
Around the Nation: Tasmania

Editor: Justice Stephen Estcourt AM

A WISE MAN

In the years since 10 May 1824, when John Lewes Pedder took his seat as Chief Justice in the newly built Supreme Court of Van Diemen's Land court house, there have been more than 40 puisne judges appointed to the Court, including one, Alexander Macduff Baxter, who never sat. Some of them have been very wise. Some, like Mr Justice Algernon Montagu and his successor, Mr Justice Thomas Horne, not so wise. Montagu was removed for alleged misconduct after the so called "Judge Storm" in which Lieutenant-Governor Arthur and the Court clashed over the validity of the *Dog Act 1846*.¹ Horne narrowly escaped the same fate by taking an early pension and resigning.

To my mind however (as self-appointed Court historian), few have been as wise, in the correct sense of the word, or as kind, as the late Justice Robert (Bob) Nettlefold. As noted by his son-in-law, Justice Des Fagan of the New South Wales Supreme Court, in delivering the eulogy at Justice Nettlefold's funeral in August last year,² his Honour's decisions on points of law were closely and economically reasoned and carefully supported by reference to authority. His legal rulings were precise and reliable.

However more of his personality and his wisdom were seen in decisions where an evaluative judgment was to be made. For example, says Justice Fagan, when Justice Nettlefold sat on the Court of Criminal Appeal to hear prisoners' appeals against asserted manifest excess, or in the Full Court to hear plaintiffs' appeals against inadequacy of damages. On those occasions, if he was confident that the appeal should be upheld, his reasons would include a detailed compassionate description of the subjective features of the case.

Robert Richard Nettlefold was born on 11 April 1925 in Hobart. His father was Sydney Nettlefold whose forebears had settled in the eastern lower Midlands during the mid to late 1800s. The area they settled came to be known as Baden. His mother was Bridget O'Connor. She was one of eight children in a family that took up land a few kilometres further to the south. This was higher country exposed to cold westerly winds in the winter. There was often snow on the ground.

A number of Irish Catholic families settled there. They first called the location Limerick but after a while they adopted the name Tunnack, which in the local aboriginal dialect meant "cold".

Sydney and Bridget had three boys, Rupert, Brian and then Robert. Justice Nettlefold's father, Sydney Charles Nettlefold was a well-known Midlands identity. He was born in Oatlands, a Circuit town for our itinerant Supreme Court, and he farmed at Baden all his life. He was a Justice of the Peace for a long period and was also a coroner at one time.

The Nettlefold's were English stock and followed the Church of England. The wider Nettlefold family disapproved of Sydney having married an Irish Catholic girl. Ultimately the boys were brought up as Catholics and were educated at St Brigid's Convent school at Tunnack.

The school had been established by the Sisters of St Joseph who came there from Bathurst in the 1890s. The school building was donated by the O'Connor family, whose descendants remain prominent Tasmanian graziers. The school comprised just two rooms, one for juniors and one for seniors. There would be 30 to 40 students there at any one time. Justice Nettlefold and his brothers had to walk two and a half kilometres each way to and from school each day, at times through snow.

The quality of the teaching was excellent. The Sisters soon recognised all three of the Nettlefold boys as capable students and further encouraged them. Rupert could have learned and done anything and ultimately he chose to go on to the land. Brian, like Justice Nettlefold, chose law and became a

¹ *An Act to Restrain the Increase of Dogs* (10 Vic, No 5).

² From which, I gratefully acknowledge, the text of Justice Nettlefold's biographical details has been taken.

prominent Queen's Counsel at the Victorian Bar. The nuns prepared all three boys to go on to board at St Virgil's College in Hobart for their secondary education. His Honour attended there between 1939 and 1943.

From the first he was quiet, reserved and studious. He took two important influences from this upbringing and early education. First he learned that study was valued and applauded. He was not made to feel inadequate for not being a football star. All his life he appreciated and built upon the thoroughness of this early education.

Second, he must have picked up something of the disapproval of Irish Catholics in the wider Nettlefold clan and among other English Protestant families in the locality. He developed a very keen sensitivity to prejudice, an opposition to it, and an immediate sympathy for anyone he perceived to be an underdog. That outlook contributed to his leaning toward Labor politics and to aspects of the compassion and sympathy he displayed on the Bench.

Justice Nettlefold excelled at St Virgil's in his learning and in debating. He never spoke much about boarding school life but his teens must have been quite long hard years. Travel from the city back to Baden was by train to Parattah, north of the Rhyndaston tunnel, and then by grocery truck or bus back to his home. The trip could certainly not be made each weekend and, at best, he would get home at the end of each term.

In early 1944, aged 19, his Honour enrolled at the University of Tasmania to undertake a law degree. He graduated with Honours in 1947. He entered articles of clerkship with the senior partner of Dobson Mitchell and Allport, Henry Dobson, a descendant of Sir William Lambert Dobson, the fourth Chief Justice of Tasmania. Justice Nettlefold was admitted as a practitioner of the Supreme Court of Tasmania to practice on 3 September 1948.

