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## Notes and Commentaries

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### The New Zealand Silver Oar Mace

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#### Introduction

On Friday 29 November 2002 the Maritime Law Association of Australia and New Zealand presented a silver Oar Mace of Admiralty in memory of the late Justice Bradley Harle Giles to the New Zealand High Court sitting in Admiralty.

The ceremony, which was held in the Auckland High Court, was unique in many respects, not the least being that this was the first time an Oar Mace had been presented to a New Zealand court. The ceremony was presided over by the Chief Justice of New Zealand, the Rt. Hon. Dame Sian Elias, who was joined on the Bench by members of the Australian and New Zealand judiciary, including Chief Justice Black of the Federal Court of Australia. This fitting gesture acknowledged the trans-Tasman nature of the Association. The important contribution of the judiciary to the work of the Association was more than evident with the presence on the Bench of Justice Philippides, of the Supreme Court of Queensland, being the President of the Association, and Justice Cooper of the Federal Court of Australia, a former Vice-President of the Association.

Amongst the 60 or so who gathered in Courtroom No. 1 were members of the Giles family, members of the Association, and friends and colleagues of Brad Giles.

This paper provides an overview of the historical origins and role of the Oar Mace in Admiralty matters, and a record of the presentation of the New Zealand Oar Mace.

#### The Oar Mace in History

The exact historical origins of judicial maces in general, and Oar Maces of the Admiralty in particular, are unknown. The most plausible theory is that civic maces derived their physical form from battle-maces, universally recognized instruments of power and force. The use of civic maces in England dates from as early as the thirteenth century. They were used to symbolise the executive authority of the bailiff, and were later employed in a broader ceremonial role to signify the magisterial jurisdiction of local mayors, sheriffs or aldermen.<sup>1</sup>

Oar Maces appear to have been associated with the exercise of the Admiralty jurisdiction in England from at least the fourteenth or fifteenth centuries. A later account, describing the establishment of the High Court of Admiralty in London in 1360, refers to “a Marshal who carrieth a Silver Oar before the Judge”. More compelling contemporaneous evidence is found in the Paston letters, which refer to the

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<sup>1</sup> For an excellent historical discussion, and descriptions and photographs of most of the extant Oar Maces, see the National Maritime Museum *Oar Maces of Admiralty* (HMSO, London, 1966). Hereinafter NMM.

confiscation in 1459 during the Wars of the Roses of “the ore and the bokys of registrye of the Amrelte”, presumably the Vice-Admiralty Court of Norfolk.<sup>2</sup>

The Oar Mace seems to have played a dual role which reflects its historical origins. First, it was used by the Admiralty Marshal and other lesser court officials like water bailiffs as symbols of their authority to execute orders of the Admiralty Court.<sup>3</sup> The mace, or a miniature, was carried and displayed by these officials when boarding, searching, arresting or seizing vessels, or, more mundanely, when enforcing port regulations and collecting harbour dues. Indeed, at the lower end of the scale, the Oar Mace seems to have been merely a nautical variation on the police constable’s tipstaff.<sup>4</sup>

The Oar Mace played a rather grimmer role in criminal trials. It was routinely displayed at public executions ordered in Admiralty sessions for nautical crimes and piracy, as a tangible reminder of the Admiralty Court’s might and retribution. The following account of the execution of Captain James Lowry in 1762 for murdering one of his crew is typical:<sup>5</sup>

On the 25th of March, at half past nine in the morning, the unfortunate convict was brought out of Newgate, to undergo the sentence of the law; on seeing the cart which was to convey him to the gallows, he became pale but soon recovered a degree of serenity of countenance. ... Before the cart was carried a silver oar of a very antique form. ... He was then taken out of the cart, and placed upon a scaffold under the gallows, where he put on a white cap. He prayed very devoutly with the ordinary of Newgate, about a quarter of an hour; then giving the executioner his money and watch, the platform fell. After hanging twenty minutes, the body was cut down, put into a boat, and carried to Blackwall, and there hung in chains, on the bank of the Thames.

The more important and enduring function of the Oar Mace, however, has been to serve as a visual symbol of its Court’s Admiralty jurisdiction. The Oar Mace has therefore traditionally been placed on or near the Bench whenever the Court is hearing Admiralty matters,<sup>6</sup> as “the emblem of that high jurisdiction”.<sup>7</sup>

The physical placement of the Oar Mace therefore provides a metaphor for the demarcation of the Court’s Admiralty jurisdiction and its general civil jurisdiction.<sup>8</sup>

<sup>2</sup> Id at 6-7.

