



# Proceeds of Crime Act 2002

## 2002 CHAPTER 29

### PART 3

#### CONFISCATION: SCOTLAND

##### *Confiscation orders*

#### **92 Making of order**

- (1) The court must act under this section where the following three conditions are satisfied.
- (2) The first condition is that an accused falls within either of the following paragraphs—
  - (a) he is convicted of an offence or offences, whether in solemn or summary proceedings, or
  - (b) in the case of summary proceedings in respect of an offence (without proceeding to conviction) an order is made discharging him absolutely.
- (3) The second condition is that the prosecutor asks the court to act under this section.
- (4) The third condition is that the court decides to order some disposal in respect of the accused; and an absolute discharge is a disposal for the purpose of this subsection.
- (5) If the court acts under this section it must proceed as follows—
  - (a) it must decide whether the accused has a criminal lifestyle;
  - (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
  - (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.
- (6) If the court decides under subsection (5)(b) or (c) that the accused has benefited from the conduct referred to—
  - (a) it must decide the recoverable amount, and
  - (b) it must make an order (a confiscation order) requiring him to pay that amount.

---

*Status: This is the original version (as it was originally enacted).*

---

- (7) But the court must treat the duty in subsection (6) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the accused in respect of loss, injury or damage sustained in connection with the conduct.
- (8) Before making an order under this section the court must take into account any representations made to it by any person whom the court thinks is likely to be affected by the order.
- (9) The standard of proof required to decide any question arising under subsection (5) or (6) is the balance of probabilities.
- (10) The first condition is not satisfied if the accused is unlawfully at large (but section 111 may apply).
- (11) For the purposes of any appeal or review, an order under this section is a sentence.
- (12) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2).
- (13) In this section and sections 93 to 118 “the court” means the High Court of Justiciary or the sheriff.

### **93 Recoverable amount**

- (1) The recoverable amount for the purposes of section 92 is an amount equal to the accused’s benefit from the conduct concerned.
- (2) But if the accused shows that the available amount is less than that benefit the recoverable amount is—
  - (a) the available amount, or
  - (b) a nominal amount, if the available amount is nil.
- (3) But if section 92(7) applies the recoverable amount is such amount as—
  - (a) the court believes is just, but
  - (b) does not exceed the amount found under subsection (1) or (2) (as the case may be).
- (4) In calculating the accused’s benefit from the conduct concerned for the purposes of subsection (1), any property in respect of which—
  - (a) a recovery order is in force under section 266, or
  - (b) a forfeiture order is in force under section 298(2),must be ignored.
- (5) If the court decides the available amount, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding that amount.

### **94 Accused’s benefit**

- (1) If the court is acting under section 92 this section applies for the purpose of—
  - (a) deciding whether the accused has benefited from conduct, and
  - (b) deciding his benefit from the conduct.
- (2) The court must take account of—
  - (a) conduct occurring up to the time it makes its decision;

- (b) property obtained up to that time.
- (3) Subsection (4) applies if—
  - (a) the conduct concerned is general criminal conduct,
  - (b) a confiscation order mentioned in subsection (5) has at an earlier time been made against the accused, and
  - (c) his benefit for the purposes of that order was benefit from his general criminal conduct.
- (4) His benefit found at the time the last confiscation order mentioned in subsection (3)(c) was made against him must be taken for the purposes of this section to be his benefit from his general criminal conduct at that time.
- (5) If the conduct concerned is general criminal conduct the court must deduct the aggregate of the following amounts—
  - (a) the amount ordered to be paid under each confiscation order previously made against the accused;
  - (b) the amount ordered to be paid under each confiscation order previously made against him under—
    - (i) the Drug Trafficking Offences Act 1986 (c. 32);
    - (ii) Part 1 of the Criminal Justice (Scotland) Act 1987 (c. 41);
    - (iii) Part 6 of the Criminal Justice Act 1988 (c. 33);
    - (iv) the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 1990/2588 (N.I.17));
    - (v) Part 1 of the Drug Trafficking Act 1994 (c. 37);
    - (vi) Part 1 of the Proceeds of Crime (Scotland) Act 1995 (c. 43);
    - (vii) the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I.9)); or
    - (viii) Part 2 or 4 of this Act.
- (6) But subsection (5) does not apply to an amount which has been taken into account for the purposes of a deduction under that subsection on any earlier occasion.
- (7) The reference to general criminal conduct in the case of a confiscation order made under any of the provisions listed in subsection (5)(b) is a reference to conduct in respect of which a court is required or entitled to make one or more assumptions for the purpose of assessing a person's benefit from the conduct.

## **95 Available amount**

- (1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
  - (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the accused minus the total amount payable in pursuance of obligations which then have priority, and
  - (b) the total of the values (at that time) of all tainted gifts.
- (2) An obligation has priority if—
  - (a) it is an obligation of the accused to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction for an offence and at any time before the confiscation order is made, or
  - (b) it is an obligation of the accused to pay a sum which would be—

---

*Status: This is the original version (as it was originally enacted).*

---

(i) a preferred debt if the accused's estate were sequestrated on the date of the confiscation order, or

(ii) a preferential debt if his winding up were ordered on that date.

(3) In subsection (2)—

“preferred debt” has the meaning given by section 51(2) of the Bankruptcy (Scotland) Act 1985 (c. 66);

“preferential debt” has the meaning given by section 386 of the Insolvency Act 1986 (c. 45).

## **96 Assumptions to be made in case of criminal lifestyle**

(1) Where the court decides under section 92 that the accused has a criminal lifestyle it must make the following four assumptions for the purpose of—

- (a) deciding whether he has benefited from his general criminal conduct, and
- (b) deciding his benefit from the conduct.

(2) The first assumption is that any property transferred to the accused at any time after the relevant day was obtained by him—

- (a) as a result of his general criminal conduct, and
- (b) at the earliest time he appears to have held it.

(3) The second assumption is that any property held by the accused at any time after the date of conviction was obtained by him—

- (a) as a result of his general criminal conduct, and
- (b) at the earliest time he appears to have held it.

(4) The third assumption is that any expenditure incurred by the accused at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.

(5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the accused, he obtained it free of any other interests in it.

(6) But the court must not make any of those assumptions in relation to particular property or expenditure if—

- (a) the assumption is shown to be incorrect, or
- (b) there would be a serious risk of injustice if the assumption were made.

(7) If the court does not make one or more of those assumptions it must state its reasons.

(8) The relevant day is the first day of the period of six years ending with—

- (a) the day when proceedings for the offence concerned were instituted against the accused, or
- (b) if there are two or more offences and proceedings for them were instituted on different days, the earliest of those days.

(9) But if a confiscation order mentioned in section 94(3)(c) has been made against the accused at any time during the period mentioned in subsection (8)—

- (a) the relevant day is the day when the accused's benefit was calculated for the purposes of the last such confiscation order;

- (b) the second assumption does not apply to any property which was held by him on or before the relevant day.
- (10) The date of conviction is—
- (a) the date on which the accused was convicted of the offence concerned, or
  - (b) if there are two or more offences and the convictions are on different dates, the date of the latest.

## **97 Effect of order on court’s other powers**

- (1) If the court decides to make a confiscation order it must act as mentioned in subsections (2) and (4) in respect of the offence or offences concerned.
- (2) The court must take account of the confiscation order before—
- (a) it imposes a fine on the accused, or
  - (b) it makes an order falling within subsection (3).
- (3) These orders fall within this subsection—
- (a) an order involving payment by the accused, other than a compensation order under section 249 of the Procedure Act (compensation orders);
  - (b) an order under section 27 of the Misuse of Drugs Act 1971 (c. 38) (forfeiture orders);
  - (c) an order under Part 2 of the Proceeds of Crime (Scotland) Act 1995 (c. 43) (forfeiture orders);
  - (d) an order under section 23 of the Terrorism Act 2000 (c. 11) (forfeiture orders).
- (4) Subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the accused.
- (5) Subsection (6) applies if—
- (a) a court makes both a confiscation order and a compensation order under section 249 of the Procedure Act against the same person in the same proceedings, and
  - (b) the court believes he will not have sufficient means to satisfy both the orders in full.
- (6) In such a case the court must direct that so much of the compensation as it specifies is to be paid out of any sums recovered under the confiscation order; and the amount it specifies must be the amount it believes will not be recoverable because of the insufficiency of the person’s means.

## **98 Disposal of family home**

- (1) This section applies where a confiscation order has been made in relation to any person and the prosecutor has not satisfied the court that the person’s interest in his family home has been acquired as a benefit from his criminal conduct.
- (2) Where this section applies, then, before the administrator disposes of any right or interest in the person’s family home he shall—
- (a) obtain the relevant consent; or
  - (b) where he is unable to do so, apply to the court for authority to carry out the disposal.

---

*Status: This is the original version (as it was originally enacted).*

---

(3) On an application being made to it under subsection (2)(b), the court, after having regard to all the circumstances of the case including—

- (a) the needs and financial resources of the spouse or former spouse of the person concerned;
- (b) the needs and financial resources of any child of the family;
- (c) the length of the period during which the family home has been used as a residence by any of the persons referred to in paragraph (a) or (b),

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) 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 administrator as it applies to an application under subsection (2)(b) and, for the purposes of this subsection, any reference in subsection (3) to the granting of the application shall be construed as a reference to the granting of decree in the action.

