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TERRITORY

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SUPREME COURT OF THE NORTHERN  
TERRITORY OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

CHIEF JUSTICE

THE HONOURABLE JUSTICE BRIAN FRANK MARTIN AO MBE

JUDGES

THE HONOURABLE JUSTICE SIR WILLIAM JOHN FRANCIS  
KEARNEY CBE (Retiring 14 October 1999)

THE HONOURABLE JUSTICE DAVID NORMAN ANGEL

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THE HONOURABLE JUSTICE STEVEN RONALD BAILEY

THE HONOURABLE JUSTICE TREVOR JOHN RILEY

(Appointed 1 February 1999)

JUDGE RESIDENT OUTSIDE THE  
NORTHERN TERRITORY

THE HONOURABLE JUSTICE JOHN FOSTER GALLOP

THE HONOURABLE JUSTICE LANCELOT JOHN PRIESTLEY

THE HONOURABLE JUSTICE HOWARD ONLEY

ACTING JUDGE

THE HONOURABLE TREVOR REES MORLING

(25 August 1997 - 24 August 1998)

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ATTORNEY GENERAL

THE HONOURABLE S L STONE MLA

(appointed 15 September 1997 - 8 February 1999)

THE HONOURABLE D G BURKE MLA

(appointed 9 February 1999 and continuing)

Jim had an innate sense of justice, particularly in the area of interrogation of Aborigines by police. I wonder how many of us remember that he had introduced a code of conduct as a guide for police, long before the Anunga rules appeared in the law reports in *R v Anunga* (1976) 11 ALR 412.

In the somewhat isolated world to which judges are supposed to remove themselves, without, of course, losing touch with community values and attitudes – a conundrum for even the most versatile judges – it is important to be able to confer and discuss cases and the law with your fellow judges. James Muirhead was a wonderful oracle in those respects; so sound of judgment, so generous with his advice. But most I remember him as a friend.

There have been a few occasions during my time on this Bench, and especially when I was privileged to share the Bench with James Muirhead, when I needed the hand of friendship from someone. James Muirhead was always there and, incidentally, I should add, so was Margaret. I well remember the dinners at the Muirheads. They were always a joyous occasion with plenty of stimulating banter and discussion.

James Muirhead was always liked and respected by the profession, for obvious reasons: he was courteous, attentive, compassionate, and, wherever possible, merciful. No legal practitioner or litigant in person ever left his Honour's Court with a feeling of injustice or discourtesy from the Bench. So highly did the Northern Territory Bar regard James Muirhead, that they named a splendid set of Chambers after him.

When I think about James Muirhead as a judge, what springs to my mind are the words of Lord Ellenborough speaking about Lord Maugham:

*“He treated me not with malice. For that his nature was incapable. Rather, he let me down gently, as you would a child lispng its prattle out of season.”*

On behalf of this Court and the Federal Court of Australia, I extend sincere condolences to Margaret and the family. It was a privilege to have known James Muirhead, to have worked with him as a Judge, and to have been embraced by him as a friend. We shall all miss him.

MARTIN CJ:

Mr Solicitor, do you move?

MR PAULING QC:

I appear on behalf of the Chief Minister to offer, on behalf of Government, sincere condolences to the family and to speak briefly of his Honour.

His Honour gave fine service to the Northern Territory and the Government recognised that immediately, following the news of his death, by offering a State funeral. Listening to the eulogy and the speeches that were made at that funeral, one could not fail to notice a portrait painted large of a rich life, a life that enriched others, a life that gave service to his country and especially to this Territory.

When he retired as Administrator, he retired to go to Perth to be near his family, but of course most of his family happened to be here. So those who not just liked Jim but loved Jim, had the opportunity of seeing him frequently every dry season and it was, of course, here that his life journey ended, in a place that he dearly loved, a place to which he gave fine service, and, on behalf of the Government of the Northern Territory, we salute his contribution.

MARTIN CJ:

Mr Loftus, do you move?

MR LOFTUS:

I rise on behalf of members of the Northern Territory Bar Association, in the absence of the President, Mr Colin McDonald QC.

In my preparation to address this Court, many adjectives sprang to mind in reflecting about his Honour James Muirhead.; “Dignity”, “courtesy”, “fairness”, “passion”, and a good many more. All of these descriptions applied not only to his Honour as a member of the Supreme Court Bench, but as a member of the community, in his public life, in his private life, and as a friend.