<sup>3</sup> FL Wiswall *The Development of Admiralty Jurisdiction and Practice Since 1800: An English Study with American Comparisons* (Cambridge University Press, 1970) 47.

<sup>4</sup> See P Lynch *The Crown’s Justice, A Brief Look At English Tipstaves* <<http://www.policeguide.com/britpol.htm>> figs 17 and 18 for illustrations of a brass tipstaff dated 1831 and used by Admiralty Court officials. It featured a hollow barrel which could be unscrewed to reveal a silver oar engraved “Admiralty of England”.

<sup>5</sup> *The Newgate Calendar: CAPTAIN JAMES LOWRY - Executed at Execution Dock, March 25, 1762, for murdering one of his Crew* <<http://www.exclassics.org/newgate/ng292.htm>>.

<sup>6</sup> Wiswall, *supra* n 3, 123, 154; B Currie “The Silver Oar and All That: A Study of the Romero Case” (1959) 27 *University of Chicago LR* 1, 75-78; LK Wroth “The Silver Oar and More: Henry J. Bourguignon as Legal Historian” (2000) 31 *University of Toledo LR* 185 at 186.

<sup>7</sup> Charles Dickens *The Personal History of David Copperfield* (Chapman & Hall, London, 1879) vol 1, ch 26, p 405, referring to a salvage case in the High Court of Admiralty.

<sup>8</sup> There is a charming but wholly ahistorical suggestion in *Hark v Antilles Airboats, Inc* 355 F Supp 683 at 684 n 1 (DVI 1973) that the practice of placing the Oar Mace on the bench arose from the merger of the English High Court of Admiralty into the Supreme Court of Judicature in 1873-5 and its relegation to the Probate, Divorce and Admiralty Division. Judges sitting in Admiralty supposedly dealt with the confusion resulting from the merger by placing the Oar Mace on the Bench to indicate that they were dealing exclusively with Wrecks, rather than Wives or Wills! See also “*Rumpelheimer v. Haddock: Port to Port*” in AP Herbert *Uncommon Law: Being Sixty-Six Misleading Cases Revised and Collected in One Volume* 237 (Methuen, London, 1935) 237, commented on by JC Sweeney (2000) 31 *Journal of Maritime Law & Commerce* 551, for a lighthearted treatment of the demarcation between the Admiralty and general civil jurisdictions.

Several US cases illustrate that this metaphor still has some potency and currency. In *Hark v Antilles Airboats, Inc.*,<sup>9</sup> for example, the Judge framed the entire jurisdictional issue in terms of “whether the bailiff shall place the Silver Oar of the Admiralty on the bench. My answer is that the oar should be placed on the bench and that this matter will proceed as an action in admiralty and not as a case in the common law court.” In a recent case, *In Re Bernstein*,<sup>10</sup> the District Court of Massachusetts noted that “[o]n the left corner of the bench in the courtroom where this session of the Court sits there rests a replica of the Silver Oar of Admiralty, the historic symbol of this court’s admiralty jurisdiction. .... When the Court sits ‘in admiralty,’ the ‘Silver Oar’ is moved to the right corner of the bench. The central question in this case is whether to move the oar, i.e., whether admiralty jurisdiction exists.” The Court concluded that “[t]he Silver Oar moves to the right; this Court has admiralty jurisdiction over this matter.”<sup>11</sup>

The archetypal Oar Mace is, of course, the Oar Mace of the High Court of Admiralty in London. The current Oar Mace is probably the third to have been used in the history of the High Court of Admiralty in all its incarnations. The blade of the Oar Mace is believed to date from the reign of Henry VII, whereas the shaft probably dates from 1798, the year in which Lord Stowell became Judge of the High Court of Admiralty.<sup>12</sup>

The English Oar Mace served as the prototype for Oar Maces for the Vice-Admiralty Courts in England, the Admiralty Court of the Cinque Ports<sup>13</sup> and the Court of Passage of the Borough of Liverpool, as well as the Colonial Vice-Admiralty courts increasingly spread across the globe. Silver Oars were crafted for the Vice-Admiralty Courts of Bermuda,<sup>14</sup> Boston, Massachusetts,<sup>15</sup> Calcutta,<sup>16</sup> Toronto<sup>17</sup> and apparently Malta.<sup>18</sup>

In more recent times, a number of modern Oar Maces have been created and presented to Admiralty Courts to celebrate special occasions or milestones in the Admiralty jurisdiction, or to commemorate the lives of distinguished maritime lawyers. In Canada, the Canadian Maritime Law Association presented the Federal Court of Canada with a replica of the Silver Oar of the Admiralty in 1996, to mark the 120th

<sup>9</sup> Id, at 684.

