
STATUTORY INSTRUMENTS

1991 No. 1467 (S.135)

CRIMINAL LAW, SCOTLAND

**The Confiscation of the Proceeds of Drug Trafficking
(Designated Countries and Territories) (Scotland) Order 1991**

Made - - - - 26th June 1991
Coming into force - - 10th July 1991

At the Court at Buckingham Palace, the 26th day of June 1991

Present,

The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been approved by a resolution of each House of Parliament:

Now, therefore, Her Majesty, in exercise of the powers conferred upon Her by section 30 of the Criminal Justice (Scotland) Act 1987(1), is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

Citation and commencement

1. This Order may be cited as the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991 and shall come into force on the fourteenth day following the making of this Order.

Interpretation

2. In this Order—

“the Act” means the Criminal Justice (Scotland) Act 1987;

“designated country” means a country or territory designated under article 3(1) of this Order;

“appropriate authority of a designated country” means—

(a) the authority specified opposite that country in Schedule 1 to this Order; or

- (b) where no authority is specified, the authority appearing to the Court to be the appropriate authority for that country for the purposes of sections 30 and 30A of the Act⁽²⁾, and of the other provisions of the Act as applied under article 3(2) of this Order;
- “a court of a designated country” includes a court of any state or territory of a designated country.

Designation of and application of the Act to countries and territories

3.—(1) Each of the countries and territories specified in Schedule 1 to this Order is hereby designated for the purposes of sections 30 and 30A of the Act.

(2) In relation to a designated country, Part I of the Act shall apply, subject to the modifications specified in Schedule 2 to this Order, to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there, and, accordingly, in relation to such orders and such proceedings, Part I of the Act shall have effect as set out in Schedule 3 to this Order.

Proof of orders and judgment of court in a designated country

4.—(1) For the purposes of sections 30 and 30A of the Act, and of the other provisions of the Act as applied under article 3(2) of this Order—

- (a) any order made or judgment given by a court in a designated country purporting to bear the seal of that court or to be signed by any person in his capacity as a judge, magistrate or officer of the court, shall be deemed without further proof to have been duly sealed or, as the case may be, to have been signed by that person; and
- (b) a document, duly authenticated, which purports to be a copy of any order made or judgment given by a court in a designated country shall be deemed without further proof to be a true copy.

(2) A document purporting to be a copy of any order made or judgment given by a court in a designated country is duly authenticated for the purpose of paragraph (1)(b) above if it purports to be certified by any person in his capacity as a judge, magistrate or officer of the court in question or by or on behalf of the appropriate authority of the designated country.

Evidence in relation to proceedings and orders in a designated country

5.—(1) For the purposes of sections 30 and 30A of the Act, and of the other provisions of the Act as applied under article 3(2) of this Order, a certificate purporting to be issued by or on behalf of the appropriate authority of a designated country stating—

- (a) that proceedings have been instituted and have not been concluded, or that proceedings are to be instituted, there;
- (b) that an external confiscation order is in force and is not subject to appeal;
- (c) that all or a certain amount of the sum payable under an external confiscation order remains unpaid in the designated country, or that other property recoverable under an external confiscation order remains unrecovered there;
- (d) that any person has been notified of any proceedings in accordance with the law of the designated country; or

(2) Section 30 was substituted by and section 30A was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40), section 63.

- (e) that an order (however described) made by a court of the designated country has the purpose of recovering payments or other rewards received in connection with drug trafficking or their value,

shall, in any proceedings in the Court of Session, be sufficient evidence of the facts so stated.

(2) In any such proceedings a statement contained in a document, duly authenticated, which purports to have been received in evidence or to be a copy of a document so received, or to set out or summarise evidence given in proceedings in a court in a designated country, shall be sufficient evidence of any fact stated therein.

(3) A document is duly authenticated for the purposes of paragraph (2) above if it purports to be certified by any person in his capacity as a judge, magistrate or officer of the court in the designated country, or by or on behalf of the appropriate authority of the designated country, to have been received in evidence or to be a copy of a document so received, or, as the case may be, to be the original document containing or summarising the evidence or a true copy of that document.

Certificate as to appropriate authority of a designated country

6. Where in relation to any designated country no authority is specified in Schedule 1 to this Order, a certificate made by the Secretary of State to the effect that the authority specified therein is the appropriate authority for the purposes of sections 30 and 30A of the Act, and of the other provisions of the Act as applied by article 3(2) of this Order shall be sufficient evidence of that fact.

Representation of government of a designated country

7. A request for assistance sent to the Secretary of State by the appropriate authority of a designated country shall, unless the contrary is shown, be deemed to constitute the authority of the government of that country for the Lord Advocate to act on its behalf in any proceedings in the Court of Session under section 30A of the Act or any other provision of the Act as applied by article 3(2) of this Order.

Satisfaction of confiscation order in a designated country

8.—(1) Where—

- (a) a confiscation order has been made under section 1 of the Act; and
- (b) a request has been sent by the Secretary of State to the appropriate authority of a designated country for assistance in enforcing that order; and
- (c) in execution of that request property is recovered in that country,

the amount payable under the confiscation order shall be treated as reduced by the value of the property so recovered.

(2) For the purposes of this article, and without prejudice to the admissibility of any evidence which may be admissible apart from this paragraph, a certificate purporting to be issued by or on behalf of the appropriate authority of a designated country stating that property has been recovered there in execution of a request by the Secretary of State, stating the value of the property so recovered and the date on which it was recovered shall, in any proceedings in a court in Scotland be sufficient evidence of the facts so stated.

Currency conversion

9.—(1) Where the value of property recovered as described in article 8(1) of this Order is expressed in a currency other than that of the United Kingdom, the extent to which the amount payable under the confiscation order is to be reduced under that paragraph shall be calculated on

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the basis of the exchange rate prevailing on the date on which the property was recovered in the designated country concerned.

(2) Where an amount of money payable or remaining to be paid under an external confiscation order registered in the Court of Session under section 30 of the Act is expressed in a currency other than that of the United Kingdom, for the purpose of any action taken in relation to that order under the Act as applied under article 3(2) of this Order the amount shall be converted into the currency of the United Kingdom on the basis of the exchange rate prevailing on the date of registration of the order.

(3) For the purposes of this article a written certificate purporting to be signed by any person acting in his capacity as an officer of any bank in the United Kingdom and stating the exchange rate prevailing on a specified date shall be sufficient evidence of the facts so stated.

G. I. de Deney
Clerk of the Privy Council

SCHEDULE 1

Article 3(1)

Designated country	Appropriate authority
Anguilla	the Attorney General of Anguilla
Australia	the Attorney General's Department
the Bahamas	the Attorney General of the Bahamas
Bahrain	the Ministry of Interior
Bangladesh	—
Bardados	the Attorney General
Bermuda	the Attorney General of Bermuda
Bhutan	—
Bolivia	—
Canada	the Minister of Justice or officials designated by that Minister
the Cayman Islands	the Attorney General of the Cayman Islands
Chile	—
China	—
Costa Rica	—
Cyprus	—
Ecuador	—
Egypt	—
France	—
Ghana	—
Gibraltar	the Attorney General of Gibraltar
Grenada	—
Guatemala	—
Guernsey	Her Majesty's Attorney General for the Bailiwick of Guernsey
Guinea	—
Hong Kong	the Attorney General of Hong Kong
India	the Ministry of Home Affairs
Isle of Man	Her Majesty's Attorney General for the Isle of Man
Italy	the Ministry of Justice
Jersey	Her Majesty's Attorney General for the Bailiwick of Jersey
Jordan	—

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Designated country	Appropriate authority
Madagascar	—
Malaysia	the Inspector General of Police, Malaysia
Montserrat	the Attorney General of Montserrat
Nicaragua	—
Nigeria	the Attorney General of the Federation of the Republic of Nigeria
Oman	—
Paraguay	—
Qatar	—
Saudi Arabia	the Ministry of the Interior
Senegal	—
Spain	the Ministerio de Justicia, Madrid
Sweden	the Ministry for Foreign Affairs
Switzerland	the Eidgenössisches Justiz und Polizeidepartement
Togo	—
Tunisia	—
Uganda	—
Union of Soviet Socialist Republics (including the Byelorussian Soviet Socialist Republic)	—
United Arab Emirates	—
United Mexican States	the Office of the Attorney General
United States of America	the Attorney General of the United States of America
Yugoslavia	—

SCHEDULE 2

Article 3(2)

MODIFICATIONS OF PART I OF THE CRIMINAL JUSTICE (SCOTLAND)
ACT 1987 IN ITS APPLICATION TO EXTERNAL CONFISCATION ORDERS

1. For section 1 there shall be substituted the following section:—

“1 External confiscation orders

(1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Act as an “external confiscation order”.