His career journey took him from conventional beginnings in Adelaide to some quite unconventional and often onerous legal pathways. Most will remember his Honour presiding over the trial of Michael and Lindy Chamberlain, and that the Honourable John Phillips QC later attested to his unfailing courtesy and strong sense of duty.

His Honour’s connections with the Northern Territory extend well back into the mists of time when, in 1870, his great-grandfather, Henry Muirhead, became the registered owner of lot 311 Cavenagh Street, Darwin. To those unfamiliar with town planning in Darwin, lot 311 is now the site of the Don Hotel. Perhaps if the Muirhead fortunes had taken another direction, his Honour may well have presided over members of a different bar – not quite such an onerous task.

His Honour came to the Territory after service in Papua New Guinea where he had served for five months as an Acting Judge of the Supreme Court, and that is where I first came to meet him. He was then seconded to Canberra to establish the Australian Institute of Criminology, before being appointed to the Bench of the Supreme Court of the Northern Territory in 1974.

He became the second resident judge in the Northern Territory, joining fellow South Australian Sir William Forster. The Territory could not have wished for two more eminent jurists. Until 1985 the Territory was home to his Honour and his wife, Margaret. Together, they served the community in their own various capacities with a unique style of dignity, friendliness and a complete lack of pomposity. Their retirement to Western Australia was short-lived, and in 1987 they returned to the Territory when his Honour was appointed as an Acting Judge.

Shortly thereafter, he was selected as Commissioner of the joint State and Federal Royal Commission into Aboriginal Deaths in Custody, which he described as one of the saddest and most difficult tasks of his life. His Honour had a great love of and concern for the Aboriginal people in the Territory, as evidenced by being a member of the court that promulgated the *Anunga* guidelines.

In truth, he was deeply concerned about the balance to be addressed between society and the individual, be they Aboriginal or non-Aboriginal.

Appointed as the Administrator of the Northern Territory in 1989, he again acquitted himself with what had become the accepted and expected Muirhead style. Since his appointment to the Bench in 1974, the Northern Territory Bar has expanded and developed, and those of use who appeared regularly before him saw the ideal role model.

The four sets of Bar Chambers now in Darwin reflect his belief in the development of an independent Bar. One of those Chambers bears his name, which is a lasting memorial to the esteem in which he is held.

It behoves us, as a profession, to uphold that balance between society and the individual, to which his Honour strove.

MARTIN CJ:

Mr Southwood, do you move?

MR SOUTHWOOD:

The names of only a very few people are remembered beyond their lives. Muirhead J was a person whose name will be remembered well. He will be kindly looked on by history. That he will be remembered so well is perhaps a little ironic.

As I knew him, and as I read his judgments, he was a man more concerned

about getting on with the task at hand. He was in the same mould as Justice John Starke in Victoria. He was a legal practitioner concerned about the individuals involved in disputation and with getting on and deciding their cases fairly and justly, not about the legal system as a whole or the apparent integrity of a rule or principle, or about writing judgments that would withstand the scrutiny of scholars for an eternity.

What I have said about the fact that his Honour was keen to get on with things does not mean that his Honour did not write significant judgments, or that his actions did not have significant historical consequences. One has only to pick up a legal digest to find extensive reference to his Honour's judgments.

A brief survey of them throws up such cases as *Coulthard v Steer* (1981-82) 12 NTR 13; *Foster & Others v Mountford* (1976) 29 FLR 233; *Fry v Jennings* (1983-84) 25 NTR 19; *Jabaltjari v Hammersley* (1977) 15 ALR 94; *Jabanunga v Symons* (1978) 18 ALR 379; *Jabanunga v Williams* (1980) 6 NTR 19; *R v Jabanardi*; *Jabarula v Svikart* (1983-84) 11 A Crim R 131; *James v Fullerton* (1983) 77 FLR 321; *O'Toole v Arnold* (1982) 16 NTR 8; (1981-82) 61 FLR 372; *Parsons & Others v Australian Telecommunications Commission* (1984) 28 NTR 19; *Putti v Simpson* (1974-75) 6 ALR 47; *Tippett v Murphy* (1982) 62 FLR 183; (1982) 16 NTR 13; *Weston v Woodroffe* (1985) 30 NTR 34; *R v The Liquor Commission (NT)*; *ex p Pitjantjatjara Council Inc* (1984) 73 FLR 193, and so on. They are judgments about the criminal process, about the preservation of Aboriginal rights in property, about the appropriate way to interrogate suspects, and various other matters.