(5) In this section—

“family home”, in relation to any person (in this subsection referred to as “the relevant person”) means any property in which the relevant person has or had (whether alone or in common with any other person) a right or interest, being property which is occupied as a residence by the relevant person and his or her spouse or by the relevant person’s spouse or former spouse (in any case with or without a child of the family) or by the relevant person with a child of the family;

“child of the family” includes any child or grandchild of either the relevant person or his or her spouse or former spouse, and any person who has been treated by either the relevant person or his or her spouse or former spouse as if he or she were a child of the relevant person, spouse or former spouse, whatever the age of such a child, grandchild or person may be; and

“relevant consent” means in relation to the disposal of any right or interest in a family home—

- (a) in a case where the family home is occupied by the spouse or former spouse of the relevant person, the consent of the spouse or, as the case may be, of the former spouse, whether or not the family home is also occupied by the relevant person;
- (b) where paragraph (a) 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.

### *Procedural matters*

## **99 Postponement**

(1) The court may—

- (a) proceed under section 92 before it sentences the accused for the offence (or any of the offences concerned), or

- (b) postpone proceedings under section 92 for a specified period.
- (2) A period of postponement may be extended.
- (3) A period of postponement (including one as extended) must not end after the permitted period ends.
- (4) But subsection (3) does not apply if there are exceptional circumstances or if the accused has failed to comply with an order under section 102(1).
- (5) The permitted period is the period of two years starting with the date of conviction.
- (6) But if—
  - (a) the accused appeals against his conviction for the offence (or any of the offences) concerned, and
  - (b) the period of three months (starting with the day when the appeal is determined or otherwise disposed of) ends after the period found under subsection (5),the permitted period is that period of three months.
- (7) A postponement or extension may be made—
  - (a) on application by the accused;
  - (b) on application by the prosecutor;
  - (c) by the court of its own motion.
- (8) If—
  - (a) proceedings are postponed for a period, and
  - (b) an application to extend the period is made before it ends,the application may be granted even after the period ends.
- (9) The date of conviction is—
  - (a) the date on which the accused was convicted of the offence concerned, or
  - (b) if there are two or more offences and the convictions were on different dates, the date of the latest.
- (10) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.
- (11) But subsection (10) does not apply if before it made the confiscation order the court has—
  - (a) imposed a fine on the accused;
  - (b) made an order falling within section 97(3);
  - (c) made an order under section 249 of the Procedure Act.

## **100 Effect of postponement**

- (1) If the court postpones proceedings under section 92 it may proceed to sentence the accused for the offence (or any of the offences) concerned.
- (2) Subsection (1) is without prejudice to sections 201 and 202 of the Procedure Act.
- (3) In sentencing the accused for the offence (or any of the offences) concerned in the postponement period the court must not—
  - (a) impose a fine on him,

---

*Status: This is the original version (as it was originally enacted).*

---

- (b) make an order falling within section 97(3), or
  - (c) make an order for the payment of compensation under section 249 of the Procedure Act.
- (4) If the court sentences the accused for the offence (or any of the offences) concerned in the postponement period, after that period ends it may vary the sentence by—
- (a) imposing a fine on him,
  - (b) making an order falling within section 97(3), or
  - (c) making an order for the payment of compensation under section 249 of the Procedure Act.
- (5) But the court may proceed under subsection (4) only within the period of 28 days which starts with the last day of the postponement period.
- (6) Where the court postpones proceedings under section 92 following conviction on indictment, section 109(1) of the Procedure Act (intimation of intention to appeal against conviction or conviction and sentence) has effect as if the reference to the final determination of the proceedings were a reference to the relevant day.
- (7) Despite subsection (6), the accused may appeal under section 106 of the Procedure Act against any confiscation order made, or any other sentence passed, after the end of the postponement period, in respect of the conviction.
- (8) Where the court postpones proceedings under section 92 following conviction on complaint—
- (a) section 176(1) of the Procedure Act (stated case: manner and time of appeal) has effect in relation to an appeal under section 175(2)(a) or (d) as if the reference to the final determination of the proceedings were a reference to the relevant day, and
  - (b) the draft stated case in such an appeal must be prepared and issued within 3 weeks of the relevant day.
- (9) Despite subsection (8), the accused may appeal under section 175(2)(b), and the prosecutor may appeal under section 175(3)(b), of the Procedure Act against any confiscation order made, or any other sentence passed, after the end of the postponement period, in respect of the conviction.
- (10) The relevant day is—
- (a) in the case of an appeal against conviction where the court has sentenced the accused under subsection (1), the day on which the postponement period commenced;
  - (b) in any other case, the day on which sentence is passed in open court.
- (11) The postponement period is the period for which proceedings under section 92 are postponed.

## **101 Statement of information**

- (1) When the court is proceeding under section 92 the prosecutor must, within such period as the court may order, give the court a statement of information.
- (2) If the prosecutor believes the accused has a criminal lifestyle the statement of information is a statement of matters the prosecutor believes are relevant in connection with deciding these issues—



- (a) whether the accused has a criminal lifestyle;
  - (b) whether he has benefited from his general criminal conduct;
  - (c) his benefit from the conduct.
- (3) A statement under subsection (2) must include information the prosecutor believes is relevant—
- (a) in connection with the making by the court of a required assumption under section 96;
  - (b) for the purpose of enabling the court to decide if the circumstances are such that it must not make such an assumption.
- (4) If the prosecutor does not believe the accused has a criminal lifestyle the statement of information is a statement of matters the prosecutor believes are relevant in connection with deciding these issues—
- (a) whether the accused has benefited from his particular criminal conduct;
  - (b) his benefit from the conduct.
- (5) If the prosecutor gives the court a statement of information—
- (a) he may at any time give the court a further statement of information;
  - (b) he must give the court a further statement of information if it orders him to do so, and he must give it within the period the court orders.
- (6) If the court makes an order under this section it may at any time vary it by making another one.

## **102 Accused's response to statement of information**

- (1) When the prosecutor gives the court a statement of information and the court is satisfied that he has served a copy on the accused, the court shall order the accused—
- (a) to indicate the extent to which he accepts each allegation in the statement, and
  - (b) so far as he does not accept such an allegation, to give particulars of any matters he proposes to rely on,
- within the period it orders.
- (2) Where by virtue of section 99 the court postpones proceedings under section 92, the period ordered by the court under subsection (1) shall be a period ending not less than six months before the end of the permitted period mentioned in section 99.
- (3) If the accused accepts to any extent an allegation in a statement of information the court may treat his acceptance as conclusive of the matters to which it relates for the purpose of deciding the issues referred to in section 101(2) or (4) (as the case may be).
- (4) If the accused fails in any respect to comply with an order under subsection (1) he may be treated for the purposes of subsection (3) as accepting every allegation in the statement of information apart from—
- (a) any allegation in respect of which he has complied with the requirement;
  - (b) any allegation that he has benefited from his general or particular criminal conduct.
- (5) Where—
- (a) an allegation in a statement of information is challenged by the accused, or
  - (b) the matters referred to in subsection (1)(b) are challenged by the prosecutor,

---

*Status: This is the original version (as it was originally enacted).*

---

the court must consider the matters being challenged at a hearing.

- (6) The judge presiding at the hearing may, if he is not the trial judge and he considers it in the interests of justice to do so, adjourn the hearing to a date when the trial judge is available.
- (7) If the court makes an order under this section it may at any time vary it by making another one.
- (8) No acceptance under this section that the accused has benefited from conduct is admissible in evidence in proceedings for an offence.

### **103 Provision of information by accused**

- (1) For the purpose of obtaining information to help it in carrying out its functions under section 92 the court may at any time order the accused to give it information specified in the order.
- (2) An order under this section may require all or a specified part of the information to be given in a specified manner and before a specified date.
- (3) If the accused fails without reasonable excuse to comply with an order under this section the court may draw such inference as it thinks appropriate.
- (4) Subsection (3) does not affect any power of the court to deal with the accused in respect of a failure to comply with an order under this section.
- (5) If the prosecutor accepts to any extent an allegation made by the accused—
  - (a) in giving information required by an order under this section, or
  - (b) in any other statement given to the court in relation to any matter relevant to deciding the available amount under section 95,the court may treat the acceptance as conclusive of the matters to which it relates.
- (6) For the purposes of this section an allegation may be accepted in a manner ordered by the court.
- (7) If the court makes an order under this section it may at any time vary it by making another order.
- (8) No information given under this section which amounts to an admission by the accused that he has benefited from criminal conduct is admissible in evidence in proceedings for an offence.

### *Reconsideration*

### **104 No order made: reconsideration of case**

- (1) This section applies if—
  - (a) the first condition in section 92 is satisfied but no court has proceeded under that section,
  - (b) the prosecutor has evidence which was not available to him on the relevant date,
  - (c) before the end of the period of six years starting with the date of conviction the prosecutor applies to the court to consider the evidence, and

---

*Status: This is the original version (as it was originally enacted).*

---

- (d) after considering the evidence the court thinks it is appropriate for it to proceed under section 92.
- (2) The court must proceed under section 92, and when it does so subsections (3) to (8) below apply.
- (3) If the court has already sentenced the accused for the offence (or any of the offences) concerned section 92(4) does not apply.
- (4) Section 94(2) does not apply, and the rules applying instead are that the court must take account of—
  - (a) conduct occurring before the relevant date;
  - (b) property obtained before that date;
  - (c) property obtained on or after that date if it was obtained as a result of or in connection with conduct occurring before that date.
- (5) In relation to the assumptions that the court must make under section 96—
  - (a) the first and second assumptions do not apply with regard to property first held by the accused on or after the relevant date;
  - (b) the third assumption does not apply with regard to expenditure incurred by him on or after that date;
  - (c) the fourth assumption does not apply with regard to property obtained (or assumed to have been obtained) by him on or after that date.
- (6) The recoverable amount for the purposes of section 92 is such amount as—
  - (a) the court believes is just, but
  - (b) does not exceed the amount found under section 93.
- (7) In arriving at the just amount the court must have regard in particular to—
  - (a) the amount found under section 93;
  - (b) any fine imposed on the accused in respect of the offence (or any of the offences) concerned;
  - (c) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (d) any compensation order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (8) If an order for payment of compensation under section 249 of the Procedure Act has been made against the accused in respect of the offence or offences concerned, section 97(5) and (6) do not apply.
- (9) The relevant date is—
  - (a) if the court made a decision not to proceed under section 92, the date of the decision;
  - (b) if the court did not make such a decision, the date of the conviction.
- (10) The date of conviction is—
  - (a) the date on which the accused was convicted of the offence concerned, or
  - (b) if there are two or more offences and the convictions were on different dates, the date of the latest.