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(2) In subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.

(3) In this Part of this Act, “drug trafficking” means doing or being concerned in any of the following, whether in Scotland or elsewhere—

- (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the Misuse of Drugs Act 1971⁽³⁾;
- (b) transporting or storing such a drug where possession of it contravenes section 5(1) of that Act;
- (c) importing or exporting such a drug where the importation or exportation is prohibited by section 3(1) of that Act;
- (d) producing, supplying, transporting, storing, importing or exporting such a drug in contravention of a corresponding law (“corresponding law” having the meaning assigned by section 36(1) of that Act);
- (e) manufacturing or supplying a scheduled substance within the meaning of section 12 of the Criminal Justice (International Co-operation) Act 1990⁽⁴⁾ where the manufacture or supply is an offence under that section,

and includes, whether in Scotland or elsewhere, entering into or being otherwise concerned in an arrangement whereby—

- (i) the retention or control by or on behalf of another person of the other person’s proceeds of drug trafficking is facilitated; or
- (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person’s disposal or are used for that other person’s benefit to acquire property by way of investment.”.

2. Sections 2 to 4 shall be omitted.

3. In section 5⁽⁵⁾—

(a) for subsection (1) there shall be substituted the following subsection:—

“(1) Subject to subsection (3) below the following property is realisable in terms of this Part of this Act—

- (a) in relation to an external confiscation order made in respect of specified property, the property which is specified in the order; and
- (b) in any other case—
 - (i) the whole estate of a person against whom an external confiscation order has been made, or against whom proceedings which may result in an external confiscation order being made, have been, or are to be, instituted in a court in a designated country or against whom a restraint order has been made; and
 - (ii) the whole estate of a person to whom any person whose whole estate is realisable by virtue of sub-paragraph (i) above has (directly or indirectly and whether in one transaction or in a series of transactions) made an implicative gift,

if the proceedings have not been concluded.”;

(b) For subsection (2) there shall be substituted the following sub-section:—

⁽³⁾ 1971 c. 38.

⁽⁴⁾ 1990 c. 5.

⁽⁵⁾ Section 5(3)(b) was amended by the Prevention of Terrorism (Temporary Provisions) Act 1989 (c. 4), section 25(1) and Schedule 8, paragraph 9.

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“(2) In sub-section (1) above, “the whole estate of a person” means his whole estate, wherever situated and includes—

- (a) any income or estate vesting in the holder of the realisable property; and
 - (b) the capacity to exercise, and to take proceedings for exercise of, such powers in, over or in respect of any property as might have been exercised by the holder of the realisable property for his own benefit.”;
- (c) In subsection (3)(a) for the words “subsection (1)(a) or (b)” there shall be substituted “subsection (1)(b)”;
- (d) subsections (4), (7) and (8) shall be omitted;
- (e) for subsection (5) there shall be substituted the following subsection:—

“(5) For the purposes of this Part of this Act, the value—

- (a) of realisable property (other than money) owned by a person in respect of whom an external confiscation order has been made shall be its market value having regard to any security or real burden which would require to be discharged in realising the property or any other factors which might reduce the amount recoverable by such realisation;
 - (b) of an implicative gift shall, subject to section 6(2) and (3) of this Act, be—
 - (i) the value of the gift when received adjusted to take account of subsequent changes in the value of money, or
 - (ii) where subsection (6) below applies, the value there mentioned, whichever is the greater.”;
- (f) for subsection (6) there shall be substituted the following subsection:—
- “(6) If at any time the recipient holds—
- (a) the property which he received (not being cash); or
 - (b) property which in whole or in part, directly or indirectly represents in his hands the property which he received,

the value referred to in subsection (5)(b)(ii) above is, subject to section 6(2) and (3) of this Act, the value at that time of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it represents the property which he had received.”.

4. In section 6(1)—

- (a) for the words “section 1 of this Act” there shall be substituted the words “the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991.”;
- (b) for paragraph (a) there shall be substituted the following paragraph:—

“(a) made not more than six years before the date on which in respect of a person, proceedings which might result in an external confiscation order being made were instituted against him or a restraint order was made (whichever first occurs);”.

5. For section 7 there shall be substituted the following section:—

“7 Application of provisions relating to fines to enforcement of external confiscation orders

(1) An external confiscation order which has been registered by the Court of Session in terms of section 30A of this Act shall be remitted for enforcement to and shall be enforceable

as if it were a fine imposed under the Criminal Procedure (Scotland) Act 1975(6) by the sheriff of Lothian and Borders at Edinburgh.

- (a) (2) Where an external confiscation order has been remitted to the sheriff in terms of subsection (1) of this section the sheriff may at any time except where an administrator has been appointed in relation thereto order that it shall be enforced by civil diligence;
- (b) an order in terms of paragraph (a) of this subsection shall have the effect of authorising the like diligence as if the external confiscation order was a fine imposed under the Criminal Procedure (Scotland) Act 1975 and, without prejudice to the foregoing generality, inhibition and adjudication and such diligence, whatever the amount of the external confiscation order, may be executed in the same manner as if the proceedings were on an extract decree of the sheriff in a summary cause.

(3) Any sums recovered in respect of an external confiscation order shall be payable to and recoverable by the proper office in Exchequer for Her Majesty's use.”.

6. In section 8–

- (a) for subsection (1) there shall be substituted the following subsection:–

“(1) Where–

- (a) proceedings which might result in an external confiscation order being made have been instituted against a person in a designated country and–
 - (i) the proceedings have not been concluded; and
 - (ii) either an external confiscation order has been made in the proceedings or it appears to the Court of Session that there are reasonable grounds for believing that such an order may be made in them, or
- (b) it appears to the Court of Session that proceedings which might result in an external confiscation order being made are to be instituted against a person in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them,

the Court of Session may, on the application of the Lord Advocate, make in respect of the person such order (in this Act referred to as a “restraint order” as is described in section 9 of this Act. Any such application shall be heard in chambers.”;

- (b) for subsection (5) there shall be substituted the following subsection:–

“(5) Where, a restraint order having been made by virtue of subsection (1) above, the proceedings in relation to which the external confiscation order was made are concluded, the Lord Advocate shall forthwith apply to the Court of Session for recall of the restraint order and the Court shall grant the application.”.

7. In section 9–

- (a) In subsection (1) the words “, subject to subsection (5) below,” shall be omitted;
- (b) for subsection (2) there shall be substituted the following subsection:–
 - “(2) A restraint order may provide for the service on, or the provision of notice to, persons affected by the order in such manner as the Court of Session may direct.”;
- (c) in subsection (3)(b) for the words “Great Britain” there shall be substituted the word “Scotland”;
- (d) subsections (4) and (5) shall be omitted.

(6) 1975 c. 21.

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8. In section 10, for subsection (1) there shall be substituted the following subsection:–
- “(1) A constable or a person commissioned by the Commissioners of Customs and Excise may, for the purpose of preventing realisable property of a person subject to a restraint order from being removed from Scotland, seize the property.”
9. After section 10 there shall be inserted the following section:–

“Application for restraint orders

10A. An application under section 8(1) of this Act shall be supported by a certificate which shall–

- (a) state, where applicable, the grounds for believing that an external confiscation order may be made in proceedings instituted or to be instituted in the designated country concerned;
- (b) give particulars of realisable property in respect of which the order is sought and specify the person or persons holding such property;
- (c) in a case to which section 8(1)(b) of this Act applies, indicate when it is intended that proceedings should be instituted in the designated country concerned,

and the certificate may unless the Court of Session otherwise directs, contain statements of information or belief with the sources and grounds thereof.”