The cases reveal a real understanding of the underlying difficulties that people face, such as lack of education, problems with alcohol, youth, and language. In contrast to those very important decisions, his Honour summed it up in his own way in his autobiography on court work. In the opening he says:

*"A judge's work on a court of various jurisdictions is inevitably interesting and this was my own experience. The factual situations and the people one encounters vary from case to case and there is no time to be bored, save perhaps when confronted by counsel incapable of defining or narrowing the issues; the type that go on and on, tedious and ineffective in cross-examination, or prolix in address."*

His Honour was always keen to get to the root causes of the problem. That sort of approach equipped him well for the Royal Commission into Aboriginal Deaths in Custody and the good work that has flowed from that with such things as Aboriginal Reconciliation.

MARTIN CJ:

A former associate to the Judge, and one who continued her working relationship with him at the Court, also sends her apologies. She asked if I would add something on her behalf, and I am pleased to do so.

Karen Jackson writes:

*"For me, I learnt the meaning of humanity, servility and consideration, which he displayed in every dealing he had, both with the profession and the litigants who appeared before him. The Northern Territory and those who had the pleasure of knowing him have lost a very dear and valued friend. The style of man Muirhead J was is rare in these modern times."*

I might conclude with part of the remarks made on a prior occasion by the now Chief Justice of Victoria, Justice John Harber Phillips:



*“So four times a Judge, then Royal Commissioner and Administrator. Six appointments under the Crown and a lifetime spent in the honourable discharge of them.”*

With that, and all else that has been said, may I, on behalf of the Court, say I concur.

SUPREME COURT OF THE  
NORTHERN TERRITORY OF AUSTRALIA

CEREMONIAL SITTING  
TO FAREWELL

THE HONOURABLE JUSTICE SIR WILLIAM JOHN FRANCIS KEARNEY, CBE

On 13 August 1999, at a sitting before the Full Court, tributes were paid to the Honourable Sir William Kearney to mark his Honour's imminent retirement as a Judge of the Court. Sir William held office as a Judge of the Supreme Court of Papua New Guinea from 1976-1980, and as Deputy Chief Justice of the National Court of Papua New Guinea from 1980-1982. His Honour was appointed a Judge of the Supreme Court of the Northern Territory in 1982 and held office as an Aboriginal Land Commissioner from 1982-1987. His Honour officially retired on 13 October 1999.

Addresses were delivered by the Chief Minister and Attorney-General, Mr Denis Burke; Mr Colin McDonald QC on behalf of the Bar Association and Mr Stephen Southwood on behalf of the Law Society. Some edited parts of these addresses follow.

MR BURKE:

Your Honour, you have served this Court and the Territory for a long time in one of the highest but most onerous offices anyone can attain. You will be missed by the Territory legal profession; you have been a source of wise counsel to many practitioners, particularly the younger members of the profession. They have benefited particularly from your courtesy that you have extended to all practitioners in your Court.

May you and Lady Jessie enjoy your retirement for many, many years. You go with the thanks of the Government and Territorians.

MR McDONALD QC:

On behalf of the Members of the Northern Territory Bar Association, I rise to bid you, Sir William, Lady Jessie and the members of your family, farewell; you, Sir William, as a Judge of this Court after 17 years of fine service as a Supreme Court Judge and as Aboriginal Land Rights Commissioner.

In the 17 years you have served people of the Northern Territory, you have demonstrated your qualities of courtesy, scholarship, fair-mindedness and a rigorous commitment to the rule of law. You came to the Territory after a distinguished career as a Supreme Court Judge in Papua New Guinea from 1976 to 1982, the last two years of which you served as the Deputy Chief Justice of the National and Supreme Court of that nation.

Upon your arrival in the Northern Territory, you also took up the position of Aboriginal Land Rights Commissioner. In the first few years here you mainly sat as the Land Rights Commissioner, so we did not see much of you in the day-to-day work of the court, but many of us noticed that you were here because the library cards were littered with your name. You were, and remain, a prodigious user of the library.