---

*Status: This is the original version (as it was originally enacted).*

---

- (11) In this section references to the court are to the court which had jurisdiction in respect of the offence or offences concerned to make a confiscation order.

**105 No order made: reconsideration of benefit**

- (1) This section applies if the following two conditions are satisfied.
- (2) The first condition is that in proceeding under section 92 the court has decided that—
- (a) the accused has a criminal lifestyle but has not benefited from his general criminal conduct, or
  - (b) the accused does not have a criminal lifestyle and has not benefited from his particular criminal conduct.
- (3) The second condition is that—
- (a) the prosecutor has evidence which was not available to him when the court decided that the accused had not benefited from his general or particular criminal conduct,
  - (b) before the end of the period of six years starting with the date of conviction the prosecutor applies to the court to consider the evidence, and
  - (c) after considering the evidence the court concludes that it would have decided that the accused had benefited from his general or particular criminal conduct (as the case may be) if the evidence had been available to it.
- (4) If this section applies the court—
- (a) must make a fresh decision under section 92(5)(b) or (c) as to whether the accused has benefited from his general or particular criminal conduct (as the case may be);
  - (b) may make a confiscation order under that section.
- (5) Subsections (6) to (11) below apply if the court proceeds under section 92 in pursuance of this section.
- (6) If the court has already sentenced the accused for the offence (or any of the offences) concerned section 92(4) does not apply.
- (7) Section 94(2) does not apply, and the rules applying instead are that the court must take account of—
- (a) conduct occurring before the date of the original decision that the accused had not benefited from his general or particular criminal conduct;
  - (b) property obtained before that date;
  - (c) property obtained on or after that date if it was obtained as a result of or in connection with conduct occurring before that date.
- (8) In relation to the assumptions that the court must make under section 96—
- (a) the first and second assumptions do not apply with regard to property first held by the accused on or after the date of the original decision that the accused had not benefited from his general or particular criminal conduct;
  - (b) the third assumption does not apply with regard to expenditure incurred by him on or after that date;
  - (c) the fourth assumption does not apply with regard to property obtained (or assumed to have been obtained) by him on or after that date.

- (9) The recoverable amount for the purposes of section 92 is such amount as—
  - (a) the court believes is just, but
  - (b) does not exceed the amount found under section 93.
- (10) In arriving at the just amount the court must have regard in particular to—
  - (a) the amount found under section 93;
  - (b) any fine imposed on the accused in respect of the offence (or any of the offences) concerned;
  - (c) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (d) any compensation order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (11) If an order for the payment of compensation under section 249 of the Procedure Act has been made against the accused in respect of the offence or offences concerned, section 97(5) and (6) do not apply.
- (12) The date of conviction is the date found by applying section 104(10).
- (13) In this section references to the court are to the court which had jurisdiction in respect of the offence or offences concerned to make a confiscation order.

## **106 Order made: reconsideration of benefit**

- (1) This section applies if—
  - (a) a court has made a confiscation order,
  - (b) there is evidence which was not available to the prosecutor at the relevant time,
  - (c) the prosecutor believes that if the court were to find the amount of the accused's benefit in pursuance of this section it would exceed the relevant amount,
  - (d) before the end of the period of six years starting with the date of conviction the prosecutor applies to the court to consider the evidence, and
  - (e) after considering the evidence the court thinks it is appropriate for it to proceed under this section.
- (2) The court must make a new calculation of the accused's benefit from the conduct concerned, and when it does so subsections (3) to (5) below apply.
- (3) Section 94(2) does not apply, and the rules applying instead are that the court must take account of—
  - (a) conduct occurring up to the time it decided the accused's benefit for the purposes of the confiscation order;
  - (b) property obtained up to that time;
  - (c) property obtained after that time if it was obtained as a result of or in connection with conduct occurring before that time.
- (4) In applying section 94(3) the confiscation order must be ignored.
- (5) In relation to the assumptions that the court must make under section 96—

---

*Status: This is the original version (as it was originally enacted).*

---

- (a) the first and second assumptions do not apply with regard to property first held by the accused after the time the court decided his benefit for the purposes of the confiscation order;
  - (b) the third assumption does not apply with regard to expenditure incurred by him after that time;
  - (c) the fourth assumption does not apply with regard to property obtained (or assumed to have been obtained) by him after that time.
- (6) If the amount found under the new calculation of the accused's benefit exceeds the relevant amount the court—
- (a) must make a new calculation of the recoverable amount for the purposes of section 92, and
  - (b) if it exceeds the amount required to be paid under the confiscation order, may vary the order by substituting for the amount required to be paid such amount as it believes just.
- (7) In applying subsection (6)(a) the court must—
- (a) take the new calculation of the accused's benefit;
  - (b) apply section 95 as if references to the time the confiscation order is made were to the time of the new calculation of the recoverable amount and as if references to the date of the confiscation order were to the date of that new calculation.
- (8) In applying subsection (6)(b) the court must have regard in particular to—
- (a) any fine imposed on the accused for the offence (or any of the offences) concerned;
  - (b) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (c) any order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (9) But in applying subsection (6)(b) the court must not have regard to an order falling within subsection (8)(c) if a court has made a direction under section 97(6).
- (10) In deciding under this section whether one amount exceeds another the court must take account of any change in the value of money.
- (11) The relevant time is—
- (a) when the court calculated the accused's benefit for the purposes of the confiscation order, if this section has not applied previously;
  - (b) when the court last calculated the accused's benefit in pursuance of this section, if this section has applied previously.
- (12) The relevant amount is—
- (a) the amount found as the accused's benefit for the purposes of the confiscation order, if this section has not applied previously;
  - (b) the amount last found as the accused's benefit in pursuance of this section, if this section has applied previously.
- (13) The date of conviction is the date found by applying section 104(10).

## **107 Order made: reconsideration of available amount**

- (1) This section applies if—
  - (a) a court has made a confiscation order,
  - (b) the amount required to be paid was the amount found under section 93(2), and
  - (c) the prosecutor applies to the court to make a new calculation of the available amount.
- (2) In a case where this section applies the court must make the new calculation, and in doing so it must apply section 95 as if references to the time the confiscation order is made were to the time of the new calculation and as if references to the date of the confiscation order were to the date of the new calculation.
- (3) If the amount found under the new calculation exceeds the relevant amount the court may vary the order by substituting for the amount required to be paid such amount as—
  - (a) it thinks is just, but
  - (b) does not exceed the amount found as the accused's benefit from the conduct concerned.
- (4) In arriving at the just amount the court must have regard in particular to—
  - (a) any fine imposed on the accused for the offence (or any of the offences) concerned;
  - (b) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (c) any order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (5) But in deciding what is just the court must not have regard to an order falling within subsection (4)(c) if a court has made a direction under section 97(6).
- (6) In deciding under this section whether one amount exceeds another the court must take account of any change in the value of money.
- (7) The relevant amount is—
  - (a) the amount found as the available amount for the purposes of the confiscation order, if this section has not applied previously;
  - (b) the amount last found as the available amount in pursuance of this section, if this section has applied previously.
- (8) The amount found as the accused's benefit from the conduct concerned is—
  - (a) the amount so found when the confiscation order was made, or
  - (b) if one or more new calculations of the accused's benefit have been made under section 106 the amount found on the occasion of the last such calculation.

## **108 Inadequacy of available amount: variation of order**

- (1) This section applies if—
  - (a) a court has made a confiscation order, and
  - (b) the accused or the prosecutor applies to the court to vary the order under this section.

---

*Status: This is the original version (as it was originally enacted).*

---

- (2) In such a case the court must calculate the available amount and in doing so it must apply section 95 as if references to the time the confiscation order is made were to the time of the calculation and as if references to the date of the confiscation order were to the date of the calculation.
- (3) If the court finds that the available amount (as so calculated) is inadequate to meet the amount remaining to be paid it may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just.
- (4) If a person's estate has been sequestrated or he has been adjudged bankrupt, or if an order for the winding up of a company has been made, the court must take into account the extent to which realisable property held by him or by the company may be distributed among creditors.
- (5) The court may disregard any inadequacy which it thinks is attributable (wholly or partly) to anything done by the accused for the purpose of preserving property held by the recipient of a tainted gift from any risk of realisation under this Part.
- (6) In subsection (4) "company" means any company which may be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

#### **109 Inadequacy of available amount: discharge of order**

- (1) This section applies if—
  - (a) a court has made a confiscation order,
  - (b) the prosecutor applies to the court to discharge the order under this section, and
  - (c) the amount remaining to be paid under the order is less than £1,000.
- (2) In such a case the court must calculate the available amount, and in doing so it must apply section 95 as if references to the time the confiscation order is made were to the time of the calculation and as if references to the date of the confiscation order were to the date of the calculation.
- (3) If the court—
  - (a) finds that the available amount (as so calculated) is inadequate to meet the amount remaining to be paid, and
  - (b) is satisfied that the inadequacy is due wholly to a specified reason or a combination of specified reasons,
 it may discharge the confiscation order.
- (4) The specified reasons are—
  - (a) in a case where any of the realisable property consists of money in a currency other than sterling, that fluctuations in currency exchange rates have occurred;
  - (b) any reason specified by the Scottish Ministers.
- (5) The Scottish Ministers may by order vary the amount for the time being specified in subsection (1)(c).