10. In section 11, subsection (6) shall be omitted.
11. In section 13–
- (a) in paragraph (b) of subsection (1) for the words “where a confiscation order has been made” there shall be substituted the words “where an external confiscation order has been registered in the Court of Session under section 30A of this Act”;
 - (b) in paragraph (b) of subsection (2) for the words “paragraph (b)” there shall be substituted “paragraph (b)(ii)”;
 - (c) in sub-section (3)(a)(i) the word “external” shall be inserted before the word “confiscation”.
12. In section 14, for paragraph (c) of sub-section (1) there shall be substituted the following paragraph:–
- “(c) may bring, defend or continue any legal proceedings relating to the property;”.
13. In section 15 for subsection (3) there should be substituted the following subsection:–
- “(3) In subsection (1) above “appropriate bank or institution” means a bank or an institution authorised by the Bank of England under the Banking Act 1987(7).”.
14. In section 16–
- (a) in subsection (1)–
 - (i) for the words from “be applied”, in the last place where they occur, to the end of the subsection there shall be substituted the words “be paid to the Court of Session and applied for the purposes specified in subsection (3) below and in the order so specified.”;
 - (ii) in paragraph (b) the word “external” shall be inserted before the word “confiscation”;

(7) 1987 c. 22.

- (b) in subsection (2) for the words “If, after the amount payable under the confiscation order”, there shall be substituted the words “Where a fixed amount is payable under the external confiscation order and after that amount”;
 - (c) in subsection (3)(8)–
 - (i) for the words from “The receipt” to “money received” there shall be substituted the words “The sheriff clerk shall apply any sum received on account of an amount payable under an external confiscation order”;
 - (ii) for the words from “and the balance” to the end of the subsection there shall be substituted the words “and any sums remaining after all the payments required to be made under the foregoing provisions of this section have been made shall be paid into the Consolidated Fund.”.
- 15.** In section 23–
- (a) in subsection (2) for the words from “making available” to the end of the subsection there shall be substituted the words “recovering property which is liable to be recovered under an external confiscation order registered under section 30A of this Act or as the case may be with a view to making available for recovering property which may become liable to be recovered under any external confiscation order which may be made in the case of a person.”;
 - (b) in subsection (4) the words “(a) or” shall be omitted;
 - (c) in subsection (6)–
 - (i) for the words “a confiscation” there shall be substituted the words “an external confiscation”;
 - (ii) the words “(other than an obligation having priority within the meaning of section 5(8) of this Act)” shall be omitted;
 - (d) subsection (7) shall be omitted.
- 16.** Sections 25 to 30 and 31 and 32 shall be omitted.
- 17.** In section 33–
- (a) in subsection (2)–
 - (i) for the words “, 24, 27 and 28” there shall be substituted the words “and 24”;
 - (ii) the word “external” shall be inserted immediately before the word “confiscation”;
 - (b) in subsection (5)–
 - (i) in paragraph (a) the words “proceedings as regards an offence to which section 1 of this Act relates have been instituted against him and have not been concluded or when” shall be omitted; and
 - (ii) in paragraph (b) for the words “conclusion of the proceedings” there shall be substituted the words “discharge of the restraint order.”.
- 18.** In section 34(9)–
- (a) in subsection (2) for the words “, 24, 27 and 28” there shall be substituted the words “and 24”;
 - (b) in subsection 5(a) the words “proceedings for a drug trafficking offence have been instituted against him and have not been concluded or when” shall be omitted;

(8) Subsection (3) was amended by the Criminal Justice Act 1988 (c. 33), Schedule 5, paragraph 21.

(9) Section 34(6) was amended by the Criminal Justice Act 1988 (c. 33), Schedule 5, paragraph 22.

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- (c) in subsection 5(b) for the words “conclusion of the proceedings” there shall be substituted the words “discharge of the restraint order”; and
 - (d) for subsection (6) there shall be substituted the following subsection:–
 - “(6) In any case in which a petition in bankruptcy was presented, or a receiving order or an adjudication in bankruptcy was made, before 29th December 1986 (the date on which the Insolvency Act 1986(10) came into force), subsection (2) above shall have effect as if–
 - (a) for the reference to the bankrupt’s estate for the purposes of Part IX of the Insolvency Act 1986 there were substituted a reference to the property of the bankrupt for the purposes of the Bankruptcy Act 1914(11);
 - (b) for the reference to section 280(2)(c) of the Act of 1986 there were substituted a reference to section 26(2) of that Act; and
 - (c) subsection (2)(b) were omitted.”.
19. In subsection (2) of section 35, for the words “, 24, 27 and 28” there shall be substituted the words “and 24”.
20. In section 35, for subsection (4) there shall be substituted the following subsection:–
“(4) For the purposes of the application of Parts IV and V of the Insolvency Act 1986 (winding up of registered companies and winding up of unregistered companies) to a company which the Court of Session has jurisdiction to wind up, a person is not a creditor in so far as any sum due to him by the company is due in respect of an external confiscation order.”.
21. In subsection (2) of section 37 the words “or (3) (a)” shall be omitted.
22. Sections 38 to 41 shall be omitted.
23. Sections 42 to 44 shall be omitted.
24. In section 45–
 - (a) in subsection (1) the word “external” shall be inserted before the word “confiscation”;
 - (b) in subsections (4), (5)(a)(i), and (5)(c) for the words “a confiscation” there shall be substituted the words “an external confiscation”;
 - (c) in subsection (5)–
 - (i) for paragraph (a)(ii) there shall be substituted the following:–
 - “(ii) at the end there shall be added the words “; and in the foregoing provisions of this subsection “external confiscation order” has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987”;
 - (ii) for paragraph (b) there shall be substituted the following:–
 - “(b) in section 7(1) (constitution of apparent insolvency)–
 - (i) in paragraph (b), at the beginning there shall be inserted the words “not being a person whose property is for the time being affected by a restraint order or subject to an external confiscation order”;
 - (ii) in paragraph (c), after the words “became due” there shall be inserted the words “or that but for his property being affected by a restraint order or subject to an external confiscation order, he would be able to do so”; and

(10) 1986 c. 45.

(11) 1914 c. 59.

(iii) at the end there shall be added the words “In paragraph (d) above liquid debt” does not include a sum payable under an external confiscation order, and in the foregoing provisions of this subsection—

“external confiscation order” has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987; and

“restraint order” has the meaning assigned by section 9 of the said Act of 1987;”;

(d) subsections (2), (3), (6) and (7) shall be omitted.

25. In section 47—

(a) in subsection (1)—

(i) the definitions of “authorised government department” and “designated country” shall be omitted;

(ii) the word “external” shall be inserted immediately before the word “confiscation”;

(iii) the following shall be inserted after the definition of “restraint order”:

“the 1975 Act means the Criminal Procedure (Scotland) Act 1975;”.

(b) in subsection (4)—

(i) paragraph (a) shall be omitted;

(ii) at the end of paragraph (b) there shall be added the words “, and whether received before or after the commencement of the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991 and whether received in connection with drug trafficking carried on by the recipient or some other person;”;

(c) for subsection (5) there shall be substituted the following subsection:—

“(5) For the purposes of this Part of this Act—

(a) proceedings are instituted in a designated country when—

(i) under the law of the designated country concerned one of the steps specified in relation to that country in column 2 of the Appendix hereto has been taken there in respect of alleged drug trafficking by a person which may result in an external confiscation order being made; or

(ii) an application has been made to court in a designated country for an external confiscation order,

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

(b) proceedings are concluded as regards an offence—

(i) when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an external confiscation order being made in the proceedings; or

(ii) on the satisfaction of an external confiscation order made in the proceedings (whether by the recovery of all property liable to be recovered, or the payment of any amount due, or otherwise).”.