Your Honour, the Commonwealth Law Reports also refer to you by name in your capacity as Aboriginal Land Commissioner.

Your rulings generally stood the test of the most severe scrutiny of the Justices of the High Court in those cases where you were named. After five years as the Aboriginal Land Rights Commissioner, you embarked upon the work of a Supreme Court Judge in earnest. You gave rulings and judgments in all areas of the law. The Australian Law Reports, the Federal Law Reports, and now, more

recently, the Northern Territory Law Reports contain the products of your research and your work.

Your Honour, you were always a good listener and you were keen to note and acknowledge arguments, and, indeed, acknowledge arguments in your judgments. However, as the years progressed, you used certain phrases which experience, amongst the wiser or more canny hands, bore strong indicators of what Your Honour's ultimate decision was going to be.

I'll quote but four. "Do you mind repeating that argument?" Which meant: "I have identified the losing argument in this case". The next quote: "I can't quite see how you put this argument", which meant: "I'm giving you an opportunity to withdraw the losing argument". Then after counsel, as counsel has to, puts the losing argument, Your Honour would say: "Thank you, I understand. I hadn't quite seen how you'd put that argument", which meant: "The argument is now lost". Then, finally, the coup de grace was: "Really? I see", and Your Honour would raise Your Honour's eyebrows and smile, which meant that the argument was going to be lost, with costs.

Your Honour, on a more serious note, you've made a very strong contribution to This Court and to the people of the Northern Territory. You only have to look around to see how the community has turned out today to bid you farewell.

Although Your Honour, a private person, and your wife a very public-spirited person, you have engaged in pursuits of cultural and intellectual life of Darwin and the Northern Territory, particularly in the Chinese community, and you and Jessie were regular attendees at public lectures and seminars, and anything that was going of interest and concern.

Your Honour, you've always been urbane and cultured and your politeness is something you've borne with you throughout your years in the court, and for that we thank you.

For the historical records, because I'm sure this record will go missing if I don't put it on the transcript somewhere, Your Honour presided over the last criminal trial in the old Supreme Court Building. It also happened to be the first criminal trial in this building: *R v Mezzadri*. I can still remember, in the course of the trial in the old building, the microphones being removed and Your Honour inquiring of the officials, who were doing it, did they understand that a trial was in progress? Yes, they did, but niceties were not for them. Your Honour politely reconvened the trial the next day, as I was explaining to my client, that we were going to a new venue in the new building, microphones permitting.

No acknowledgment of you would be complete without an acknowledgment of Lady Jessie Kearney. Many things can be said about Jessie, but these are the words that first came out: "energy", "vitality" and "enthusiasm". These are the long traits that we've witnessed and seen in her public-spirited approach to life in the Northern Territory.

Lady Jessie seemed to be everywhere and involved in everything, including, at one time, I recall, politics. She had literary lunches and had an interest in heritage and contemporary issues. I can recall well the massive swing of over 20 percent when she sat as an independent in the seat of Port Darwin, in, I think, the 1990 election. She scored just behind the Labor candidate and that's an attestation of how popular she was in the community. Had she scored just ahead of the Labor candidate she would've come very close to winning the seat.

So to you, Sir William, and to Lady Jessie, as a committed married couple, we pay tribute. We pay tribute to your daughters who are here today. May you have many happy years ahead enjoying each other as a family unit, travelling and feasting on literature. To you and to Jessie, and to your daughters, Jillian, Angela

and Alice, the members of the Northern Territory Bar Association wish you well.  
MR SOUTHWOOD:

Your Honour has been on the Supreme Court Bench for almost two decades. Your Honour has been the senior puisne judge for the majority of that time. It has been an eventful two decades.

The Supreme Court has also had its comings and goings. There have been four Chief Justices during Your Honour's period on the Bench: Chief Justices Forster, O'Leary, Asche, and Your Honour Martin CJ. Toohey, Forster and Muirhead JJ have departed from the Bench. Nader, O'Leary, Rice, Maurice and Asche JJ were appointed and departed the Bench. Martin CJ and Angel, Mildren, Thomas, Riley JJ have been appointed and remain. Your Honour and Gallop J remain the two constants; some would say fire and ice.

