a person commissioned by the Commissioners of Customs and Excise as soon as is reasonably practicable after it comes to his attention.

(2) Subsection (1) above does not make it an offence for a professional legal adviser to fail to disclose any information or other matter which has come to him in privileged circumstances.

(3) It is a defence to a charge of committing an offence under this section that the person charged had a reasonable excuse for not disclosing the information or other matter in question.

(4) Where a person discloses to a constable or a person so commissioned-

(a) his suspicion or belief that another person is engaged in drug money laundering, or

(b) any information or other matter on which that suspicion or belief is based,

the disclosure shall not be treated as a breach of any restriction imposed by statute or otherwise.

(5) Without prejudice to subsection (3) or (4) above, in the case of a person who was in employment at the relevant time, it is a defence to a charge of committing an offence under this section that he disclosed the information or other matter in question to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures.

(6) A disclosure to which subsection (5) above applies shall not be treated as a breach of any restriction imposed by statute or otherwise.

(7) In this section "drug money laundering" means doing any act which constitutes an offence under-

(a) section 42A or 43 of this Act; or

(b) section 14 of the Criminal Justice (International Co-operation) Act 1990 (concealing or transferring proceeds of drug trafficking),

or, in the case of an act done otherwise than in Scotland, would constitute such an offence if done in Scotland.

(8) For the purposes of subsection (7) above, having possession of any property shall be taken to be doing an act in relation to it.



(9) For the purposes of this section, any information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated, or given, to him-

- (a) by, or by a representative of, a client of his in connection with the giving by the adviser of legal advice to the client;
- (b) by, or by a representative of, a person seeking legal advice from the adviser; or
- (c) by any person-
  - (i) in contemplation of, or in connection with, legal proceedings; and
  - (ii) for the purpose of those proceedings.

(10) No information or other matter shall be treated as coming to a professional legal adviser in privileged circumstances if it is communicated or given with a view to furthering any criminal purpose.

(11) A person guilty of an offence under this section shall be liable-

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or to both, or
- (b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine, or to both.

#### NOTE

<sup>1</sup> Section inserted by 1993 Act, s 19(1).

Tipping-off.

**143B.**-(1) A person is guilty of an offence if-

- (a) he knows or suspects that a constable or a person commissioned by the Commissioners of Customs and Excise is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into drug money laundering within the meaning of subsections (7) and (8) of section 43A of this Act; and
- (b) he discloses to any other person information or any other matter which is likely to prejudice that investigation, or

proposed investigation.

(2) A person is guilty of an offence if-

- (a) he knows or suspects that a disclosure has been made to a constable, or a person so commissioned, under section 42A, 43 or 43A of this Act; and
- (b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.

(3) A person is guilty of an offence if-

- (a) he knows or suspects that a disclosure of a kind mentioned in section 42A(8), 43(4A) or 43A(5) of this Act has been made; and
- (b) he discloses to any person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.

(4) Nothing in subsections (1) to (3) above makes it an offence for a professional legal adviser to disclose any information or other matter-

- (a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or
- (b) to any person-
  - (i) in contemplation of, or in connection with, legal proceedings; and
  - (ii) for the purpose of those proceedings.

(5) Subsection (4) above does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(6) In proceedings against a person for an offence under subsection (1), (2) or (3) above, it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way mentioned in that subsection.

(7) A person guilty of an offence under this section shall be liable-

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the

statutory maximum or to both, or

- (b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine, or to both.

(8) No constable, person so commissioned or other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in connection with the enforcement, or intended enforcement, of any provision of this Act or of any other enactment relating to drug trafficking or the proceeds of such trafficking.

## NOTE

<sup>1</sup> Section inserted by 1993 Act, s 19(1).

Offences relating to controlled drugs: fines. 1975 c. 21.

**44.**-(1) Without prejudice to section 395(1) of the 1975 Act (fines) as applied by section 194 of that Act but subject to the proviso to subsection (1) of section 2 of this Act, where a person is convicted on indictment of an offence to which this section relates and sentenced in respect of that offence to a period of imprisonment or detention, the Court where-

- (a) paragraph (b) below does not apply shall, unless it is satisfied that for any reason it would be inappropriate to do so, also impose a fine;
- (b) it makes an order under section 1(1) of this Act as regards the person, may also impose a fine.

(2) In determining the amount of a fine imposed under paragraph (a) of subsection (1) above, the Court shall have regard to any profits likely to have been made by the person from the crime in respect of which he has been convicted.

(3) This section relates to the same offences as does section 1 of this Act.

(4) Where in any proceedings a fine has been imposed by virtue of subsection (1) above 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 imposed on default of payment of a fine (or instalment thereof) or of a confiscation order (or instalment thereof); but only where that default has occurred before the warrant for imprisonment is issued for the default in relation to the fine imposed by virtue of subsection (1) of this section.

*Minor amendments, service, notice and interpretation*

Minor amendments in relation to drug trafficking.  
4 & 5 Geo. 5 c. 59.  
1974 c. 53.