#### **110 Information**

- (1) This section applies if—



- (a) the court proceeds under section 92 in pursuance of section 104 or 105, or
  - (b) the prosecutor applies under section 106.
- (2) In such a case—
- (a) the prosecutor must give the court a statement of information within such period as the court may specify;
  - (b) section 101 applies accordingly (with appropriate modifications where the prosecutor applies under section 106);
  - (c) sections 102 and 103 apply accordingly.

*Accused unlawfully at large*

**111 Conviction or other disposal of accused**

- (1) This section applies if an accused is unlawfully at large after—
- (a) he is convicted of an offence or offences, whether in solemn or summary proceedings, or
  - (b) in the case of summary proceedings in respect of an offence (without proceeding to conviction) an order is made discharging him absolutely.
- (2) If this section applies the court may, on the application of the prosecutor and if it believes it is appropriate for it to do so, proceed under section 92 in the same way as it must proceed if the conditions there mentioned are satisfied; but this is subject to subsection (3).
- (3) If the court proceeds under section 92 as applied by this section, this Part has effect with these modifications—
- (a) any person the court believes is likely to be affected by an order under section 92 is entitled to appear before the court and make representations;
  - (b) the court must not make an order under section 92 unless the prosecutor has taken reasonable steps to contact the accused;
  - (c) section 92(12) applies as if the reference to subsection (2) were to subsection (1) of this section;
  - (d) sections 96, 101(3), 102 and 103 do not apply;
  - (e) sections 104, 105 and 106 do not apply while the accused is still unlawfully at large.
- (4) Once the accused has ceased to be unlawfully at large, section 104 has effect as if subsection (1)(a) read—
- “(a) in a case where section 111 applies the court did not proceed under section 92.”

**112 Accused neither convicted nor acquitted**

- (1) This section applies if—
- (a) proceedings for an offence or offences are instituted against an accused but are not concluded,
  - (b) he is unlawfully at large, and
  - (c) the period of two years (starting with the day the court believes he first became unlawfully at large) has ended.

---

*Status: This is the original version (as it was originally enacted).*

---

- (2) If this section applies the court may, on an application by the prosecutor and if it believes it is appropriate for it to do so, proceed under section 92 in the same way as it must proceed if the conditions there mentioned are satisfied; but this is subject to subsection (3).
- (3) If the court proceeds under section 92 as applied by this section, this Part has effect with these modifications—
  - (a) any person the court believes is likely to be affected by an order under section 92 is entitled to appear before the court and make representations;
  - (b) the court must not make an order under section 92 unless the prosecutor has taken reasonable steps to contact the accused;
  - (c) section 92(12) applies as if the reference to subsection (2) were to subsection (1) of this section;
  - (d) sections 96, 101(3), 102, 103, 104 and 105 do not apply;
  - (e) section 106 does not apply while the accused is still unlawfully at large.
- (4) Once the accused has ceased to be unlawfully at large, section 106 has effect as if references to the date of conviction were to—
  - (a) the day when proceedings for the offence were instituted against the accused, or
  - (b) if there are two or more offences and proceedings for them were instituted on different days, the earliest of those days.
- (5) If—
  - (a) the court makes an order under section 92 as applied by this section, and
  - (b) the accused is later convicted of the offence (or any of the offences) concerned, section 92 does not apply so far as that conviction is concerned.

### **113 Variation of order**

- (1) This section applies if—
  - (a) the court makes a confiscation order under section 92 as applied by section 112,
  - (b) the accused ceases to be unlawfully at large,
  - (c) he is convicted of an offence (or any of the offences) mentioned in section 112(1)(a),
  - (d) he believes that the amount required to be paid was too large (taking the circumstances prevailing when the amount was found for the purposes of the order), and
  - (e) before the end of the relevant period he applies to the court to consider the evidence on which his belief is based.
- (2) If (after considering the evidence) the court concludes that the accused's belief is well founded—
  - (a) it must find the amount which should have been the amount required to be paid (taking the circumstances prevailing when the amount was found for the purposes of the order), and
  - (b) it may vary the order by substituting for the amount required to be paid such amount as it believes is just.
- (3) The relevant period is the period of 28 days starting with—

- (a) the date on which the accused was convicted of the offence mentioned in section 112(1)(a), or
  - (b) if there are two or more offences and the convictions were on different dates, the date of the latest.
- (4) But in a case where section 112(1)(a) applies to more than one offence the court must not make an order under this section unless it is satisfied that there is no possibility of any further proceedings being taken or continued in relation to any such offence in respect of which the accused has not been convicted.

#### **114 Discharge of order**

- (1) Subsection (2) applies if—
- (a) the court makes a confiscation order under section 92 as applied by section 112,
  - (b) the accused is later tried for the offence or offences concerned and acquitted of the offence or offences, and
  - (c) he applies to the court to discharge the order.
- (2) In such a case the court must discharge the order.
- (3) Subsection (4) applies if—
- (a) the court makes a confiscation order under section 92 as applied by section 112,
  - (b) the accused ceases to be unlawfully at large,
  - (c) subsection (1)(b) does not apply, and
  - (d) he applies to the court to discharge the order.
- (4) In such a case the court may discharge the order if it finds that—
- (a) there has been undue delay in continuing the proceedings mentioned in section 112(1), or
  - (b) the prosecutor does not intend to proceed with the prosecution.
- (5) If the court discharges a confiscation order under this section it may make such a consequential or incidental order as it thinks is appropriate.

### *Appeals*

#### **115 Appeal by prosecutor**

- (1) Section 108 of the Procedure Act (Lord Advocate’s right of appeal in solemn proceedings) is amended as provided in subsections (2) to (4).
- (2) In subsection (1), after paragraph (c) insert—
- “(ca) a decision under section 92 of the Proceeds of Crime Act 2002 not to make a confiscation order;”
- (3) In subsection (2)(b)(ii), for the words “or (c)” substitute “, (c) or (ca)”.
- (4) After subsection (2) insert—
- “(3) For the purposes of subsection (2)(b)(i) above in its application to a confiscation order by virtue of section 92(11) of the Proceeds of Crime Act

---

*Status: This is the original version (as it was originally enacted).*

---

2002, the reference to the disposal being unduly lenient is a reference to the amount required to be paid by the order being unduly low.”

- (5) Section 175 of the Procedure Act (right of appeal in summary proceedings) is amended as provided in subsections (6) to (8).
- (6) In subsection (4), after paragraph (c) insert—
  - “(ca) a decision under section 92 of the Proceeds of Crime Act 2002 not to make a confiscation order;”
- (7) In subsection (4A)(b)(ii), for the words “or (c)” substitute “, (c) or (ca)”.
- (8) After subsection (4A) insert—
  - “(4B) For the purposes of subsection (4A)(b)(i) above in its application to a confiscation order by virtue of section 92(11) of the Proceeds of Crime Act 2002, the reference to the disposal being unduly lenient is a reference to the amount required to be paid by the order being unduly low.”

#### *Payment and enforcement*

### **116 Time for payment**

- (1) The amount ordered to be paid under a confiscation order must be paid on the making of the order; but this is subject to the following provisions of this section.
- (2) If the accused shows that he needs time to pay the amount ordered to be paid, the court making the confiscation order may make an order allowing payment to be made in a specified period.
- (3) The specified period—
  - (a) must start with the day on which the confiscation order is made, and
  - (b) must not exceed six months.
- (4) If within the specified period the accused applies to the sheriff court for the period to be extended and the court, after giving the prosecutor an opportunity of being heard, believes there are exceptional circumstances, it may make an order extending the period.
- (5) The extended period—
  - (a) must start with the day on which the confiscation order is made, and
  - (b) must not exceed 12 months.
- (6) An order under subsection (4)—
  - (a) may be made after the end of the specified period, but
  - (b) must not be made after the end of the period of twelve months starting with the day on which the confiscation order is made.
- (7) The court must not make an order under subsection (2) or (4) unless it gives the prosecutor an opportunity to make representations.

## **117 Interest on unpaid sums**

- (1) If the amount required to be paid by a person under a confiscation order is not paid when it is required to be paid (whether when the order is made or within a period specified under section 116), he must pay interest on the amount for the period for which it remains unpaid.
- (2) The rate of interest is the rate payable under a decree of the Court of Session.
- (3) For the purposes of this section no amount is required to be paid under a confiscation order if—
  - (a) an application has been made under section 116(4),
  - (b) the application has not been determined by the court, and
  - (c) the period of 12 months starting with the day on which the confiscation order was made has not ended.
- (4) In applying this Part the amount of the interest must be treated as part of the amount to be paid under the confiscation order.