26. After section 47 there shall be inserted the Appendix set out at the end of Schedule 3 to this Order.

SCHEDULE 3

Article 3(2)

PART I OF THE CRIMINAL JUSTICE (SCOTLAND) ACT 1987 AS MODIFIED,
AS APPLIED IN RELATION TO EXTERNAL CONFISCATION ORDERS**External confiscation orders**

1.—(1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Act as an “external confiscation order”.

(2) in subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.

(3) In this Part of this Act, “drug trafficking” means doing or being concerned in any of the following, whether in Scotland or elsewhere—

- (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the Misuse of Drugs Act 1971⁽¹²⁾;
- (b) transporting or storing such a drug where possession of it contravenes section 5(1) of that Act;
- (c) importing or exporting such a drug where the importation or exportation is prohibited by section 3(1) of that Act;
- (d) producing, supplying, transporting, storing, importing or exporting such a drug in contravention of a corresponding law (“corresponding law” having the meaning assigned by section 36(1) of that Act);
- (e) manufacturing or supplying a scheduled substance within the meaning of section 12 of the Criminal Justice (International Co-operation) Act 1990⁽¹³⁾ where the manufacture or supply is an offence under that section,

and includes, whether in Scotland or elsewhere, entering into or being otherwise concerned in an arrangement whereby—

- (i) the retention or control by or on behalf of another person of the other person’s proceeds of drug trafficking is facilitated; or
- (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person’s disposal or are used for that other person’s benefit to acquire property by way of investment.

Realisable property

5.—(1) Subject to subsection (3) below the following property is realisable in terms of this Part of this Act—

- (a) in relation to an external confiscation order made in respect of specified property, the property which is specified in the order; and
- (b) in any other case—
 - (i) the whole estate of a person against whom an external confiscation order has been made, or against whom proceedings which may result in an external confiscation order being made have been, or are to be, instituted in a court in a designated country or against whom a restraint order has been made; and

⁽¹²⁾ 1971 c. 38.

⁽¹³⁾ 1990 c. 5.

- (ii) the whole estate of a person to whom any person whose whole estate is realisable by virtue of sub-paragraph (i) above has (directly or indirectly and whether in one transaction or in a series of transactions) made an implicative gift, if the proceedings have not been concluded.

(2) In subsection (1) above, “the whole estate of a person” means his whole estate, wherever situated and includes—

- (a) any income or estate vesting in the holder of the realisable property; and
- (b) the capacity to exercise, and to take proceedings for exercising, such powers in, over or in respect of any property as might have been exercised by the holder of the realisable property for his own benefit.

(3) Property is not realisable if—

- (a) held on trust by a person mentioned in subsection (1)(b) above for a person not so mentioned; or
- (b) an order under—
 - (i) section 27 of the Misuse of Drugs Act 1971 (forfeiture orders), or
 - (ii) section 223 or 436 of the 1975(14) Act (forfeiture of property), or
 - (iii) section 43 of the Powers of Criminal Courts Act 1973(15) (deprivation orders), or
 - (iiia) section 13(2), (3) or (4) of the Prevention of Terrorism (Temporary Provisions) Act 1989 (forfeiture orders)(16),
 - (iv) any other statutory provision providing specifically for forfeiture in relation to an offence,

is in force in respect of the property.

(5) For the purposes of this Part of this Act, the value—

- (a) of realisable property (other than money) owned by a person in respect of whom an external confiscation order has been made shall be its market value having regard to any security or real burden which would require to be discharged in realising the property or to any other factors which might reduce the amount recoverable by such realisation;
- (b) of an implicative gift shall, subject to section 6(2) and (3) of this Act, be—
 - (i) the value of the gift when received adjusted to take account of subsequent changes in the value of money, or
 - (ii) where subsection (6) below applies, the value there mentioned,whichever is the greater.

(6) If at any time the recipient holds—

- (a) the property which he received (not being cash); or
- (b) property which in whole or in part, directly or indirectly represents in his hands the property which he received,

the value referred to in subsection (5)(b)(ii) above is, subject to section 6(2) and (3) of this Act, the value at that time of the property mentioned in paragraph (a) above or, as the case may be, of the property mentioned in paragraph (b) above so far as it represents the property which he had received.

(14) 1975 c. 21; section 436 was substituted by the Criminal Justice (Scotland) Act 1980 (c. 62), Schedule 7, paragraph 71.

(15) 1973 c. 62; section 43 was amended by the Criminal Justice Act 1988 (c. 33), section 69.

(16) 1989 c. 4.

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Implicative gifts

6.—(1) Subject to subsection (4) below, in this Part of this Act references to an “implicative gift” are references to a gift (whether made before or after the commencement of the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991)—

- (a) made not more than six years before the date on which in respect of a person, proceedings which might result in an external confiscation order being made were instituted against him or a restraint order was made (whichever first occurs);
- (b) made at any time if the gift was—
 - (i) of property received by the giver in connection with drug trafficking carried on by him or another, or
 - (ii) of property which, in whole or in part, directly or indirectly represented in the giver’s hands property received by him in that connection.

(2) For the purposes of subsection (1) above, the circumstances in which a person is to be treated as making a gift shall include those of a case where he transfers an interest in property to another person, directly or indirectly, for a consideration significantly less than the value of that interest at the time of transfer. In subsection (3) below the said consideration is referred to as “consideration A” (or as “A”) and the said value as “consideration B” (or as “B”).

(3) In the case mentioned in subsection (2) above, section 5 of this Act shall apply as if the reference in sub-paragraph (i) of subsection (5)(b) of that section to “the value of the gift when received” were a reference to the amount by which consideration A is exceeded by consideration B and as if in sub-paragraph (ii) of the said subsection (5)(b) the reference to “the value there mentioned” were a reference to a value determined in accordance with the formula—

$$\frac{C(B-A)}{B}$$

where

C is what the value referred to in the said sub-paragraph (ii) would be had the gift been an outright gift.

(4) A gift made for a charitable purpose to a person who is not an associate of the giver, being a gift which having regard to all the circumstances it was reasonable to make, is not an implicative gift.

(5) In subsection (4) above, “charitable purpose” means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.

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

7.—(1) An external confiscation order which has been registered by the Court of Session in terms of section 30A of this Act shall be remitted for enforcement to and shall be enforceable as if it were a fine imposed under the Criminal Procedure (Scotland) Act 1975(17) by the sheriff of Lothian and Borders at Edinburgh.

- (a) (2) (a) Where an external confiscation order has been remitted to the sheriff in terms of subsection (1) of this section the sheriff may at any time except where an administrator has been appointed in relation thereto order that it shall be enforced by civil diligence;
- (b) an order in terms of paragraph (a) of this subsection shall have the effect of authorising the like diligence as if the external confiscation order was a fine imposed under the Criminal Procedure (Scotland) Act 1975 and, without prejudice to the foregoing generality, inhibition and adjudication and such diligence, whatever the amount of the external

(17) 1975 c. 21.

confiscation order, may be executed in the same manner as if the proceedings were on an extract decree of the sheriff in a summary cause.

(3) Any sums recovered in respect of an external confiscation order shall be payable to and recoverable by the proper office in Exchequer for Her Majesty's use.

Cases in which restraint orders may be made

8.—(1) Where—

- (a) proceedings which might result in an external confiscation order being made have been instituted against a person in a designated country and—
 - (i) the proceedings have not been concluded; and
 - (ii) either an external confiscation order has been made in the proceedings or it appears to the Court of Session that there are reasonable grounds for believing that such an order may be made in them, or
- (b) it appears to the Court of Session that proceedings which might result in an external confiscation order being made are to be instituted against a person in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them,

the Court of Session may, on the application of the Lord Advocate, make in respect of the person such order (in this Act referred to as a “restraint order”) as is described in section 9 of this Act. Any such application shall be heard in chambers.