45.-(1) Section 28 of the Bankruptcy Act 1914 (effect of order of discharge) shall have effect as if amounts payable under confiscation orders were debts excepted under subsection (1)(a) of that section.

(2) In section 1(2)(a) of the Rehabilitation of Offenders Act 1974 (failure to pay fines etc. not to prevent person becoming rehabilitated) the reference to a fine or other sum adjudged to be paid by or on a conviction does not include a reference to an amount payable under a confiscation order.

1982 c. 27.

(3) In subsection (4A) of section 18 of the Civil Jurisdiction and Judgments Act 1982 (exceptions as to enforcement of UK judgments in other parts of UK), at the end there shall be added the following words-

"; or as respects the enforcement in England and Wales of orders made by the Court of Session under or for the purposes of Part I of the Criminal Justice (Scotland) Act 1987".

1986 c. 45.

(4) Section 281(4) of the Insolvency Act 1986 (discharge of bankrupt not to release him from liabilities in respect of fines, etc.) shall have effect as if the reference to a fine included a reference to a confiscation order.

1985 c. 66.

(5) In the 1985 Act-

(a) in section 5(4) (interpretation)-

(i) after the words "future debts" there shall be inserted the words "or amounts payable under a confiscation order"; and

(ii) at the end of there shall be added the words "; and

1986 c. 32.

in the foregoing provisions of this subsection "confiscation order" has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987 or by section 1(8) of the Drug Trafficking Offences Act 1986";

- (b) in section 7(1) (constitution of apparent insolvency)-
  - (i) in paragraph (b), at the beginning there shall be inserted the words "not being a person whose property is for the time being affected by a restraint order or subject to a confiscation, or charging, order,";
  - (ii) in paragraph (c), after the words "became due" there shall be inserted the words "or that but for his property being affected by a restraint order or subject to a confiscation, or charging, order he would be able to do so"; and
  - (iii) at the end there shall be added the words "In paragraph (d) above, "liquid debt" does not include a sum payable under a confiscation order; and in the foregoing provisions of this subsection-

"charging order" has the meaning assigned by section 9(2) of the Drug Trafficking Offences Act 1986;

"confiscation order" has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987 or by section 1(8) of the said Act of 1986; and

"restraint order" has the meaning assigned by section 9 of the said Act of 1987 or by section 8 of the said Act of 1986"; and

- (c) section 55(2) (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.

- (6) In section 231 of the 1975 Act (intimation of intention to appeal)-

1975 c. 21.

- (a) in subsection (1), after the words "236B(2) of this Act" there shall be inserted the words "and to section 2(2) of the Criminal Justice (Scotland) Act 1987 (postponed confiscation orders)";
- (b) in subsection (4), at the beginning there shall be inserted

the words "Subject to subsection (5) below,"; and

- (c) after subsection (4) there shall be added the following subsection-

"(5) Without prejudice to subsection (2) of section 2 of the said Act of 1987, the reference in subsection (4) above to "the day on which sentence is passed in open court" shall, in relation to any case in which, under subsection (1) of that section, a decision has been postponed for a period, be construed as a reference to the day on which that decision is made (whether or not a confiscation order is then made or any other sentence is then passed)."

- (7) In the Drug Trafficking Offences Act 1986-

- (a) at the end of section 2(5) (assessing the proceeds of drug trafficking) there shall be inserted the words-

"References in this subsection to a confiscation order include a reference to a confiscation order within the meaning of Part I of the Criminal Justice (Scotland) Act 1987";

- (b) in section 8 (restraint orders)-

- (i) in subsection (8), for the words "the High Court has made a restraint order" there shall be substituted the words "a restraint order has been made" and at the end of that subsection there shall be added the words-

"In this subsection, the reference to a restraint order includes a reference to a restraint order within the meaning of Part I of the Criminal Justice (Scotland) Act 1987, and, in relation to such an order, "realisable property" has the same meaning as in that Part"; and

- (ii) in subsection (9), for the words "court's directions" there shall be substituted the words "directions of the court which made the order";

- 1(c) in section 16 (sequestration of person holding realisable property)-

- (i) in subsection (2), at the end there shall be added the words ", and it shall not be competent to submit a claim in relation to the confiscation order to the permanent trustee in accordance with

section 48 of that Act."

(d) in section 19(2)(b)(ii) (compensation for loss in consequence of anything done in relation to realisable property by or in pursuance of order of Court of Session), for the words "20, 21 or 22 of this Act" there shall be substituted the words "11 (as applied by subsection (6) of that section), 27 or 28 of the Criminal Justice (Scotland) Act 1987 (inhibition and arrestment of property affected by restraint order and recognition and enforcement of orders under this Act)";

(e) in section 33 (power to inspect Land Register etc.)-

(i) in subsection (2), after paragraph (c) there shall be inserted the words-" or

(d) the Lord Advocate or any person conducting a prosecution in Scotland on his behalf";

(ii) in subsection (4)-

after the words "8 or 11 of this Act" there shall be inserted the words "or by an administrator appointed under section 13 of the Criminal Justice (Scotland) Act 1987 (comparable Scottish provisions)"; and

in each of paragraphs (a) and (b), after the word "receiver" there shall be inserted the words "(or administrator)"; and

(f) in section 40(4)(b) (effect in Scotland), at the beginning there shall be inserted the words "section 3(6)".