## **118 Application of provisions about fine enforcement**

- (1) The provisions of the Procedure Act specified in subsection (2) apply, with the qualifications mentioned in that subsection, in relation to a confiscation order as if the amount ordered to be paid were a fine imposed on the accused by the court making the confiscation order.
- (2) Those provisions are—
  - (a) section 211(3) to (6);
  - (b) section 214(4) to (6), but as if the references in subsection (4) to payment by instalments were omitted;
  - (c) section 216, but as if subsection (1)—
    - (i) gave the prosecutor an opportunity to be heard at any enquiry under that subsection; and
    - (ii) applied whether the offender was in prison or not;
  - (d) section 217;
  - (e) section 218(2) and (3);
  - (f) section 219, provided that—
    - (i) where a court imposes a period of imprisonment in respect of both a fine and a confiscation order the amounts in respect of which the period is imposed must, for the purposes of subsection (2), be aggregated;
    - (ii) before imposing a period of imprisonment by virtue of that section the court must require a report from any administrator appointed in relation to the confiscation order as to whether and how he is likely to exercise his powers and duties under this Part and must take that report into account; and the court may, pending such exercise, postpone any decision as to such imposition; and
    - (iii) where an administrator has not been appointed in relation to the confiscation order, or where the accused does not ask under section 116 for time for payment of any confiscation order imposed by the court, the prosecutor may apply to the court to postpone the imposition of any period of imprisonment for a period not exceeding

---

*Status: This is the original version (as it was originally enacted).*

---

- 3 months to enable the prosecutor to apply to the court for the appointment of an administrator;
- (g) section 220, but as if the reference in subsection (1) to payment of a sum by the person included a reference to payment of the sum in respect of the person by an administrator appointed in relation to the confiscation order;
  - (h) section 221, except where an administrator is appointed in relation to the confiscation order;
  - (i) section 222, except that for the purposes of that section “confiscation order” in subsection (1) above must be construed as including such an order within the meaning of the Drug Trafficking Act 1994 (c. 37), the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 1990/2588 (N.I. 17)), the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I. 9)) or of Part 2 or 4 of this Act;
  - (j) section 223;
  - (k) section 224.
- (3) Where a court, by virtue of subsection (1), orders the amount ordered to be paid under a confiscation order to be recovered by civil diligence under section 221 of the Procedure Act, any arrestment executed by a prosecutor under subsection (3) of section 124 of this Act is to be treated as having been executed by the court as if that subsection authorised such execution.
- (4) Subsection (5) applies where—
- (a) a warrant for apprehension of the accused is issued for a default in payment of the amount ordered to be paid under a confiscation order in respect of an offence or offences, and
  - (b) at the time the warrant is issued the accused is liable to serve a period of imprisonment or detention (other than one of life imprisonment or detention for life) in respect of the offence (or any of the offences).
- (5) In such a case any period of imprisonment or detention to which the accused is liable by virtue of section 219 of the Procedure Act runs from the expiry of the period of imprisonment or detention mentioned in subsection (4)(b).

*Restraint orders etc*

**119 Conditions for exercise of powers**

- (1) The court may exercise the powers conferred by section 120 if any of the following conditions is satisfied.
- (2) The first condition is that—
- (a) a criminal investigation has been instituted in Scotland with regard to an offence, and
  - (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.
- (3) The second condition is that—
- (a) proceedings for an offence have been instituted in Scotland and not concluded, and
  - (b) there is reasonable cause to believe that the accused has benefited from his criminal conduct.

- (4) The third condition is that—
- (a) an application by the prosecutor has been made under section 104, 105, 111 or 112 and not concluded, or the court believes that such an application is to be made, and
  - (b) there is reasonable cause to believe that the accused has benefited from his criminal conduct.
- (5) The fourth condition is that—
- (a) an application by the prosecutor has been made under section 106 and not concluded, or the court believes that such an application is to be made, and
  - (b) there is reasonable cause to believe that the court will decide under that section that the amount found under the new calculation of the accused’s benefit exceeds the relevant amount (as defined in that section).
- (6) The fifth condition is that—
- (a) an application by the prosecutor has been made under section 107 and not concluded, or the court believes that such an application is to be made, and
  - (b) there is reasonable cause to believe that the court will decide under that section that the amount found under the new calculation of the available amount exceeds the relevant amount (as defined in that section).
- (7) The second condition is not satisfied if the court believes that—
- (a) there has been undue delay in continuing the proceedings, or
  - (b) the prosecutor does not intend to proceed.
- (8) If an application mentioned in the third, fourth or fifth condition has been made the condition is not satisfied if the court believes that—
- (a) there has been undue delay in continuing the application, or
  - (b) the prosecutor does not intend to proceed.
- (9) If the first condition is satisfied—
- (a) references in this Part to the accused are to the alleged offender;
  - (b) references in this Part to the prosecutor are to the person the court believes is to have conduct of any proceedings for the offence;
  - (c) section 144(8) has effect as if proceedings for the offence had been instituted against the accused when the investigation was instituted.
- (10) In this section, sections 120 to 140 and Schedule 3 “the court” means—
- (a) the Court of Session, where a trial diet or a diet fixed for the purposes of section 76 of the Procedure Act in proceedings for the offence or offences concerned is to be, is being or has been held in the High Court of Justiciary;
  - (b) the sheriff exercising his civil jurisdiction, where a diet referred to in paragraph (a) is to be, is being or has been held in the sheriff court.

## **120 Restraint orders etc**

- (1) If any condition set out in section 119 is satisfied the court may make an order (a restraint order) interdicting any specified person from dealing with any realisable property held by him.
- (2) A restraint order may provide that it applies—

---

*Status: This is the original version (as it was originally enacted).*

---

- (a) to all realisable property held by the specified person whether or not the property is described in the order;
  - (b) to realisable property transferred to the specified person after the order is made.
- (3) A restraint order may be made subject to exceptions, and an exception may in particular—
- (a) make provision for reasonable living expenses and reasonable legal expenses;
  - (b) make provision for the purpose of enabling any person to carry on any trade, business, profession or occupation;
  - (c) be made subject to conditions.
- (4) But an exception to a restraint order may not make provision for any legal expenses which—
- (a) relate to an offence which falls within subsection (5), and
  - (b) are incurred by a person against whom proceedings for the offence have been instituted or by a recipient of a tainted gift.
- (5) These offences fall within this subsection—
- (a) the offence mentioned in section 119(2) or (3), if the first or second condition (as the case may be) is satisfied;
  - (b) the offence (or any of the offences) concerned, if the third, fourth or fifth condition is satisfied.
- (6) The court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.
- (7) A restraint order does not affect property subject to a charge under—
- (a) section 9 of the Drug Trafficking Offences Act 1986 (c. 32),
  - (b) Part 6 of the Criminal Justice Act 1988 (c. 33),
  - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 1990/2588 (N.I. 17)),
  - (d) section 27 of the Drug Trafficking Act 1994 (c. 37), or
  - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I. 9)).
- (8) Dealing with property includes removing the property from Scotland.

## **121 Application, recall and variation**

- (1) This section applies to a restraint order.
- (2) An order may be made on an ex parte application by the prosecutor, which may be heard in chambers.
- (3) The prosecutor must intimate an order to every person affected by it.
- (4) Subsection (3) does not affect the time when the order becomes effective.
- (5) The prosecutor and any other person affected by the order may apply to the court to recall an order or to vary it; and subsections (6) to (9) apply in such a case.
- (6) If an application under subsection (5) in relation to an order has been made but not determined, realisable property to which the order applies must not be realised.



- (7) The court may—
  - (a) recall the order;
  - (b) vary the order.
- (8) In the case of a restraint order, if the condition in section 119 which was satisfied was that proceedings were instituted or an application was made, the court must recall the order on the conclusion of the proceedings or of the application (as the case may be).
- (9) In the case of a restraint order, if the condition in section 119 which was satisfied was that an investigation was instituted or an application was to be made, the court must recall the order if within a reasonable time proceedings for the offence are not instituted or the application is not made (as the case may be).

## **122 Appeals**

- (1) If on an application for a restraint order the court decides not to make one, the prosecutor may reclaim or appeal to the Court of Session against the decision.
- (2) The prosecutor and any person affected by the order may reclaim or appeal to the Court of Session against the decision of the court on an application under section 121(5).

## **123 Inhibition of property affected by order**

- (1) On the application of the Lord Advocate, the Court of Session may, in relation to the property mentioned in subsection (2), grant warrant for inhibition against any person specified in a restraint order.
- (2) That property is the heritable realisable property to which the restraint order applies (whether generally or such of it as is specified in the application).
- (3) The warrant for inhibition—
  - (a) has effect as if granted on the dependence of an action for debt by the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly, and
  - (b) has the effect of letters of inhibition and must forthwith be registered by the Lord Advocate in the Register of Inhibitions and Adjudications.
- (4) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868 (c. 101) (effective date of inhibition) applies in relation to an inhibition for which warrant is granted under subsection (1) as it applies to an inhibition by separate letters or contained in a summons.
- (5) The execution of an inhibition under this section in respect of property does not prejudice the exercise of an administrator's powers under or for the purposes of this Part in respect of that property.
- (6) An inhibition executed under this section ceases to have effect when, or in so far as, the restraint order ceases to apply in respect of the property in relation to which the warrant for inhibition was granted.
- (7) If an inhibition ceases to have effect to any extent by virtue of subsection (6) the Lord Advocate must—
  - (a) apply for the recall or, as the case may be, the restriction of the inhibition, and

---

*Status: This is the original version (as it was originally enacted).*

---

- (b) ensure that the recall or restriction is reflected in the Register of Inhibitions and Adjudications.

#### **124 Arrestment of property affected by order**

- (1) On the application of the prosecutor the court may, in relation to moveable realisable property to which a restraint order applies (whether generally or such of it as is specified in the application), grant warrant for arrestment.
- (2) Such a warrant for arrestment may be granted only if the property would be arrestable if the person entitled to it were a debtor.
- (3) A warrant under subsection (1) has 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.
- (4) The execution of an arrestment under this section in respect of property does not prejudice the exercise of an administrator's powers under or for the purposes of this Part in respect of that property.
- (5) An arrestment executed under this section ceases to have effect when, or in so far as, the restraint order ceases to apply in respect of the property in relation to which the warrant for arrestment was granted.
- (6) If an arrestment ceases to have effect to any extent by virtue of subsection (5) the prosecutor must apply to the court for an order recalling, or as the case may be, restricting the arrestment.