<sup>10</sup> 81 F Supp 2d 176 at 177 (Mass 1999).

<sup>11</sup> Id, at 182. See also *Pacific Growth SA v Aon Corp* 2000 AMC 152 (SDNY) where the Court directed that, as an insurance brokerage dispute was within the Admiralty jurisdiction, “the oar, if it can be found, will be hung in the courtroom for this case”. The oar in question is in fact kept in the Museum of the City of New York: see NMM, supra n 1, 11.

<sup>12</sup> For a detailed description, see GB Hughes “Silver Oar of the Admiralty” *Country Life*, April 10, 1958. The current Oar Mace – rather unflatteringly described in the House of Lords as a “paddle” – was recently valued at £20,563 including VAT: see the List of Non-Operational Antiques/Works of Art within the Lord Chancellor’s Department <<http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds02/text/20501w02.htm>>.

<sup>13</sup> The original Silver Oar of the Admiral of the Cinque Ports was stolen during the 1960s and a replica oar made in 1979: see Cinque Ports and Civic Ceremonial <<http://www.cinqueports.org/civic.htm>>.

<sup>14</sup> 1701. NMM, supra n 1, p 11, plates 7, 8. The Oar Mace became the ceremonial mace of the Island Council.

<sup>15</sup> Circa 1725. See NMM, supra n 1, p 11, plate 9; SC O’Neill “The Silver Admiralty Oar” (1998) 4 Massachusetts Legal History 17; JJ Woodruff “Merchants, Traders, and Pirates: The Birth of the Admiralty Clause” (2002) 26 Tulane Maritime LJ 563 at 565.

<sup>16</sup> Date uncertain – of the Victorian era. NMM, supra n 1, p 12

<sup>17</sup> 1962. NMM, supra n 1, p 12, plate 10. This Oar Mace was presented by several members of the Ontario Bar to the Ontario Admiralty District of the Exchequer Court of Canada.

<sup>18</sup> See <<http://www.global.net.mt/jansen/Places/Malta/Birgu/Birgu%20-%20Maritime%20Museum.htm>> which refers to a display of the silver Oar Mace and seals of the Vice-Admiralty Court of Malta. This Oar Mace is not mentioned in any other sources.

anniversary of the founding of the Exchequer Court and the 25th anniversary of the Federal Court.<sup>19</sup> In Australia, a replica of the Silver Oar was presented to the Supreme Court of New South Wales in 1970 by the State Bar in memory of William Wallis Caldwell QC. And in 1999, the Maritime Law Association of Australia and New Zealand presented an Oar Mace to the Federal Court of Australia in Melbourne, in memory of one of its long-standing members, Captain Don Brooker.

### **An Oar Mace for New Zealand**

At the presentation of the Oar Mace to the Auckland High Court, Jennifer Sutton, Chair of the New Zealand Branch of the Maritime Law Association of Australia and New Zealand and Vice-President of the Federal Association, delivered the following address:

“I am privileged to be asked on this occasion to speak on behalf of the Association and to present to the Court the Oar Mace in memory of Bradley Harle Giles.

When the Association first considered how best to mark the contribution of His Honour to Admiralty law the ideas mooted included a scholarship or the presentation of an Oar Mace. After consulting with Pru Giles it was determined that an Oar Mace was the appropriate way in which to acknowledge the significant role His Honour played in maritime and Admiralty law in New Zealand, both as an advocate and as a Judge of this Court.

On behalf of the Association I extend a warm welcome to Pru Giles, and the other family members here today.

I am also delighted that we have in our presence several members of the judiciary of this Court and of the Australian Courts. This reflects the role of the Association on both sides of the Tasman. I wish to acknowledge the members of the Australian judiciary; Chief Justice Black and Justice Cooper of the Federal Court (Justice Cooper being a former Vice-President of the Association), and of course the Association’s Federal President Justice Philippides of the Supreme Court of Queensland.

