

OBITUARIES

Lord Mackay of Clashfern (1927–2026)

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James Peter Hymers Mackay, Baron Mackay of Clashfern, who died on 7 July 2026, five days after his ninety-ninth birthday, was the pre-eminent Scots lawyer of his generation and the only member of the Faculty of Advocates ever to hold the office of Lord Chancellor of Great Britain. He occupied the woolsack from 1987 to 1997, the longest continuous tenure of any Lord Chancellor in the twentieth century, having reached it by a route that began at the Scottish Bar and passed through the Office of Lord Advocate, the College of Justice, and the appellate committee of the House of Lords. To an English audience he is remembered as a reforming Lord Chancellor. To a Scots lawyer he was the outstanding Scottish jurist of the late twentieth century, whose speeches still shape the law of delict (civil wrongs), and whose career brought Scots legal thinking to the very centre of the British state.

From mathematics to the Faculty

Mackay was born in Edinburgh on 2 July 1927, the only child of a railway signalman from Clashfern in the north-west of Sutherland, the place from which he later took his territorial designation. He was raised in the Free Presbyterian Church, in a household where Bible study and observance of the Sabbath were the ordinary furniture of life. A scholarship took him to George Heriot's School, and from there he read mathematics and physics at the University of Edinburgh, graduating with first-class honours in 1948. He taught mathematics at the University of St Andrews and took a further degree at Trinity College, Cambridge, before turning at last to law, returning to Edinburgh for an LLB with distinction and admission to the Faculty of Advocates in 1955.

His hinterland as a mathematician was evident throughout his legal career. Contemporaries at the Bar, and later those who read his opinions, noticed in him an insistence on exact definition, an unwillingness to be hurried past a step in the argument, and a gift for finding within a mass of authority the directly relevant legal principle. He built a substantial practice, much of it in complex revenue work. He took silk in 1965 and served as Sheriff Principal of Renfrew and Argyll before being elected Dean of the Faculty of Advocates in 1976.

The Scots Law Lord

In 1979, the incoming Conservative government appointed him Lord Advocate – the senior law officer in Scotland – and he was created a life peer to hold the office. Judicial preferment followed soon after, first as a Senator of the College of Justice in 1984 and then, within a year, as a Lord of Appeal in Ordinary in 1985. He thus became the Scottish voice in the House of Lords, the seat he would eventually vacate for Lord Jauncey of Tullichettle.

His tenure as a full-time Law Lord lasted only two years, and as Lord Chancellor he sat sparingly, so his reported opinions are not numerous – but his limited contributions nonetheless had an outsized influence on the law. Every Scots law student is familiar with *Smith v Littlewoods Organisation Ltd*,² a delict (tort, for the common lawyers) appeal arising from the burning of a disused Dunfermline cinema by vandals, in which the House held that there is no general duty to prevent third parties from causing harm. In this, Mackay gave one of the two leading speeches – setting a high bar where loss is brought about by an independent human agency. Foreseeability

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² *Smith v Littlewoods Organisation Ltd* 1987 SC (HL) 37 (reported sub nom *Maloco v Littlewoods Organisation Ltd*); [1987] AC 241.

of a mere possibility is not sufficient. Instead, a pursuer must establish a basis for treating the harm as more than a bare possibility, approaching the highly probable.³ This remains the starting point, north and south of the border, for liability founded on the wrongdoing of others, and for the reluctance of the law to build a duty of care on foreseeability alone.

He returned to this theme, delivering the opinion of the House, in *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd*,⁴ a Scots appeal on the duty owed by nominated sub-contractors. When the House came to consider a landlord's liability for a tenant's violence in *Mitchell v Glasgow City Council*,⁵ it was Mackay's warning in *Thomson* against an analysis resting simply on foreseeability that was applied.⁶ A continuous thread therefore runs from *Littlewoods* through *Thomson* to *Mitchell* over the course of three decades.

His influence was not confined to Scots law though. He sat on the seven-member bench in *Murphy v Brentwood District Council*,⁷ that overruled *Anns v Merton*⁸ and restated the law of pure economic loss. In his time on the Appellate Committee, he prepared one of the principal speeches in *R v Howe*,⁹ the authority that duress is no defence to murder. Mackay disinclined to grand statements of policy favoured by some of his contemporaries and was correspondingly wary of any executive interference with the courts. Mackay was also highly protective of the distinctiveness of Scots law.

Pepper v Hart

Perhaps Mackay's most important judicial intervention, however, was a dissent. In *Pepper (Inspector of Taxes) v Hart*,¹⁰ the House of Lords relaxed the exclusionary rule and permitted, in defined circumstances, reference to ministerial statements in Hansard as an aid to construing ambiguous legislation. The case concerned a provision of the Finance Act 1976,¹¹ and is also the leading judicial authority on valuing benefits in kind. On the meaning of the section, Mackay agreed with the majority, but he alone declined to open the door to Hansard. His objection was practical rather than constitutional. Advisers and counsel, he warned, would feel bound to trawl parliamentary debates as a matter of routine, lengthening litigation and inflating its cost, and often to no purpose.¹²

That concern with the price of justice perhaps reflected his staunchly presbyterian beliefs, and it made the dissent unusually prescient. Within a decade the majority's rule was being narrowed and questioned. In *Robinson v Secretary of State for Northern Ireland*¹³ three of his successors observed that Mackay had proved 'the better prophet',¹⁴ and by *Spath Holme*¹⁵ the rule had been confined to the ascertainment of the meaning of a particular word or phrase.¹⁶ It is rare for a lone dissent to be so thoroughly vindicated, and rarer still for the vindication to come from the bench itself.