There has been growing confidence of the executive in the local profession as is evidenced by the increasing appointment of members of the local profession to judicial positions and the out-sourcing of government work. There's been an end to the men's club, both in the law and in politics, and there's been the development of the Court of Appeal.

Throughout all this Your Honour has remained a constant and devoted servant of the law. Your Honour has always remained patient, detached, courteous and extremely fair. In a word, "chivalrous". Your Honour has never avoided making a hard decision, even when such decisions may seem a little unjust to the lay person. Your Honour has always adopted an orthodox approach to legal reasoning and the application of legal principle.

Your Honour has also endeavoured to ensure counsel appearing before you behave appropriately. I recall a recent case before Your Honour when I was again led by great counsel, as he was then. He and I were amused by one of my learned friend Mr Maurice's submissions again. Our laughter was getting a little too loud and Your Honour properly directed us not to laugh at opposing counsel's submissions. Your Honour reminded us that it was like pouring kerosene on a naked flame.

Upon being asked about his imminent retirement as President, Nelson Mandela very humbly, and somewhat facetiously, said: "I must step down while there are one or two people who admire me". On behalf of the profession, Your Honour, may I say the profession admires and appreciates the great service you've given to the law and to the community.

May Your Honour and Mrs Kearney, Lady Kearney, in your retirement enjoy waking up with the sun and walking the countryside of the Bay of Islands, and any other adventure that you and Lady Kearney may embark upon.

MARTIN CJ:

Your Honour?

KEARNEY J:

Thank you, Chief Justice.

Mr Attorney, Mr McDonald and Mr Southwood, thank you all for those comprehensive reviews of events and the flattering and unduly generous personal remarks.

Luckily for me, and it would seem also for Jessie, no-one I see has risen to their feet to put the obvious countervailing submissions. Perhaps you will excuse me from subjecting what you have all said to the usual critical judicial scrutiny. I will say only that your submissions in the past, gentlemen, have been more accurate than those you have put today.

I should also say that, in anticipation of kind words being said, my brother Gallop J pointed out a fact to me just before we came down, that had my

late father been present and heard what you have all said he would have been proud of me. My mother being here, she believes implicitly everything you have said, gentlemen.

My thanks also to all of you here today, in numbers really quite overwhelming to me. Your attendance, and the remarks made by counsel at the Bar table, honour the office of a Judge of this Honourable Court, from which I will shortly retire. Public respect for the office of a judge, and for the court itself, is essential if this mechanism of ours for the resolution of disputes in a peaceful fashion, according to the rules of law, is to prevail, otherwise disputes will be settled simply by reference to raw power.

Of course, the trouble you have all taken to come here today is a great compliment to me and I am keenly aware of it. One way or the other, all of you, ladies and gentlemen, are important to me in my life. I would indeed wish to acknowledge each of you personally, but, if I did that, we would be here until midnight and time simply does not permit. So please do not take it amiss if I mention just a few names.

I appreciate very much the presence on the Bench today of the longest serving member of this Court, His Honour Gallop J, whose many kindnesses to me on and from the day I was sworn in, back in April of 1982, I very well remember.

I am also glad that several of my former associates are able to be here today. Let me say that they have all enlivened, over the years, the otherwise solitary working life of a judge.

Mrs Claydon and Mrs Guinnane, former members of my staff who have controlled the calendar of my work and who saw to it that that calendar was met, are here today. To both of them, for their care, their efficiency, and, indeed, their companionship over the years, I owe an enormous and unpayable debt.

Further, the most important people in my life are here today: my mother, my wife and my three daughters. For their presence, I'm very grateful. But I will say no more about that because that is a matter of family life and not public life. But I must say that I thank my wife, Jessie, for her constant support.

My working life as a Judge of this Court, and indeed as Aboriginal Land Commissioner, has really been a great experience for me; very enjoyable, despite the necessary loneliness and the maintenance of a distance from one's fellow man that being a judge in a relatively small community, such as the Northern Territory, really commands.

During my 17 years on the Bench here there have been many, and indeed accelerating, changes in society, some of which have been pointed out today. Many of those changes have affected the Court. In November 1991, as Mr McDonald said, we moved across to this magnificent building which will be the home of the Court for many years to come.