#### **125 Management administrators**

- (1) If the court makes a restraint order it may at any time, on the application of the prosecutor—
  - (a) appoint an administrator to take possession of any realisable property to which the order applies and (in accordance with the court's directions) to manage or otherwise deal with the property;
  - (b) order a person who has possession of property in respect of which an administrator is appointed to give him possession of it.
- (2) An appointment of an administrator may be made subject to conditions or exceptions.
- (3) Where the court makes an order under subsection (1)(b), the clerk of court must notify the accused and any person subject to the order of the making of the order.
- (4) Any dealing of the accused or any such person in relation to property to which the order applies is of no effect in a question with the administrator unless the accused or, as the case may be, that person had no knowledge of the administrator's appointment.
- (5) The court—
  - (a) may order a person holding an interest in realisable property to which the restraint order applies to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the accused or the recipient of a tainted gift;
  - (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property.

- (6) The court must not—
  - (a) confer the power mentioned in subsection (1) to manage or otherwise deal with the property, or
  - (b) exercise the power conferred on it by subsection (5),unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.
- (7) The court may order that a power conferred by an order under this section is subject to such conditions and exceptions as it specifies.
- (8) Managing or otherwise dealing with property includes—
  - (a) selling the property or any part of it or interest in it;
  - (b) carrying on or arranging for another person to carry on any trade or business the assets of which are or are part of the property;
  - (c) incurring capital expenditure in respect of the property.
- (9) Subsections (1)(b) and (5) do not apply to property for the time being subject to a charge under—
  - (a) section (9) of the Drug Trafficking Offences Act 1986 (c. 32);
  - (b) section 78 of the Criminal Justice Act 1988 (c. 33);
  - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 1990/2588 (N.I. 17));
  - (d) section 27 of the Drug Trafficking Act 1994 (c. 37);
  - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I. 9)).

## **126 Seizure**

- (1) If a restraint order is in force a constable or a customs officer may seize any realisable property to which it applies to prevent its removal from Scotland.
- (2) Property seized under subsection (1) must be dealt with in accordance with the directions of the court which made the order.

## **127 Restraint orders: restriction on proceedings and remedies**

- (1) While a restraint order has effect, the court may sist any action, execution or any legal process in respect of the property to which the order applies.
- (2) If a court (whether the Court of Session or any other court) in which proceedings are pending in respect of any property is satisfied that a restraint order has been made or applied for or made in respect of the property, the court may either sist the proceedings or allow them to continue on any terms it thinks fit.
- (3) Before exercising any power conferred by subsection (2), the court must give an opportunity to be heard to—
  - (a) the applicant for the restraint order;
  - (b) any administrator appointed under section 125.

---

*Status: This is the original version (as it was originally enacted).*

---

*Realisation of property: general*

**128 Enforcement administrators**

- (1) This section applies if—
  - (a) a confiscation order is made,
  - (b) it is not satisfied, and
  - (c) it is not subject to appeal.
- (2) In such a case the court may on the application of the prosecutor exercise the powers conferred on it by this section.
- (3) The court may appoint an administrator in respect of realisable property.
- (4) An appointment of an administrator may be made subject to conditions or exceptions.
- (5) The court may confer the powers mentioned in subsection (6) on an administrator appointed under subsection (3) above.
- (6) Those powers are—
  - (a) power to take possession of any realisable property;
  - (b) power to manage or otherwise deal with the property;
  - (c) power to realise any realisable property, in such manner as the court may specify.
- (7) The court may order any person who has possession of realisable property to give possession of it to an administrator referred to in subsection (5).
- (8) The clerk of court must notify the accused and any person subject to an order under subsection (7) of the making of the order.
- (9) Any dealing of the accused or any such person in relation to property to which the order applies is of no effect in a question with the administrator unless the accused or, as the case may be, that person had no knowledge of the administrator's appointment.
- (10) The court—
  - (a) may order a person holding an interest in realisable property to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the accused or the recipient of a tainted gift;
  - (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property.
- (11) The court must not—
  - (a) confer the power mentioned in subsection (6)(b) or (c) in respect of property, or
  - (b) exercise the power conferred on it by subsection (10) in respect of property, unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.
- (12) Managing or otherwise dealing with property includes—
  - (a) selling the property or any part of it or interest in it;
  - (b) carrying on or arranging for another person to carry on any trade or business the assets of which are or are part of the property;
  - (c) incurring capital expenditure in respect of the property.

- (13) The court may order that a power conferred by an order under this section is subject to such conditions and exceptions as it specifies.
- (14) Subsection (6) does not apply to property for the time being subject to a charge under—
- (a) section 9 of the Drug Trafficking Offences Act 1986 (c. 32);
  - (b) section 78 of the Criminal Justice Act 1988 (c. 33);
  - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 199/2588 (N.I. 17));
  - (d) section 27 of the Drug Trafficking Act 1994 (c. 37);
  - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I. 9)).

### **129 Management administrators: discharge**

- (1) This section applies if—
- (a) an administrator stands appointed under section 125 in respect of realisable property (the management administrator), and
  - (b) the court appoints an administrator under section 128.
- (2) The court must order the management administrator to transfer to the other administrator all property held by him by virtue of the powers conferred on him by section 125.
- (3) If the management administrator complies with an order under subsection (2) he is discharged—
- (a) from his appointment under that section,
  - (b) from any obligation under this Act arising from his appointment.

### **130 Application of sums by enforcement administrator**

- (1) This section applies to sums which—
- (a) are in the hands of an administrator appointed under section 128(3), and
  - (b) fall within subsection (2).
- (2) These sums fall within this subsection—
- (a) the proceeds of the realisation of property under section 128(6)(c);
  - (b) any sums (other than those mentioned in paragraph (a)) in which the accused holds an interest.
- (3) The sums must be applied as follows—
- (a) first, they must be applied in payment of such expenses incurred by a person acting as an insolvency practitioner as are payable under this subsection by virtue of section 432;
  - (b) second, they must be applied in making any payments as directed by the court;
  - (c) third, they must be applied on the accused's behalf towards satisfaction of the confiscation order.
- (4) If the amount payable under any confiscation order has been fully paid and any sums remain in the administrator's hands he must distribute them—
- (a) among such persons who held (or hold) interests in the property concerned as the court directs, and

---

*Status: This is the original version (as it was originally enacted).*

---

- (b) in such proportions as it directs.
- (5) Before making a direction under subsection (4) the court must give persons who held (or hold) interests in the property concerned a reasonable opportunity to make representations to it.
- (6) For the purposes of subsections (4) and (5) the property concerned is—
  - (a) the property represented by the proceeds mentioned in subsection (2)(a);
  - (b) the sums mentioned in subsection (2)(b).
- (7) The administrator applies sums as mentioned in subsection (3)(c) by paying them to the appropriate clerk of court on account of the amount payable under the order.
- (8) The appropriate clerk of court is the sheriff clerk of the sheriff court responsible for enforcing the confiscation order under section 211 of the Procedure Act as applied by section 118(1) of this Act.

### **131 Sums received by clerk of court**

- (1) This section applies if a clerk of court receives sums on account of the amount payable under a confiscation order (whether the sums are received under section 130 or otherwise).
- (2) The clerk of court's receipt of the sums reduces the amount payable under the order, but he must apply the sums received as follows.
- (3) First he must apply them in payment of such expenses incurred by a person acting as an insolvency practitioner as—
  - (a) are payable under this subsection by virtue of section 432, but
  - (b) are not already paid under section 130(3)(a).
- (4) If the Lord Advocate has reimbursed the administrator in respect of remuneration or expenses under section 133 the clerk of court must next apply the sums in reimbursing the Lord Advocate.
- (5) If the clerk of court received the sums under section 130 he must next apply them in payment of the administrator's remuneration and expenses.
- (6) If a direction was made under section 97(6) for an amount of compensation to be paid out of sums recovered under the confiscation order, the clerk of court must next apply the sums in payment of that amount.
- (7) If any amount remains after the clerk of court makes any payments required by the preceding provisions of this section, the amount must be disposed of in accordance with section 211(5) or (6) of the Procedure Act as applied by section 118(1) of this Act.

### *Exercise of powers*

### **132 Powers of court and administrator**

- (1) This section applies to—
  - (a) the powers conferred on a court by sections 119 to 131, 134 to 136 and Schedule 3;
  - (b) the powers of an administrator appointed under section 125 or 128(3).

- (2) The powers—
- (a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the accused;
  - (b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property or of the proceeds of realisation;
  - (c) must be exercised without taking account of any obligation of the accused or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the accused;
  - (d) may be exercised in respect of a debt owed by the Crown.
- (3) Subsection (2) has effect subject to the following rules—
- (a) the powers must be exercised with a view to allowing a person other than the accused or a recipient of a tainted gift to retain or recover the value of any interest held by him;
  - (b) in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift;
  - (c) in a case where a confiscation order has not been made against the accused, property must not be realised if the court so orders under subsection (4).
- (4) If on an application by the accused or by the recipient of a tainted gift the court decides that property cannot be replaced it may order that it must not be sold.
- (5) An order under subsection (4) may be revoked or varied.