### *The Admiralty Jurisdiction in New Zealand*

The Admiralty jurisdiction is in some respects unusual. By some it may be described as an eccentric area of law. I beg to differ. The reality is that it is a field where the Court is confronted with disputes which by their nature often involve black letter law principles and the need to have regard to practical twenty-first century commercial realities. The manner in which counsel and Judges grapple with Admiralty disputes, calls upon a careful weighing of these sometimes conflicting considerations. More often than not the substantial Admiralty cases<sup>20</sup> concern situations involving a plethora of domestic and international legal issues, numerous parties with diverse interests, related proceedings in overseas jurisdictions, and substantial sums. The pragmatic manner in which cases in the Admiralty jurisdiction are managed by the Court is an excellent example of the expeditious conduct of proceedings. In this regard it is important to acknowledge the fundamental “hands on deck” role of

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<sup>19</sup> See AJ Stone “Canada’s Admiralty Court in the Twentieth Century” (2002) 47 McGill LJ 511 at 558 n 236. The Oar Mace is displayed in the foyer of the Supreme Court Building in Ottawa.

<sup>20</sup> For example *Turners & Growers Exports Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110.

the Registrar in Admiralty proceedings. I am pleased to see past and present Registrars here today.

The Admiralty jurisdiction in New Zealand has a somewhat unique history. This was recently the subject of an article published by Paul David in the *New Zealand Law Journal*.<sup>21</sup> Many of you may not be aware that up until 1863 the New Zealand Court had no jurisdiction in Admiralty;<sup>22</sup> this is despite the fact that prior to that it sought to exercise such a jurisdiction.<sup>23</sup> After opinions from many and various English office bearers, it was determined that it was necessary for specific legislation to be introduced to remedy the unfortunate position. The result was the Vice-Admiralty Courts Act 1863, which bestowed the necessary jurisdiction upon the New Zealand Court.<sup>24</sup>

*Bradley Harle Giles*

The contribution Justice Bradley Giles made to Admiralty law in New Zealand, as both a practitioner and a Judge, cannot be underestimated. This is not a memorial sitting. That took place in 1999 after His Honour's untimely passing.<sup>25</sup> However it is appropriate on this occasion to recall His Honour's contribution. He was a partner at Russell McVeagh McKenzie Bartleet & Co. until he joined the independent Bar in 1991 and took silk in 1995. His time on the Bench was all too short. He was appointed a Judge in 1997 and passed away only two years later at the young age of 55 while still in office, and after suffering a period of illness. I will say that as counsel appearing before His Honour in a large Admiralty case which ran for a period up until his passing all counsel involved felt a deep feeling of sadness that we were losing a Judge who

<sup>21</sup> PW David "The Jurisdiction that Never Was" [2001] NZLJ 372.

<sup>22</sup> From 1841-1863, Admiralty jurisdiction in New Zealand vested in the person of the New Zealand Governor who was also appointed as Vice-Admiral in Letters Patent issued under the seal of Admiralty: see, for example, Russell to Hobson, G01/02, 31 March 1841 (NZ Archives); 1841 NZ Gov Gaz 71 on the appointment of Governor Hobson as the first Vice-Admiral in New Zealand. The Governor typically appointed the Chief Justice and another Judge as Deputy Vice-Admirals: see, eg 22 January 1842 NZ Gov Gaz 12 for the appointment of Martin CJ as the first Deputy Vice-Admiral in New Zealand. This jurisdiction also vested in the nominated Judge rather than in the Court.

<sup>23</sup> The Supreme Court Ordinance 1844 provided that the New Zealand Supreme Court "shall also be an instance Court of Vice-Admiralty, with such power and jurisdiction as belong to Courts of the like nature within the Colonial possessions of Her Majesty". This was met with a stinging rebuke from the Colonial Secretary (1846 NZ Gov Gaz 82): "[T]he creation of Courts of Vice Admiralty is a branch of the Royal Prerogative never delegated to any Colonial Authority, It is exercised by the Queen, on the Advice of the Lords Commissioners of the Admiralty, and may not be lawfully exercised in any other manner.". The 1844 Ordinance was disallowed.

<sup>24</sup> The Vice-Admiralty Courts Act 1863 (Imp) simplified the earlier process by providing that the Governor and "Chief Justice or principal judicial officer" would, by virtue of their offices, automatically become Vice-Admiral and Judge of the Vice-Admiralty Court respectively. However, the 1863 Act did not prove a panacea. A few years later, Arney CJ took a temporary leave of absence from New Zealand, thereby effectively suspending the entire administration of the Admiralty jurisdiction in the colony. After a flurry of correspondence, this embarrassing hiatus was resolved in 1866 by amending the Supreme Court Act 1858 to appoint the senior Puisne Judge, Johnston J, as acting Chief Justice so that he could sit in Admiralty. As a result of this incident, the Vice-Admiralty Courts Act 1867 (Imp) provided for the appointment of Deputy Judges who might "assist or represent" Judges of the Vice-Admiralty Court. Admiralty jurisdiction could, however, only be exercised by the Chief Justice, acting Chief Justice or nominated Deputy Judges, and still vested in them personally: see H Jenkyns *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, Oxford, 1902) 33. It was only in 1891 that the New Zealand Supreme Court acquired the full status of an Admiralty Court by virtue of section 2 of the Colonial Courts of Admiralty Act 1890 (Imp), which ironically bestowed a jurisdiction in remarkably similar terms to the 1844 Ordinance.