(2) Subject to subsection (3) below, the Court of Session may, at the instance of—

- (a) the Lord Advocate, at any time vary or recall a restraint order in relation to any person or to any property;
- (b) any person having an interest, at any time vary or recall a restraint order in relation to the person or to any property; and in particular may, on the application of a person named in a restraint order as having received an implicative gift, recall the order in relation to that person if satisfied—
 - (i) that he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the giver was in any way concerned in drug trafficking; and
 - (ii) that he is not, and has never been, an associate of the giver; and
 - (iii) that he would suffer hardship were the order not to be recalled.

(3) The Court of Session may, where it has recalled a restraint order under subsection (2) above, order that property of the person at whose instance it was recalled shall cease to be realisable.

(4) Rules of court may provide that any application under subsection (2) above shall be made within such period of the applicant receiving notice of the restraint order as may be specified in the rules; and in the period between such application and any decision of the Court as regards recalling that order the powers of any administrator appointed as regards property of the applicant shall be subject to the restriction that the administrator shall not realise the property.

(5) Where, a restraint order having been made by virtue of subsection (1) above, the proceedings in relation to which the external confiscation order was made are concluded, the Lord Advocate shall forthwith apply to the Court of Session for recall of the restraint order and the Court shall grant the application.

Restraint orders

9.—(1) A restraint order is an order interdicting—

- (a) the person in respect of whom it is made from dealing with his realisable property; or

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- (b) that person and any person named in the order as appearing to the Court of Session to have received from him an implicative gift from dealing with their own, or the other's, realisable property,

(whenever that property was acquired and whether it is described in the order or not); but the order may contain conditions and exceptions to which such interdict shall be subject.

(2) A restraint order may provide for the service on, or the provision of notice to, persons affected by the order in such manner as the Court of Session may direct.

(3) In subsection (1) above, the reference to “dealing with” property shall (without prejudice to the generality of the expression) be construed as including a reference—

- (a) to making a payment in reduction of the amount of a debt; and
- (b) to removing the property from Scotland.

Seizure of property affected by restraint order

10.—(1) A constable or a person commissioned by the Commissioners of Customs and Excise may, for the purpose of preventing realisable property of a person subject to a restraint order from being removed from Scotland, seize the property.

(2) Property seized under subsection (1) above shall be dealt with in accordance with the directions of the court which made the order.

Applications for restraint orders

10A. An application under section 8(1) of this Act shall be supported by a certificate which shall—

- (a) state, where applicable, the grounds for believing that an external confiscation order may be made in proceedings instituted or to be instituted in the designated country concerned;
- (b) give particulars of realisable property in respect of which the order is sought and specify the person or persons holding such property;
- (c) in a case to which section 8(1)(b) of this Act applies, indicate when it is intended that proceedings should be instituted in the designated country concerned,

and the certificate may unless the Court of Session otherwise directs, contain statements of information or belief with the sources and grounds thereof.

Inhibition and arrestment of property affected by restraint order or by interdict under section 12

11.—(1) On the application of the Lord Advocate, the Court of Session may, in respect of—

- (a) heritable realisable property in Scotland affected by a restraint order (whether such property generally or particular such property) grant warrant for inhibition against any person interdicted by the order or, in relation to that property, under section 12 of this Act;
- (b) moveable realisable property so affected (whether such property generally or particular such property) grant warrant for arrestment if the property would be arrestable were the person entitled to it a debtor;

and, subject to the provisions of this Part of this Act, the warrant —

- (i) shall have effect as if granted on the dependence of an action for debt at the instance of the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly;
- (ii) where granted under subsection (1)(a) above, shall have the effect of letters of inhibition and shall forthwith be registered by the Lord Advocate in the register of inhibitions and adjudications.

(2) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868(18) (effective date of inhibition) shall apply in relation to an inhibition for which warrant has been granted under subsection (1)(a) above as that section applies to an inhibition by separate letters or contained in a summons.

(3) In the application of section 158 of the said Act of 1868 (recall of inhibition) to such inhibition as is mentioned in subsection (2) above, references in that section to a particular Lord Ordinary shall be construed as references to any Lord Ordinary.

(4) That an inhibition or arrestment has been executed under subsection (1) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Part of this Act in respect of that property.

(5) No inhibition or arrestment executed under subsection (1) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for such inhibition or arrestment has been granted has ceased to have effect in respect of that property; and the Lord Advocate shall –

- (a) apply for the recall, or as the case may be restriction, of the inhibition or arrestment accordingly; and
- (b) ensure that recall, or restriction, of an inhibition on such application is reflected in the register of inhibitions and adjudications.

Interdict of person not subject to restraint order

12.—(1) The Court of Session may, where it has granted a restraint order, interdict a person not subject to that order from dealing with realisable property affected by it while it is in force; and the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted.

(2) Subsection (2) of section 8 of this Act applies in relation to an interdict under subsection (1) above as the said subsection (2) applies in relation to a restraint order; and subsection (3) of section 9 thereof applies in relation to subsection (1) above as the said subsection (3) applies in relation to subsection (1) of the said section 9.

(3) An interdict under subsection (1) above shall not be effective against a person unless and until he is served with a copy both of it and of the restraint order.

Administrators

13.—(1) On the application of the Lord Advocate the Court of Session may as regards realisable property—

- (a) affected by a restraint order, appoint a person to manage, or otherwise deal with, the property; or
- (b) where an external confiscation order has been registered in the Court of Session under section 30A of this Act, appoint a person (or empower an appointee under paragraph (a) above) to realise the property,

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

(2) A requirement under subsection (1) above—

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- (a) subject to paragraph (b) below, may relate to the property generally or to particular such property and may be subject to such exceptions and conditions as may be specified by the Court;
 - (b) shall relate to property mentioned in paragraph (b)(ii) of section 5(1) of this Act only if expressly stated so to do and then only in so far as the person in whom such property is vested is named in the requirement as being subject to it.
- (3) On a requirement being imposed under subsection (1) above—
- (a) the clerk of court shall forthwith so notify—
 - (i) the person in respect of whom the restraint order, or as the case may be the external confiscation order, has been made; and
 - (ii) any other person named in the requirement as being subject to it; and
 - (b) any dealing of or with such person in relation to the property shall be of no effect in a question with the administrator unless whoever dealt with the person had, at the time when the dealing occurred, no knowledge of the appointment.
- (4) The Court of Session, at the instance of any person having an interest, may at any time—
- (a) vary or withdraw a requirement imposed under subsection (1) above; or
 - (b) without prejudice to section 17 of this Act or to the powers and duties of an administrator pending a decision under this paragraph, on cause shown, remove the administrator from office.
- (5) On the death or resignation of the administrator, or on his removal from office under subsection (4)(b) above or section 17 of this Act, the Court of Session shall appoint a new administrator. Such of the property (if any) as was, by virtue of section 14(3) of this Act, vested in the administrator who has died, resigned or been removed shall forthwith vest in the new administrator; and any requirement imposed under subsection (1) above shall, on the person subject to the requirement being notified in writing of the appointment by the appointee, apply in relation to the appointee instead of in relation to his predecessor.
- (6) The administration of property by an administrator shall be deemed continuous notwithstanding any temporary vacancy in that office.
- (7) Any appointment under this section shall be on such conditions as to caution as the accountant of court may think fit to impose; but the premium of any bond of caution or other security thereby required of the administrator shall be treated as part of his outlays in his actings as such.
- (8) Without prejudice to section 17 of this Act, section 6 of the Judicial Factors (Scotland) Act 1889⁽¹⁹⁾ (supervision of judicial factors) shall not apply in relation to an appointment under this section.

Functions of administrators

- 14.—**(1) Subject to section 17 of this Act, an administrator—
- (a) shall be entitled to take possession of, and if appointed (or empowered) under paragraph (b) of section 13(1) of this Act shall as soon as practicable take possession of, the property as regards which he has been appointed and of any document which both—
 - (i) is in the possession or control of the person (in this section referred to as “A”) in whom the property is vested (or would be vested but for an order made under subsection (3) of this section); and
 - (ii) relates to the property or to A’s assets, business or financial affairs;

⁽¹⁹⁾ 1889 c. 39.