Earlier on the Court had acquired an appellate jurisdiction. That was rightly seen as being essential to any sort of meaningful Territory self-government, and, indeed, the effect has been that thereafter the law in the Territory has been determined in the Territory. Many cases, important not only to the law of the Territory but, indeed to the law of Australia have, as a result, been determined in this Court.

Within the proper limits of statutes passed by the Parliament here, the particular task of the Court of Appeal and of the Court of Criminal Appeal is to formulate principles of law suited to the particular provisions and circumstances of all the diverse peoples of the Territory in such a manner as to lead to fair and just results. Practical experience shows that the working of such an appellate system requires a Bench of at least six judges.

Amongst other changes, the organisation of the work of the Court itself has changed over the years, particularly, in my opinion, by a quite onerous burden being borne by the Judges and the Master in an endeavour to drive the case load of the court to speedier resolution by way of caseload management.

Again, new methods of dealing with hearing cases will be shortly introduced. Electronic appeal books are well on the way. The Judges will also consider the management of the criminal calendar by way of pre-trial hearings, designed to ensure that only cases which are actually to be fought are listed for trial by jury.

So these things, of course, are always ongoing and there are always many areas for improvement. Not least of them is the improving of the understanding of the ordinary Territorian of the work of this Court, so that they understand that if and when they develop a Territory Constitution – that is, the people’s own charter of political power – their need for a judiciary independent of the government of the day is essential. That is, a judiciary independent, and seen to be independent and objective, and not representative of any particular community group. Only such a body can command the public confidence necessary to found authority to ensure that the words of the new constitution are always transfused with the ever-fresh blood of the living present.

In the adversary system under which we work, a court is effective only if the lawyers who work up the cases and argue them in court are thorough-going and insightful. May I thank the many incisive, fearless and courteous lawyers who have engaged in that task in the cases on which I have sat.

Let me say also that I am very impressed with the attitude and the competence of the young lawyers, the graduates of the former Faculty of Law and now the School of Law at the Northern Territory University. I trust that that body will overcome its current financial difficulties. It deserves every possible financial assistance to assist it in maintaining its past high standards.

The judges and the legal profession are rightly concerned to keep down legal costs as far as possible. Indeed, that matter has a vital constitutional dimension. The ordinary citizen must not, in practice, be excluded from the courts simply because of the cost of litigation. The effective right of access by a citizen to independent courts is essential to the rule of law, and the rule of law, as we should all know, is one of the most precious attributes of our society, and, indeed, it is the means by which our rights and freedom, as citizens, are protected.

They are rather grand words; enough of them. I must record how much I have enjoyed the companionship, the wisdom, the intellect of the Chief Justice, Chief Justices and the judges with whom I have had the privilege of serving over the years. I must also record the debt I owe to the competence and the devotion to duty of the staff of the Court in Darwin and Alice Springs, and, more recently, in Katherine. I value the friendship of those members of the Court. I offer to all of them, the Chief Justice, the Judges, the Master, the Court staff, my very best wishes for the future.

Gentlemen, my thanks again to those of you who have spoken over-generously today, and to all of you, men and women, for attending today. I also should thank all of the people of this far-flung Territory for the opportunity of serving them as a member of this Court.

Thank you, Chief Justice

MARTIN CJ:

Sir William Kearney J has served this Court and the public of the Territory well as a Judge and as Acting Chief Justice from time to time. Others have spoken of his pre-eminent qualities as a Judge and a person. I should add that there have been very few appeals arising from His Honour’s judgments, a

tribute to his diligent research, exhaustive preparation and great care in the formulation of his reasons for judgment.

For myself, I have valued highly his Honour's wise counsel while I have held office as Chief Justice. I have appreciated his ready acceptance of the responsibility of acting in my stead during my absence from the Territory. Last year it was a solid six months.

Many words have been spoken and others come to mind so as to describe his Honour, but, to me, they are summed up as being the words of: "affable" and "unflappable". We should not allow the occasion to pass, and it has not, without also noting the active involvement of Lady Kearney in community affairs. We will all miss her charm, grace and valued friendship.

The remaining members of the Court join with me in saying, with respect, we concur in all that has been said and we wish Sir William and Lady Kearney all the very best in their retirement years wherever they choose to spend them.

The Court will now adjourn.