*Administrators: general*

**133 Protection of administrators**

- (1) If an administrator appointed under section 125 or 128(3)—
- (a) takes action in relation to property which is not realisable property,
  - (b) would be entitled to take the action if it were realisable property, and
  - (c) believes on reasonable grounds that he is entitled to take the action,
- he is not liable to any person in respect of any loss or damage resulting from the action, except so far as the loss or damage is caused by his negligence.
- (2) Subsection (3) applies if an administrator incurs expenses in the exercise of his functions at a time when—
- (a) a confiscation order has not been made, or
  - (b) a confiscation order has been made but the administrator has recovered no money.
- (3) As soon as is practicable after they have been incurred the expenses must be reimbursed by the Lord Advocate.
- (4) Subsection (5) applies if—
- (a) an amount is due in respect of the administrator's remuneration and expenses, but

---

*Status: This is the original version (as it was originally enacted).*

---

- (b) nothing (or not enough) is available to be applied in payment of them under section 131(4).
- (5) The remuneration and expenses must be paid (or must be paid to the extent of the shortfall) by the Lord Advocate.

### **134 Protection of persons affected**

- (1) This section applies where an administrator is appointed under section 125 or 128(3).
- (2) The following persons may apply to the court—
  - (a) any person affected by action taken by the administrator;
  - (b) any person who may be affected by action the administrator proposes to take.
- (3) On an application under this section the court may make such order as it thinks appropriate.

### **135 Recall and variation of order**

- (1) The prosecutor, an administrator and any other person affected by an order made under section 125 or 128 may apply to the court to vary or recall the order.
- (2) On an application under this section the court—
  - (a) may vary the order;
  - (b) may recall the order.
- (3) But in the case of an order under section 125—
  - (a) if the condition in section 119 which was satisfied was that proceedings were started or an application was made, the court must recall the order on the conclusion of the proceedings or of the application (as the case may be);
  - (b) if the condition which was satisfied was that an investigation was started or an application was to be made, the court must recall the order if within a reasonable time proceedings for the offence are not started or the application is not made (as the case may be).

### **136 Appeals**

- (1) If on an application for an order under section 125 or 128 the court decides not to make one, the prosecutor may appeal to the Court of Session against the decision.
- (2) If the court makes an order under section 125 or 128 the following persons may appeal to the Court of Session in respect of the court's decision—
  - (a) the prosecutor;
  - (b) any person affected by the order.
- (3) If on an application for an order under section 134 the court decides not to make one, the person who applied for the order may appeal to the Court of Session against the decision.
- (4) If the court makes an order under section 134, the following persons may appeal to the Court of Session in respect of the court's decision—
  - (a) the person who applied for the order;
  - (b) any person affected by the order;



---

*Status: This is the original version (as it was originally enacted).*

---

- (c) the administrator.
- (5) The following persons may appeal to the Court of Session against a decision of the court on an application under section 135—
  - (a) the person who applied for the order in respect of which the application was made;
  - (b) any person affected by the court’s decision;
  - (c) the administrator.
- (6) On an appeal under this section the Court of Session may—
  - (a) confirm the decision, or
  - (b) make such order as it believes is appropriate.

### **137 Administrators: further provision**

Schedule 3, which makes further provision about administrators appointed under section 125 and 128(3), has effect.

### **138 Administrators: restriction on proceedings and remedies**

- (1) Where an administrator is appointed under section 128, the court may sist any action, execution or other legal process in respect of the property to which the order appointing the administrator relates.
- (2) If a court (whether the Court of Session or any other court) in which proceedings are pending in respect of any property is satisfied that an application has been made for the appointment of an administrator or that an administrator has been appointed in relation to that property, the court may either sist the proceedings or allow them to continue on any terms it thinks fit.
- (3) Before exercising any power conferred by subsection (2) the court must give an opportunity to be heard to—
  - (a) the prosecutor;
  - (b) if appointed, the administrator.

### *Compensation*

### **139 Serious default**

- (1) If the following three conditions are satisfied the court may order the payment of such compensation as it thinks is just.
- (2) The first condition is satisfied if a criminal investigation has been instituted with regard to an offence and proceedings are not instituted for the offence.
- (3) The first condition is also satisfied if proceedings for an offence are instituted against a person and—
  - (a) they do not result in his conviction for the offence, or
  - (b) he is convicted of the offence but the conviction is quashed or he is pardoned in respect of it.
- (4) If subsection (2) applies the second condition is that—

---

*Status: This is the original version (as it was originally enacted).*

---

- (a) in the criminal investigation there has been a serious default by a person mentioned in subsection (9), and
  - (b) the investigation would not have continued if the default had not occurred.
- (5) If subsection (3) applies the second condition is that—
- (a) in the criminal investigation with regard to the offence or in its prosecution there has been a serious default by a person mentioned in subsection (9), and
  - (b) the proceedings would not have been instituted or continued if the default had not occurred.
- (6) The third condition is that an application is made under this section by a person who held realisable property and has suffered loss in consequence of anything done in relation to it by or in pursuance of an order under this Part.
- (7) The offence referred to in subsection (2) may be one of a number of offences with regard to which the investigation is instituted.
- (8) The offence referred to in subsection (3) may be one of a number of offences for which the proceedings are instituted.
- (9) Compensation under this section is payable to the applicant and—
- (a) if the person in default was a constable of a police force (within the meaning of the Police (Scotland) Act 1967 (c. 77)), the compensation is payable by the police authority or joint police board for the police area for which that force is maintained;
  - (b) if the person in default was a constable not falling within paragraph (a), the compensation is payable by the body under whose authority he acts;
  - (c) if the person in default was a procurator fiscal or was acting on behalf of the Lord Advocate, the compensation is payable by the Lord Advocate;
  - (d) if the person in default was a customs officer, the compensation is payable by the Commissioners of Customs and Excise;
  - (e) if the person in default was an officer of the Commissioners of Inland Revenue, the compensation is payable by those Commissioners.
- (10) Nothing in this section affects any delictual liability in relation to a serious default.

#### **140 Confiscation order varied or discharged**

- (1) This section applies if—
- (a) the court varies a confiscation order under section 113 or discharges one under section 114, and
  - (b) an application is made to the court by a person who held realisable property and has suffered loss as a result of the making of the order.
- (2) The court may order the payment to the applicant of such compensation as it believes is just.
- (3) Compensation payable under this section is payable by the Lord Advocate.

### *Enforcement abroad*

#### **141 Enforcement abroad**

- (1) This section applies if—
  - (a) any of the conditions in section 119 are satisfied,
  - (b) the prosecutor believes that realisable property is situated in a country or territory outside the United Kingdom (the receiving country), and
  - (c) the prosecutor sends a request for assistance to the Secretary of State with a view to it being forwarded under this section.
- (2) In a case where no confiscation order has been made, a request for assistance is a request to the government of the receiving country to secure that any person is prohibited from dealing with realisable property.
- (3) In a case where a confiscation order has been made and has not been satisfied, discharged or quashed, a request for assistance is a request to the government of the receiving country to secure that—
  - (a) any person is prohibited from dealing with realisable property,
  - (b) realisable property is realised and the proceeds are applied in accordance with the law of the receiving country.
- (4) No request for assistance may be made for the purposes of this section in a case where a confiscation order has been made and has been satisfied, discharged or quashed.
- (5) If the Secretary of State believes it is appropriate to do so he may forward the request for assistance to the government of the receiving country.
- (6) If property is realised in pursuance of a request under subsection (3) the amount ordered to be paid under the confiscation order must be taken to be reduced by an amount equal to the proceeds of the realisation.
- (7) A certificate purporting to be issued by or on behalf of the requested government is sufficient evidence of the facts it states if it states—
  - (a) that the property has been realised in pursuance of a request under subsection (3),
  - (b) the date of realisation, and
  - (c) the proceeds of realisation.
- (8) If the proceeds of realisation made in pursuance of a request under subsection (3) are expressed in a currency other than sterling, they must be taken to be the sterling equivalent calculated in accordance with the rate of exchange prevailing at the end of the day of realisation.

### *Interpretation*

#### **142 Criminal lifestyle**

- (1) An accused has a criminal lifestyle if (and only if) the offence (or any of the offences) concerned satisfies any of these tests—
  - (a) it is specified in Schedule 4;
  - (b) it constitutes conduct forming part of a course of criminal activity;

---

*Status: This is the original version (as it was originally enacted).*

---

- (c) it is an offence committed over a period of at least six months and the accused has benefited from the conduct which constitutes the offence.
- (2) Conduct forms part of a course of criminal activity if the accused has benefited from the conduct and—
  - (a) in the proceedings in which he was convicted he was convicted of three or more other offences, each of three or more of them constituting conduct from which he has benefited, or
  - (b) in the period of six years ending with the day when those proceedings were instituted (or, if there is more than one such day, the earliest day) he was convicted on at least two separate occasions of an offence constituting conduct from which he has benefited.
- (3) But an offence does not satisfy the test in subsection (1)(b) or (c) unless the accused obtains relevant benefit of not less than £5000.
- (4) Relevant benefit for the purposes of subsection (1)(b) is—
  - (a) benefit from conduct which constitutes the offence;
  - (b) benefit from any other conduct which forms part of the course of criminal activity and which constitutes an offence of which the accused has been convicted.
- (5) Relevant benefit for the purposes of subsection (1)(c) is benefit from conduct which constitutes the offence.
- (6) The Scottish Ministers may by order amend Schedule 4.
- (7) The Scottish Ministers may by order vary the amount for the time being specified in subsection (3).