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- (b) shall be entitled to have access to, and to copy, any document relating to the property or to A's assets, business or financial affairs and not in such possession or control as is mentioned in paragraph (a) above;
 - (c) may bring, defend or continue any legal proceedings relating to the property;
 - (d) may borrow money in so far as it is necessary to do so to safeguard the property and may for the purposes of such borrowing create a security over any part of the property;
 - (e) may, if the administrator considers that to do so would be beneficial for the management or realisation of the property—
 - (i) carry on any business of A;
 - (ii) exercise any right of A as holder of securities in a company;
 - (iii) grant a lease of the property or take on lease any other property; or
 - (iv) enter into any contract, or execute any deed, as regards the property or as regards A's business;
 - (f) may, where any right, option or other power forms part of A's estate, make payments or incur liabilities with a view to—
 - (i) obtaining property which is the subject of; or
 - (ii) maintaining,
the right, option or power;
 - (g) may effect or maintain insurance policies as regards the property or A's business;
 - (h) may, where A has an uncompleted title to any heritable estate, complete title thereto:
Provided that completion of title in A's name shall not validate by accretion any unperfected right in favour of any person other than the administrator;
 - (j) may sell, purchase or exchange property or discharge any security for an obligation due to A:
Provided that it shall be incompetent for the administrator or an associate of his to purchase any of A's property in pursuance of this paragraph;
 - (k) may claim, vote and draw dividends in the sequestration of the estate (or bankruptcy or liquidation) of a debtor of A and may accede to a voluntary trust deed for creditors of such a debtor;
 - (l) may discharge any of his functions through agents or employees:
Provided that the administrator shall be personally liable to meet the fees and expenses of any such agent or employee out of such remuneration as is payable to the administrator by virtue of section 18(1) and (3) of this Act;
 - (m) may take such professional advice as he may consider requisite for the proper discharge of his functions;
 - (n) may at any time apply to the Court of Session for directions as regards the discharge of his functions;
 - (o) may exercise any power specifically conferred on him by the Court of Session, whether such conferral was at the time of his appointment or on his subsequent application to the Court in that regard; and
 - (p) may do anything incidental to the above powers and duties.
- (2) Subject to the proviso to paragraph (j) of subsection (1) above –

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- (a) a person dealing with an administrator in good faith and for value shall not require to determine whether the administrator is acting within the powers mentioned in that subsection; and
- (b) the validity of any title shall not be challengeable by reason only of the administrator having acted outwith those powers.

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

Money received by administrator

15.—(1) Subject to subsection (2) below, all money received by an administrator in the exercise of his functions shall be deposited by him, in the name (unless vested in the administrator by virtue of subsection (3) of section 14 of this Act) of the holder of the property realised, in an appropriate bank or institution.

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

(3) In subsection (1) above, “appropriate bank or institution” means a bank or an institution authorised by the Bank of England under the Banking Act 1987(20).

Application of proceeds of realisation and other sums

16.—(1) Subject to subsection (2) below, sums in the hands of an administrator which are—

- (a) proceeds of a realisation of property under section 13 of this Act, and
- (b) other property held by the person in respect of whom the external confiscation order was made,

shall first be applied in payment of such expenses as are payable under section 37(2) of this Act and then shall, after such payments (if any) as the Court of Session may direct have been made out of those proceeds and sums, be paid to the Court of Session and applied for the purposes specified in subsection (3) below and in the order so specified.

(2) Where a fixed amount is payable under the external confiscation order and after that amount has been fully paid, any such proceeds and sums remain in the hands of the administrator, he shall distribute them—

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

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

(3) The sheriff clerk shall apply any sum received on account of an amount payable under an external confiscation order—

- (a) first in payment of any expenses to payment of which a person is entitled under section 37(2) of this Act, but which were not paid to him under subsection (1) above;
- (b) next, in payment of the administrator's remuneration and expenses,
- (c) next, in reimbursement of any sums paid by the Lord Advocate under section 20(2) of this Act,

(20) 1987 c. 22.

and any sums remaining after all the payments required to be made under the foregoing provisions of this section have been made shall be paid into the Consolidated Fund.

Supervision of administrators

17.—(1) The accountant of court shall supervise the performance by administrators of the functions conferred on them by this Act; and in particular an administrator proposing to exercise functions conferred by any of paragraphs (c) to (p) of subsection (1) of section 14 of this Act shall first obtain the consent of the accountant of court to such exercise.

(2) If it appears to the accountant of court that an administrator has, without reasonable cause, failed to perform a duty imposed on him by any provision of this Part of this Act, he shall report the matter to the Court of Session which, after giving the administrator an opportunity to be heard as regards the matter, may remove the administrator from office, censure him or make such other order as the circumstances of the case may appear to the Court to require.

Accounts and remuneration of administrator

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

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

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

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

Effect of appointment under section 13 on diligence

19. Without prejudice to section 11 of this Act—

- (a) no arrestment or poinding of realisable property executed on or after an appointment as regards the property under section 13 of this Act shall be effectual to create a preference for the arrester or poider and any such property so arrested or poinded, or the proceeds of sale thereof, shall be handed over to the administrator;
- (b) no poinding of the ground in respect of realisable property on or after such appointment shall be effectual in a question with the administrator except for the interest on the debt of a secured creditor, being interest for the current half-yearly term and arrears of interest for one year immediately before the commencement of that term;
- (c) it shall be incompetent on or after such appointment for any other person to raise or insist in an adjudication against the realisable property or to be confirmed as executor-creditor on that property; and
- (d) no inhibition on realisable property which takes effect on or after such appointment shall be effectual to create a preference for the inhibitor in a question with the administrator.

Further provision as to administrators

20.—(1) Where an administration takes any action—

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- (a) in relation to property which is not realisable property, being action which he would be entitled to take if it were such property,
- (b) believing, and having reasonable grounds for believing, that he is entitled to take that action in relation to that property,

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

(2) Any amount due in respect of the remuneration and expenses of an administrator so appointed shall, if no sum is available to be applied in payment of it under section 16(3)(b) of this Act, be paid by the Lord Advocate.

Discharge of administrator

21. After an administrator has lodged his final accounts under section 18(1) of this Act, he may apply to the accountant of court to be discharged from office; and such discharge, if granted, shall have the effect of freeing him from all liability (other than liability arising from fraud) in respect of any act or omission of his in exercising the functions conferred on him by this Act.

Rules of court as regards accountant of court's supervision etc. of administrators

22. Without prejudice to section 16(i) of the Administration of Justice (Scotland) Act 1933(21) (power, in relation to certain statutory powers and duties, to regulate procedure etc. by Act of Sederunt), provision may be made by rules of court as regards (or as regards any matter incidental to) the accountant of court's powers and duties under this Act in relation to the functions of administrators.

Exercise of powers by Court of Session or administrator

23.—(1) The following provisions apply to the powers conferred on the Court of Session by sections 8, 11(1) to (5), 12 to 13, 16 and 24 of this Act, or on an administrator appointed under subsection (1) of the said section 13.

(2) Subject to the following provisions of this section, the powers shall be exercised with a view to recovering property which is liable to be recovered under an external confiscation order registered under section 30A of this Act or as the case may be with a view to making available for recovering property which may become liable to be recovered under any external confiscation order which may be made in the case of a person.

(3) In the case of a person who holds realisable property by virtue only of having received an implicative gift, the powers shall, so far as is reasonably attainable, be exercised so as to realise, interdict dealing with, or permit the seizure or taking possession of, property of a value no greater than the value for the time being of that gift.

(4) The powers shall be exercised with a view to allowing any person other than one mentioned in paragraph (b) of section 5(1) of this Act to retain or recover the value of any property held by him.

(5) An order may be made or other action taken in respect of a debt owed by the Crown.