<sup>25</sup> See (1999) 14 MLAANZ Journal 1-5 for the eulogies delivered at Justice Giles' memorial sitting.

had a tremendous depth of knowledge and experience to bring to maritime law in New Zealand.

His Honour was a founding member of the New Zealand Branch of the Association and was a mentor to, or colleague of, many in the Association. I do not wish to run the risk of excluding anyone. However particular reference should be made to Paul David who led the Admiralty practice at Russell McVeagh after His Honour joined the independent Bar.

The role of the judiciary in the Association is important and valued by our members. I am grateful to Justice Williams for his involvement in the New Zealand Branch in recent years since our loss of Bradley Giles.

#### *The Oar Mace*

It is no easy feat to bring an occasion such as this together. There are certain individuals I wish to thank. Tom Broadmore, the Immediate Past President of the Association, for his sterling efforts in co-ordinating the commission of the Oar Mace. Your Honours Justice Robertson and Justice Williams, who have been instrumental in making the necessary arrangements for this sitting of the Court. I also wish to specifically acknowledge the assistance provided by Pauline Barratt and Paul David.

Let me now give you some insight into the Oar Mace and its tradition. The Oar Mace to be presented today has been crafted by Thorkild Hansen of Nelson. (As an aside, it is he who brought us “the” ring in *The Lord of the Rings*.) The blade has the Admiralty pattern of the fowl anchor and the national Coat of Arms on one side and, on the other, an inscription which reads:

This Oar Mace, symbolising the admiralty jurisdiction of the High Court of New Zealand, was presented to the Auckland Registry of the Court on 29 November 2002 by the Maritime Law Association of Australia and New Zealand and colleagues and friends of the late Bradley Harle Giles, 6 March 1944- 23 April 1999. Its presentation honours the contribution he made to New Zealand maritime law, both as an advocate and as a Judge of the High Court from 6 March 1997 to 23 April 1999.

This Oar Mace differs from the few that exist around the world today in two main respects. The first is the wooden shaft turned from our native rata wood; others are made entirely of silver. The second is the Seal of the High Court which is on the base of the Mace. This technique was first used for the Melbourne Oar Mace.

It became evident from my research that the exact origin of Admiralty oars is far from certain. What information there is discloses a fascinating history behind oar maces. This has been canvassed in a few articles, and highlights the fearsome environment in which the silver oar was originally used many centuries ago. By way of illustration, the historical summaries record that it was carried by the Deputy-Marshal in England as a symbol of the Admiralty Court’s authority as he led sombre processions of those pirates or condemned sailors to be executed at the water’s edge.

What is clear is that by 1360 a silver oar was used as a symbol of authority of the High Court of Admiralty in England when maritime actions were judged. The silver oar in the form of a mace dates from at least 1559, when Queen Elizabeth I was crowned. It has been suggested that the idea of a mace was derived from the experience the English gained on the Continent during the

Crusades. At that time relatively few people were literate. The mace proved to be a means of verification of authority. The staff of the mace was hollow, to allow for papers to be carried within.

Articles also record that there was a belief that no person could be arrested on board ship, or a ship itself detained, unless the Admiralty Marshal's Deputy produced a silver miniature of the Admiralty Court mace as proof of his authority.

Turning to the present day, our maces can now be found in various courts around the globe, including those in Melbourne, Sydney, Cape Town, Boston, and Ottawa. Their purpose is solely to symbolise the Admiralty jurisdiction. It is for that purpose that this Oar Mace is to be presented to this Court. It is hoped that it will be before the Court during substantive hearings in Admiralty proceedings, and at the discretion of the Judge presiding.

#### *Presentation*

I now have the honour to present to the High Court of New Zealand sitting in its Admiralty jurisdiction, an Oar Mace of Admiralty which has been subscribed to by members of the Maritime Law Association of Australia and New Zealand and others, in memory of His Honour the late Justice Bradley Harle Giles.”