#### NOTE

<sup>1</sup> Para (ii) repealed by 1988 Act, Sch 16.

Service and notice for purposes of Part I.

**46.** Subject to the provisions of this Part of this Act, provision may be made by rules of court as to the giving of notice required for the purposes of this Part of this Act or the effecting of service so required; and different provision may be so made for different cases or classes of case and for different circumstances or classes of circumstance.

Extension of certain offences to Crown servants and exemptions for

**146A.-(1)** The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, sections 42 to 43B of this Act shall apply to such persons in the public service of the

regulators etc.

Crown, or such categories of person in that service, as may be prescribed.

(2) Section 43A of this Act shall not apply to-

(a) any person designated by regulations made by the Secretary of State for the purpose of this paragraph; or

(b) in such circumstances as may be prescribed, any person who falls within such category of person as may be prescribed for the purpose of this paragraph.

(3) The Secretary of State may designate, for the purpose of paragraph (a) of subsection (2) above, any person appearing to him to be performing regulatory, supervisory, investigative or registration functions.

(4) The categories of person prescribed by the Secretary of State, for the purpose of paragraph (b) of subsection (2) above, shall be such categories of person connected with the performance by any designated person of regulatory, supervisory, investigative or registration functions as he considers it appropriate to prescribe.

(5) In this section-

"the Crown" includes the Crown in right of Her Majesty's Government in Northern Ireland; and

"prescribed" means prescribed by regulations made by the Secretary of State.

(6) The power to make regulations under this section shall be exercisable by statutory instrument.

(7) Any such instrument shall be subject to annulment in pursuance of a resolution of either House of Parliament.

#### NOTE

<sup>1</sup> Section inserted by 1993 Act, Sch 4, para 2.

Interpretation of Part I.  
[Bill, Sch.3, para.33.]

47.-(1) In this Part of this Act (except where the context otherwise requires)-

"administrator" shall be construed in accordance with section 13 of this Act;

~~"associate" shall be construed in accordance with section 74 of the 1985 Act;~~



10 & 11 Geo. 6 c. 44.

"authorised government department" means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947;

"confiscation order" ~~has the meaning assigned by section 1(1) of this Act~~ means an order under section 1(1), 6A, 6B or 25 of this Act;

**"the court" means-**

- (a) for the purpose of sections 1 to 7A, the High Court of Justiciary or sheriff court;**
- (b) for the purposes of sections 8 to 26 and 33 to 37, the Court of Session or the sheriff court;**

"designated country" shall be construed in accordance with section 30(2) of this Act;

"drug trafficking" has the meaning assigned by section 1(6) of this Act;

"implicative gift" shall be construed in accordance with section 6 of this Act;

"realisable property" shall be construed in accordance with section 5 of this Act;

"restraint order" has the meaning assigned by section 9 of this Act; and

"the 1985 Act" means the Bankruptcy (Scotland) Act 1985.

1985 c. 66.

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

1975 c. 21.

(3) This Part of this Act applies to property whether it is situated in Scotland or elsewhere.

(4) References in this Part of this Act-

- (a) to offences include a reference to offences committed before the commencement of section 1 of this Act; but nothing in this Act imposes any duty or confers any power on any court in or in connection with proceedings against a person for an offence to which that section relates instituted before the commencement of that section;
- (b) to anything received in connection with drug trafficking include a reference to anything received both in that connection and in some other connection; and

(c) to property held by a person include a reference to property vested in the interim or permanent trustee in his sequestration or in his trustee in bankruptcy or liquidator.

(5) For the purposes of this Part of this Act (and subject to subsections (8) and (9) of section 30 of this Act), proceedings are concluded as regards an offence where-

- (a) the trial diet is deserted *simpliciter*;
- (b) the accused is acquitted or, under section 101 of the 1975 Act, discharged or liberated,
- (c) the High Court **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 **or, as the case may be, the sheriff** decides not to make a confiscation order;
- (e) his conviction is quashed; or
- (f) either the amount of a confiscation order made has been paid or there remains no liability to imprisonment in default of so much of that amount as is unpaid.

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

# APPENDIX C

## List of those who submitted comments on Discussion Paper No 82

Association of British Insurers  
Association of Chief Police Officers (Scotland)  
Association of Scottish Chambers of Commerce  
Association of Scottish Police Superintendents  
British Insurance and Investment Brokers' Association  
Committee of Scottish Clearing Bankers  
Council of Mortgage Lenders  
Court of Session Judges  
Faculty of Advocates  
Law Society of Scotland  
Procurators Fiscal Society  
Scottish Courts Administration  
Scottish Law Agents Society  
Sheriffs' Association  
Sheriffs Principal  
University of Leeds, Centre for Criminal Justice Studies