(6) Subject to subsection (4) above and without prejudice to the power of the Court of Session to make an exception under section 9(1) or 13(2)(a) of this Act for the protection of a person or his family, in exercising those powers no account shall be taken of any obligation of a person holding realisable property if that obligation conflicts with the obligation to satisfy an external confiscation order.

(21) 1933 c. 41.

Power to facilitate realisation

24.—(1) Without prejudice to any enactment or rule of law in respect of the recording of deeds relating to heritable property or the registration of interests therein, the Court of Session, to facilitate realisation under section 13 of this Act, may—

- (a) order any person (in this section referred to as “A”) holding an interest in property, not being such person (in this section referred to as “B”) as is mentioned in paragraph (a) or (b) of section 5(1) of this Act, to make such payment to an administrator appointed to realise estate comprising an interest of B in that property as the Court may direct and may, subject to such payment being made –
 - (i) authorise the administrator to transfer B’s interest to A or to discharge it in favour of A; or
 - (ii) itself by order so transfer or discharge B’s interest; or
- (b) by order—
 - (i) transfer A’s interest to B; or
 - (ii) discharge it in favour of B,on the administrator making such payment to A out of that estate in respect of A’s interest as the Court may direct.

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

Registration of external confiscation orders

30A.—(1) On an application made by or on behalf of the Government of a designated country, the Court of Session may register an external confiscation order made there if—

- (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
 - (b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
 - (c) it is of the opinion that enforcing the order in Scotland would not be contrary to the interests of justice.
- (2) In subsection (1) above “appeal” includes—
- (a) any proceedings by way of discharging or setting aside a judgment; and
 - (b) an application for a new trial or suspension of or delay on execution of any penalty or sentence.

(3) The Court of Session shall cancel the registration of an external confiscation order if it appears to the court that the order has been satisfied by payment of the amount due under it or by the person against whom it was made serving imprisonment in default of payment or by any other means.

Sequestration of person holding realisable property

33.—(1) Where the estate of a person who holds realisable property is sequestrated—

- (a) property for the time being subject to a restraint order made before the date of sequestration (within the meaning of section 12(4) of the 1985 Act⁽²²⁾); and

(22) 1985 c. 66.

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(b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section,
is excluded from the debtor's estate for the purposes of that Act.

(2) Where an award of sequestration has been made, the powers conferred on the Court of Session by sections 8, 11 to 13, 16 and 24 of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to—

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

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

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

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

(5) Where the estate of a person is sequestrated and he has directly or indirectly made an implicative gift—

- (a) no decree shall, at any time when property of the person to whom the gift was made is subject to a restraint order, be granted under section 34 or 36 of the 1985 Act (gratuitous alienations and unfair preferences) in respect of the making of the gift; and
- (b) any decree granted under either of the said sections 34 and 36 after the discharge of the restraint order shall take into account any realisation under this Act of property held by the person to whom the gift was made.

(6) In any case in which, notwithstanding the coming into force of the 1985 Act, the Bankruptcy (Scotland) Act 1913⁽²³⁾ applies to a sequestration, subsection (2) above shall have effect as if for paragraphs (a) and (b) thereof there were substituted the following paragraphs—

- “(a) property comprised in the whole property of the debtor which vests in the trustee under section 97 of the Bankruptcy (Scotland) Act 1913,
- (b) any income of the bankrupt which has been ordered, under subsection (2) of section 98 of that Act, to be paid to the trustee or any estate which, under subsection (1) of that section, vests in the trustee,”;

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

Bankruptcy in England and Wales of person holding realisable property

34.—(1) Where a person who holds realisable property is adjudged bankrupt—

- (a) property for the time being subject to a restraint order made before the order adjudging him bankrupt, and
- (b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section,

(23) 1913 c. 20.

is excluded from the bankrupt's estate for the purposes of Part IX of the Insolvency Act 1986⁽²⁴⁾.

(2) Where a person has been adjudged bankrupt, the powers conferred on the Court of Session by sections 8, 11 to 13, 16 and 24 of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to—

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

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

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

(5) Where a person is adjudged bankrupt and has directly or indirectly made an implicative gift—

- (a) no order shall, at any time when property of the person to whom the gift was made is subject to a restraint order, be made under section 339 or 423 of the Insolvency Act 1986 (avoidance of certain transactions) in respect of the making of the gift, and
- (b) any order made under either of those sections after the discharge of the restraint order shall take into account any realisation under this Act of property held by the person to whom the gift was made.

(6) In any case in which a petition in bankruptcy was presented, or a receiving order or an adjudication in bankruptcy was made, before 29th December 1986 (the date on which the Insolvency Act 1986 came into force), subsection (2) above shall have effect as if—

- (a) for the reference to the bankrupt's estate for the purposes of Part IX of the Insolvency Act 1986 there were substituted a reference to the property of the bankrupt for the purposes of the Bankruptcy Act 1914⁽²⁵⁾;
- (b) for the reference to section 280(2)(c) of the Act of 1986 there were substituted a reference to section 26(2) of that Act; and
- (c) subsection (2)(b) were omitted.

Winding up company holding realisable property

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

- (a) property for the time being subject to a restraint order made before the relevant time, and
- (b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section.

(2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the Court of Session by sections 8, 11 to 13, 16 and 24 of this Act

⁽²⁴⁾ 1986 c. 45.

⁽²⁵⁾ 1914 c. 59.

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or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable—

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

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

(4) For the purposes of the application of Parts IV and V of the Insolvency Act 1986 (winding up of registered companies and winding up of unregistered companies) to a company which the Court of Session has jurisdiction to wind up, a person is not a creditor in so far as any sum due to him by the company is due in respect of an external confiscation order.

(5) In this section—

“company” means any company which may be wound up under the Insolvency Act 1986; and
“the relevant time” means—

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

(6) In any case in which a winding up of a company commenced, or is treated as having commenced, before the date on which the Insolvency Act 1986 came into force, subsections (2) to (5) above have effect with the substitution for references to that Act of references to the Companies Act 1985(26).

Property subject to floating charge

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

- (a) so much of it as is for the time being subject to a restraint order made before the appointment of the receiver, and
- (b) any proceeds of property realised by virtue of section 13(1) of this Act for the time being in the hands of an administrator appointed under that section.

(2) Where, in the case of a company, such an appointment has been made, the powers conferred on the Court of Session by sections 8, 11 to 13, 16 and 24 of this Act or on an administrator appointed under subsection (1) of the said section 13 shall not be exercised in relation to any realisable property held by the company in relation to which the powers of the receiver are exercisable—

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

(26) 1985 c. 6.

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

(4) In this section—

“company” has the same meaning as in section 35 of this Act; and

“floating charge” includes a floating charge within the meaning given by section 462 of the Companies Act 1985(27) (power of incorporated company to create floating charge).

(5) In any case in which a receiver was appointed as is mentioned in subsection (1) above before the date on which the Insolvency Act 1986 came into force, subsections (2) to (4) above have effect with the substitution for references to that Act of references to the Companies Act 1985.

Insolvency practitioners dealing with property subject to restraint order

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

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

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

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

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

shall be entitled (whether or not he has seized or disposed of that property so as to have a lien under that subsection) to payment of those expenses under section 16(1) of this Act.

(3) In the foregoing provisions of this section, the expression “acting as an insolvency practitioner” shall be construed in accordance with section 388 (interpretation) of the said Act of 1986 except that for the purposes of such construction the reference in subsection (2)(a) of that section to a permanent or interim trustee in a sequestration shall be taken to include a reference to a trustee in a sequestration and subsection (5) of that section (which provides that nothing in the section is to apply to anything done by the official receiver) shall be disregarded; and the expression shall also comprehend the official receiver acting as receiver or manager of the property.

(27) 1985 c. 6; subsection (2) is substituted by the Companies Act 1989 (c. 40), Schedule 18, paragraph 8. Subsection (5) was amended by section 439(1) of Schedule 13 to the Insolvency Act 1986 (c. 45).