### **143 Conduct and benefit**

- (1) Criminal conduct is conduct which—
  - (a) constitutes an offence in Scotland, or
  - (b) would constitute such an offence if it had occurred in Scotland.
- (2) General criminal conduct of the accused is all his criminal conduct, and it is immaterial—
  - (a) whether conduct occurred before or after the passing of this Act;
  - (b) whether property constituting a benefit from conduct was obtained before or after the passing of this Act.
- (3) Particular criminal conduct of the accused is all his criminal conduct which falls within the following paragraphs—
  - (a) conduct which constitutes the offence or offences concerned;
  - (b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned.
- (4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

- (5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.
- (6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and in some other.
- (7) If a person benefits from conduct his benefit is the value of the property obtained.

#### **144 Tainted gifts and their recipients**

- (1) Subsections (2) and (3) apply if—
  - (a) no court has made a decision as to whether the accused has a criminal lifestyle, or
  - (b) a court has decided that the accused has a criminal lifestyle.
- (2) A gift is tainted if it was made by the accused at any time after the relevant day.
- (3) A gift is also tainted if it was made by the accused at any time and was of property—
  - (a) which was obtained by the accused as a result of or in connection with his general criminal conduct, or
  - (b) which (in whole or part and whether directly or indirectly) represented in the accused's hands property obtained by him as a result of or in connection with his general criminal conduct.
- (4) Subsection (5) applies if a court has decided that an accused does not have a criminal lifestyle.
- (5) A gift is tainted if it was made by the accused at any time after—
  - (a) the date on which the offence concerned was committed, or
  - (b) if his particular criminal conduct consists of two or more offences and they were committed on different dates, the earliest of those dates.
- (6) For the purposes of subsection (5) an offence which is a continuing offence is committed on the first occasion when it is committed.
- (7) A gift may be a tainted gift whether it was made before or after the passing of this Act.
- (8) The relevant day is the first day of the period of six years ending with—
  - (a) the day when proceedings for the offence concerned were instituted against the accused, or
  - (b) if there are two or more offences and proceedings for them were instituted on different days, the earliest of those days.
- (9) If the accused transfers property to another person (whether directly or indirectly) for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift.
- (10) If subsection (9) applies the property given is to be treated as such share in the property transferred as is represented by the fraction—
  - (a) whose numerator is the difference between the two values mentioned in subsection (9), and
  - (b) whose denominator is the value of the property at the time of the transfer.

---

*Status: This is the original version (as it was originally enacted).*

---

- (11) References to a recipient of a tainted gift are to a person to whom the accused has (whether directly or indirectly) made the gift.

#### **145 Value: the basic rule**

- (1) This section applies for the purpose of deciding the value at any time of property then held by a person.
- (2) Its value is the market value of the property at that time.
- (3) But if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection (1), is the market value of his interest at that time ignoring any charging order under a provision listed in subsection (4).
- (4) The provisions are—
- (a) section 9 of the Drug Trafficking Offences Act 1986 (c. 32);
  - (b) section 78 of the Criminal Justice Act 1988 (c. 33);
  - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 199/2588 (N.I. 17));
  - (d) section 27 of the Drug Trafficking Act 1994 (c. 37);
  - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I. 9)).
- (5) This section has effect subject to sections 146 and 147.

#### **146 Value of property obtained from conduct**

- (1) This section applies for the purpose of deciding the value of property obtained by a person as a result of or in connection with his criminal conduct; and the material time is the time the court makes its decision.
- (2) The value of the property at the material time is the greater of the following—
- (a) the value of the property (at the time the person obtained it) adjusted to take account of later changes in the value of money;
  - (b) the value (at the material time) of the property found under subsection (3).
- (3) The property found under this subsection is—
- (a) if the person holds the property obtained, that property;
  - (b) if he holds no part of the property obtained, any property which directly or indirectly represents it in his hands;
  - (c) if he holds part of the property obtained, that part and any property which directly or indirectly represents the other part in his hands.
- (4) The references in subsection (2)(a) and (b) to the value are to the value found in accordance with section 145.

#### **147 Value of tainted gifts**

- (1) The value at any time (the material time) of a tainted gift is the greater of the following—
- (a) the value (at the time of the gift) of the property given, adjusted to take account of later changes in the value of money;

- (b) the value (at the material time) of the property found under subsection (2).
- (2) The property found under this subsection is—
- (a) if the recipient holds the property given, that property;
  - (b) if the recipient holds no part of the property given, any property which directly or indirectly represents it in his hands;
  - (c) if the recipient holds part of the property given, that part and any property which directly or indirectly represents the other part in his hands.
- (3) The references in subsection (1)(a) and (b) to the value are to the value found in accordance with section 145.

#### **148 Free property**

Property is free unless an order is in force in respect of it under—

- (a) section 27 of the Misuse of Drugs Act 1971 (c. 38) (forfeiture orders),
- (b) Article 11 of the Criminal Justice (Northern Ireland) Order 1994 (S.I. 1994/2795 (N.I. 15) (deprivation orders),
- (c) Part 2 of the Proceeds of Crime (Scotland) Act 1995 (c. 43) (forfeiture of property used in crime),
- (d) section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) (deprivation orders),
- (e) section 23 or 111 of the Terrorism Act 2000 (c. 11) (forfeiture orders), or
- (f) section 246, 266, 295(2) or 298(2) of this Act.

#### **149 Realisable property**

Realisable property is—

- (a) any free property held by the accused;
- (b) any free property held by the recipient of a tainted gift.

#### **150 Property: general provisions**

- (1) Property is all property wherever situated and includes—
- (a) money;
  - (b) all forms of property whether heritable or moveable and whether corporeal or incorporeal.
- (2) The following rules apply in relation to property—
- (a) property is held by a person if he holds an interest in it;
  - (b) property is obtained by a person if he obtains an interest in it;
  - (c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;
  - (d) references to property held by a person include references to his property vested in his permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985 (c. 66)), trustee in bankruptcy or liquidator;
  - (e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;

- (f) references to an interest, in relation to land in England, Wales or Northern Ireland, are to any legal estate or equitable interest or power;
- (g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;
- (h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).

## **151 Proceedings**

- (1) 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) when he first appears on petition or when an indictment or complaint is served on him.
- (2) If more than one time is found under subsection (1) in relation to proceedings they are instituted at the earliest of those times.
- (3) Proceedings for an offence are concluded when—
  - (a) the trial diet is deserted simpliciter,
  - (b) the accused is acquitted or, under section 65 or 147 of the Procedure Act, discharged or liberated,
  - (c) the court sentences the accused without making a confiscation order and without postponing a decision as regards making such an order,
  - (d) the court decides, after such a postponement, not to make a confiscation order,
  - (e) the accused's conviction is quashed, or
  - (f) the accused is pardoned.
- (4) If a confiscation order is made against the accused in proceedings for an offence, the proceedings are concluded—
  - (a) when the order is satisfied or discharged, or
  - (b) when the order is quashed and there is no further possibility of an appeal against the decision to quash the order.
- (5) If—
  - (a) the accused is convicted in proceedings for an offence but the court decides not to make a confiscation order against him, and
  - (b) on appeal under section 108(1)(ca) or 175(4)(ca) of the Procedure Act, the High Court of Justiciary refuses the appeal,the proceedings are concluded on the determination of the appeal.

## **152 Applications**

- (1) An application under section 104, 105, 111 or 112 is concluded—
  - (a) in a case where the court decides not to make a confiscation order against the accused, when it makes the decision;



- (b) in a case where a confiscation order is made against him as a result of the application, when the order is satisfied or discharged, or when the order is quashed and there is no further possibility of an appeal against the decision to quash the order;
  - (c) in a case where the application is withdrawn, when the prosecutor notifies the withdrawal to the court to which the application was made.
- (2) An application under section 106 or 107 is concluded—
- (a) in a case where the court decides not to vary the confiscation order concerned, when it makes the decision;
  - (b) in a case where the court varies the confiscation order as a result of the application, when the order is satisfied or discharged, or when the order is quashed and there is no further possibility of an appeal against the decision to quash the order;
  - (c) in a case where the application is withdrawn, when the prosecutor notifies the withdrawal to the court to which the application was made.

### **153 Satisfaction of confiscation orders**

- (1) A confiscation order is satisfied—
- (a) when no amount is due under it;
  - (b) where the accused against whom it was made serves a term of imprisonment or detention in default of payment of the amount due under the order, on the completion of that term of imprisonment or detention.
- (2) A confiscation order is subject to appeal until there is no further possibility of an appeal on which the order could be varied or quashed; and for this purpose any power to grant leave to appeal out of time must be ignored.

### **154 Other interpretative provisions**

- (1) In this Part—
- “accused” means a person against whom proceedings for an offence have been instituted (whether or not he has been convicted);
  - “clerk of court” includes the sheriff clerk;
  - “confiscation order” means an order under section 92;
  - “conviction”, in relation to an offence, includes a finding that the offence has been committed;
  - “court” must be construed in accordance with sections 92(13) and 119(10);
  - “criminal investigation” means an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained whether a person should be charged with an offence;
  - “the Procedure Act” means the Criminal Procedure (Scotland) Act 1995 (c. 46);
  - “restraint order” means an order under section 120.
- (2) A reference to the offence (or offences) concerned must be construed in accordance with section 92(12).
- (3) A reference to sentencing the accused for an offence includes a reference to dealing with him otherwise in respect of the offence.

---

*Status: This is the original version (as it was originally enacted).*

---

*General*

**155 Rules of court**

- (1) Provision may be made by act of sederunt as to—
- (a) giving notice or serving any document for the purposes of this Part;
  - (b) the accountancy of court's functions under Schedule 3;
  - (c) the accounts to be kept by the administrator in relation to the exercise of his functions.
- (2) Subsection (1) is without prejudice to section 32 of the Sheriff Courts (Scotland) Act 1971 (c. 58) or section 5 of the Court of Session Act 1988 (c. 36).