³ *ibid* 65–68 (Lord Mackay of Clashfern).

⁴ *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* 1999 SC (HL) 9.

⁵ *Mitchell v Glasgow City Council* [2009] UKHL 11; 2009 SC (HL) 21.

⁶ *ibid* [25] (Lord Hope of Craighead), citing *British Telecommunications* (n 3) 12.

⁷ *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

⁸ *Anns v Merton London Borough Council* [1978] AC 728 (HL).

⁹ *R v Howe* [1987] AC 417 (HL).

¹⁰ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

¹¹ Finance Act 1976, s 63.

¹² *Pepper* (n 9) 614–615 (Lord Mackay of Clashfern LC).

¹³ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390.

¹⁴ *ibid* [40] (Lord Hoffmann).

¹⁵ *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349 (HL).

¹⁶ *ibid* 391–392 (Lord Bingham of Cornhill).

Lord Chancellor

Mackay was appointed Lord Chancellor in October 1987, in a surprise move following the resignation of Lord Havers, and held the office until the Conservative defeat of May 1997. That a Scots advocate should preside over the law of England and Wales was without precedent, and it is reflected in his work in the role. Where his predecessors had exported English assumptions northwards, he used his position to import Scottish ones south.

His central achievement was the reform of the legal professions. Three green papers in 1989 proposed to end the Bar's monopoly on rights of audience in the higher courts, and to widen competition in the conduct of litigation and conveyancing. The proposals drew fierce resistance from the senior judiciary and the Bar, who warned that the independence of the profession would be imperilled. Mackay pressed on, and the Courts and Legal Services Act 1990 established the framework under which solicitors could obtain higher rights of audience.¹⁷ The reform was consistent with the solicitor-advocate role in Scotland, as was his introduction of conditional fee arrangements – 'no win, no fee' – which was, effectively, the Scottish speculative basis transplanted into English practice.

His period as Lord Chancellor was not an unqualified success. His later years in office were dominated by bitter disputes over the cost and scope of legal aid, and his attempt at divorce reform in the Family Law Act 1996 was so heavily amended that its central provisions were never brought into force.¹⁸ He observed that a Lord Chancellor, once retired, should speak to the law as he found it rather than as the government wished it to be, and after 1997 he did exactly that. He returned to participating in the judicial work of the House of Lords as a former holder of high judicial office under s.5(2) of the Appellate Jurisdiction Act 1876.

Conscience and the Free Presbyterian Church

Mackay had been for some thirty years an elder of the Free Presbyterian Church of Scotland (the so-called 'Wee Frees'), a small and rigorously Calvinist denomination, strict in its sabbatarianism and firmly opposed to Roman Catholicism. Mackay would not work or travel on a Sunday and declined even to give an interview that might be broadcast on the sabbath. His austere nature was an intrinsic part of his identity at the Bar and on the Bench. A well-worn story from the Faculty of Advocates involves a colleague noticing a single small pot of honey set out with his tea and remarking 'I see your Lordship keeps a bee.'

Despite his devotion, Mackay ended up causing a major schism in the Free Church. Mackay attended two Requiem Masses for Roman Catholic colleagues, among them his friend the former Lord Justice-Clerk, Lord Wheatley. To the Free Presbyterian Synod, attendance at the Mass was participation in what it regarded as idolatry, and a breach of the church's prohibition on any show of support for the doctrines of Catholicism. Mackay's answer was that he had gone only to pay his respects to the dead, but the Synod was unsympathetic. In 1988, it suspended him from the eldership and from membership, and when it met again the following year it asked him to undertake not to attend such services in future. He declined to give such an undertaking and withdrew from the church. The dispute proved irreparable, crystallising a longer argument over freedom of conscience, and in May 1989 a substantial body of ministers and members seceded to form the Associated Presbyterian Churches. Mackay, characteristically, neither led the secession nor joined the new communion.

What this revealed was not obstinacy but the integrity that marked his professional life. He would not dissemble to preserve his standing, and he would not give an undertaking he did not mean to keep, even at the cost of a lifelong membership. He served for many years as Honorary President

¹⁷ Courts and Legal Services Act 1990, s 27.

¹⁸ Family Law Act 1996, pt II (not brought into force).

of the Scottish Bible Society, supporting its work to place a Bible in every court in Scotland, and continued to speak of scripture as a foundation of the Scottish legal tradition.

Assessment

Mackay's later honours were, fittingly, Scottish ones. He was appointed a Knight of the Thistle, Scotland's senior order of chivalry, in 1997, and installed at St Giles' Cathedral in 1999; in 2007 he was made Lord Clerk Register and ex officio Keeper of the Signet, ancient offices of the Scottish state. After the woolsack he served as editor-in-chief of *Halsbury's Laws of England*, the post customarily held by a former Lord Chancellor, and he remained an active working peer until his retirement from the House of Lords on 22 July 2022, at the age of ninety-five.

He held an office that has since been diminished, the judicial functions of the Lord Chancellor having been removed by the Constitutional Reform Act 2005, and he was among the last to embody its older form, uniting lawyer, judge, minister, and Speaker of the Upper House. He worried, latterly, that the separation of those functions had left the rule of law with fewer guardians who understood it from within. Perhaps a final, fitting, act of prescience.

He is survived by his son and two daughters. His wife, Elizabeth, whom he married in 1958, predeceased him. He was a mathematician who became an advocate, a Highlander who governed the law of England, and a Scots lawyer whose reputation for rectitude was beyond doubt.