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Minor amendments in relation to drug trafficking

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

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

(3) In the 1985 Act—

(a) in section 5(4) (interpretation)—

- (i) after the words “future debts” there shall be inserted the words “or amounts payable under an external confiscation order”; and
- (ii) at the end there shall be added the words “; and in the foregoing provisions of this subsection “external confiscation order” has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987”;

(b) in section 7(1) (constitution of apparent insolvency)—

- (i) in paragraph (b), at the beginning there shall be inserted the words “not being a person whose property is for the time being affected by a restraint order or subject to an external confiscation order,”;
- (ii) in paragraph (c), after the words “became due” there shall be inserted the words “or that but for his property being affected by a restraint order or subject to an external confiscation order, he would be able to do so”; and
- (iii) at the end there shall be added the words “In paragraph (d) above “liquid debt” does not include a sum payable under an external confiscation order”, and in the foregoing provisions of this subsection—

“external confiscation order” has the meaning assigned by section 1(1) of the Criminal Justice (Scotland) Act 1987; and

“restraint order” has the meaning assigned by section 9 of the said Act of 1987; and

(c) section 55(2) (discharge of debtor not to release him from liabilities in respect of fines etc.) shall have effect as if the reference to a fine included a reference to an external confiscation order.

Service and notice for purposes of Part I

46. Subject to the provisions of this Part of this Act, provision may be made by rules of court as to the giving of notice required for the purposes of this Part of this Act or the effecting of service so required; and different provision may be so made for different cases or classes of case and for different circumstances or classes of circumstance.

Interpretation of Part I

47.—(1) In this Part of this Act (except where the context otherwise requires)—

“administrator” shall be construed in accordance with section 13 of this Act;

“associate” shall be construed in accordance with section 74 of the 1985 Act;

“drug trafficking” has the meaning assigned by section 1(6) of this Act;

“external confiscation order” has the meaning assigned by section 1(1) of this Act;

“implicative gift” shall be construed in accordance with section 6 of this Act;

“realisable property” shall be construed in accordance with section 5 of this Act;

“restraint order” has the meaning assigned by section 9 of this Act; and

“the 1975 Act” means the Criminal Procedure (Scotland) Act 1975; and

“the 1985 Act” means the Bankruptcy (Scotland) Act 1985.

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

(3) This Part of this Act applies to property whether it is situated in Scotland or elsewhere.

(4) References in this Part of this Act—

(b) to anything received in connection with drug trafficking include a reference to anything received both in that connection and in some other connection; and whether received before or after the commencement of the Confiscation of the Proceeds of Drug Trafficking (Designated Countries and Territories) (Scotland) Order 1991 and whether received in connection with drug trafficking carried on by the recipient or some other person; and

(c) to property held by a person include a reference to property vested in the interim or permanent trustee in his sequestration or in his trustee in bankruptcy or liquidator.

(5) For the purposes of this Part of this Act—

(a) proceedings are instituted in a designated country when—

(i) under the law of the designated country concerned one of the steps specified in relation to that country in column 2 of the Appendix hereto has been taken there in respect of alleged drug trafficking by a person which may result in an external confiscation order being made; or

(ii) an application has been made to court in a designated country for an external confiscation order,

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

(b) proceedings are concluded as regards an offence—

(i) when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an external confiscation order being made in the proceedings; or

(ii) on the satisfaction of an external confiscation order made in the proceedings (whether by the recovery of all property liable to be recovered, or the payment of any amount due, or otherwise).

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APPENDIX

INSTITUTION OF PROCEEDINGS

Section 47(5)(a)(i)

Designated country	Point at which proceedings are instituted
Anguilla	<ul style="list-style-type: none"> (a) (a) when a summons or warrant is issued in respect of an offence; (b) when a person is charged with an offence after being taken into custody without a warrant; (c) when a bill of indictment is preferred
Australia	<ul style="list-style-type: none"> (a) (a) when an information has been laid before a justice of the peace; (b) when a person is charged with an offence after having been taken into custody without a warrant; (c) when a bill of indictment is preferred
the Bahamas	<ul style="list-style-type: none"> (a) (a) when an information has been laid before a justice of the peace; (b) when a person is charged with an offence after having been taken into custody without a warrant; (c) when a bill of indictment is preferred
Bahrain	when a bill of indictment is lodged in court against any person for an offence
Bermuda	when an information is laid charging a person with an offence
Barbados	<ul style="list-style-type: none"> (a) (a) when an information has been laid before a magistrate; (b) when a person is charged with an offence; (c) when a bill of indictment is preferred
the Cayman Islands	<ul style="list-style-type: none"> (a) (a) when a charge has been signed under subsection (3) or (4) of section 13 of the Criminal Procedure Code in respect of the offence; (b) when a person is charged with the offence after being arrested without a warrant under subsection (5) of that section
Gibraltar	when a person is charged with an offence, whether by the laying of an information or otherwise

Designated country	Point at which proceedings are instituted
Guernsey	when a person is charged with an offence
Hong Kong	<ul style="list-style-type: none"> (a) (a) when a magistrate issues a warrant or summons; (b) when a person is charged with an offence; (c) when an indictment is preferred
Isle of Man	<ul style="list-style-type: none"> (a) (a) where a justice of the peace issues a summons under section 4 of the Summary Jurisdiction Act 1989, when the complaint in relation to the offence is made to him; (b) where a justice of the peace issues a warrant for the arrest of any person under that section, when the complaint in relation to the offence is made to him; (c) where a person is charged with the offence after being taken into custody without a warrant, when he is taken into custody; (d) where an information is preferred by the Attorney General in a case where there have been no committal proceedings, when the information is lodged in the General Registry in accordance with section 4(1) of the Criminal Code Amendment Act 1917
Italy	<ul style="list-style-type: none"> (a) (a) when a person is notified, in accordance with article 369 of the Italian Code of Criminal Procedure, that a prosecution against him is in progress; (b) when a proposal for the application of a preventative measure (“<i>misura di prevenzione</i>”) is laid before a court
Jersey	<ul style="list-style-type: none"> (a) (a) when the Bailiff issues a warrant in respect of an offence for the arrest of a person who is out of the island; (b) when a person is arrested and charged with an offence; (c) when a summons in respect of an offence is served on a person at the instance of the Attorney General; (d) when a summons in respect of the offence is served on a person in

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Designated country	Point at which proceedings are instituted
	accordance with the provisions of Article 8 of the Police Court (Miscellaneous Provisions) (Jersey) Law, 1949
Malaysia	when a person is charged with an offence
Montserrat	(a) (a) when a judge issues a summons or warrant in respect of an offence; (b) when a person is charged with an offence after being taken into custody without a warrant
Saudi Arabia	when an information has been laid before a judicial authority
Spain	when by virtue of a judicial resolution it is decided to proceed against a person for an offence
Sweden	when a public prosecutor has established that there are reasonable grounds to suspect that a person has committed an offence and accordingly is obliged under the Code of Judicial Procedure to notify the person of the suspicion
Switzerland	when proceedings for an offence are brought before an examining magistrate
United Mexican States	when criminal proceedings are instituted by a judicial authority
United States of America	when an indictment, information or complaint has been filed against a person in respect of an offence

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides that, subject to certain modifications, Part I of the Criminal Justice (Scotland) Act 1987 applies to an order made by a court in a designated country or territory for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value (an external confiscation order), and to proceedings which have been or are to be instituted in a designated country or territory and may result in such an order being made there. It also provides, in Article 8, that the value of any property recovered in a designated country or territory in response to a request by the government of the United Kingdom for assistance in the enforcement of a confiscation

order abroad is to be treated as reducing the amount payable in Scotland under a confiscation order made by the High Court.

Article 3 of the Order designates the countries and territories listed in Schedule 1 for the purposes of enforcement of confiscation orders abroad and of external confiscation orders in Scotland, and applies the provisions of Part I of the Criminal Justice (Scotland) Act 1987 with modifications, to confiscation orders of courts in those countries and territories and proceedings which may lead to such an order being made. The modifications to Part I of the Act are set out in Schedule 2 to the Order, and Schedule 3 sets out in full Part I of the Act as so modified.