His Honour's first employed position as a qualified legal practitioner was with Ogilvie McKenna. After a relatively short period with that firm he commenced his own sole practice, RR Nettlefold, and began to build up a following of clients in litigation. He was serious, conscientious and thorough.

In 1963 he was joined in his practice by Roger Jennings. They were very different personalities but evidently they complemented each other. Both had considerable ability. Roger Jennings was to become Solicitor General some years later. The firm of Nettlefold and Jennings was a good reliable name in the law for eight years until Justice Nettlefold accepted his appointment to the Supreme Court Bench and was sworn in on 2 March 1971, at the age of 44. He continued as a part-time lecturer in law at the University of Tasmania for several years while on the Bench.

His Honour served as a Supreme Court judge for 19 years until his retirement at age 65. He brought to the Bench the conscientiousness and seriousness for which he had become known as a barrister. As he himself said when he was sworn in, he also brought humility.

Practitioners who appeared before him have said that Justice Nettlefold was courteous and considerate to junior counsel. He would forgive and correct their oversights and would not let their clients suffer for something that young and inexperienced counsel may have missed. His consideration for junior members of the Bar is well remembered in the profession. I can confirm all of those things from my own experience. His Honour was painstaking and deliberate in his conduct of proceedings, with a solemn, thoughtful manner and a powerful commanding voice which lent a great profundity to his pronouncements. He was meticulously fair and had a very dry sense of humour and a penchant for analogy.

In *Sandman v The Nominal Defendant*, an unreported decision of our Full Court, delivered on 22 August 1973, the Court, which included Mr Justice Nettlefold (as the all-male judges were then referred to), was concerned with the question of whether an injured motorist had made sufficient inquiries to attempt to locate an unidentified motor vehicle that had allegedly caused the collision in which he was injured. His Honour, in holding that he had, observed in his typical style:

If a wise man were to hide a leaf in a forest, I do not think that another wise man could be persuaded to go looking for it. And his resolve not to attempt the task would not be shaken by assurances that the forest was relatively small and the leaf of bright colour.

Although the Tasmanian Reports are replete with examples, his Honour's dry sense of humour is well captured in the following passage from his reasons for judgment in the Court of Criminal Appeal in *Brown v The Queen*:³

Notwithstanding that experience, his knowledge based on his experience as a rural worker of approximately 15 years' standing, and his experience with the country fire brigade, he was later to light no less than five other fires in the summer time. Not only that, he was to fail to give a rational explanation for his behavior on any one of the six occasions. And he had said, I repeat: "I knew all them days I lit the fires was permit days. But I just couldn't help it. I know you're not allowed to light fires on them days. Like I should have known better because that makes it worse. But you don't think of those things when you're drunk."

It is plain that his Honour was troubled about the risk of a seventh time when he "just couldn't help it". I infer that his Honour felt that a long sentence would help him avoid the temptation he had failed to avoid six times. I infer also that his Honour was not impressed by the applicant's assertion in his police statement "I'll never do it again because I'm not going to drink anymore". That his Honour was not impressed by that is a circumstance which falls far short of the remarkable.

Justice Nettlefold was much loved, and revered, by his brother judges. Former Chief Justice William Cox reproduces in his self-published book *Crossing the Bar*, a poem he penned as a new puisne judge. It includes the following verse, parodying, in addition to Justice Nettlefold, Chief Justice Sir Guy Green and judges, the late Sir George Crawford, the late Francis (Frank) Neasey, and the late David Montagu (Bob) Chambers.

Little judge kneels at the foot of his bed
Dressed in his wig and ermine and red.
Hush, hush, whisper who dares,
Our learned Chief Justice is saying his prayers.
Oh thank you God for a lovely day
I've just put some criminals out of the way.
I've done some divorces, some contracts and torts
And I've just got my name in the Law Reports
I overruled Frank in the Court of Appeal.
I dissented from George, (Bob and I did a deal)
And as to Bob Nettlefold, I can foresee
If I don't upset him he won't upset me.

After retirement from the Bench on 15 May 1990, Justice Nettlefold found an outlet for his legal skills and willingness to serve the community as a lecturer at the Tasmanian Centre for Legal Studies post-graduate Legal Practice Course, and also as a part-time Hearing Commissioner of the Human Rights and Equal Opportunity Commission, and as Chairperson of the Legislative Council Electoral Boundaries Redistribution Committee, resetting the boundaries of the State's electoral districts, and as an arbitrator.

Justice Nettlefold adored his wife Colleen who predeceased him by some five years. Their partnership was of nearly 60 years. He adored his four daughters, Maree, Bridget, Cathy and Lizzie and his many grandchildren and great grandchildren. He died on 23 August 2018 aged 93. At the time of his death he was the longest enrolled practitioner on the Roll of the Tasmanian Supreme Court.

Vale a wise man.

SE

³ *Brown v The Queen* [1985] TASSC 16, [18]–[19].