

## SIR HAYDEN ERSKINE STARKE

By THE HONOURABLE MR JUSTICE ARTHUR DEAN\*

Hayden Erskine Starke was born at Creswick, Victoria, in 1871. His father graduated in Medicine at St Andrews, and came to practice at Creswick. His mother was a Miss Mattingly before she married Dr Starke. Dr Starke died in 1877 leaving two sons and two daughters. His family was left in straitened circumstances. His widow obtained a position as a postmistress at several country towns and finally at Clifton Hill and for many years supported the young family. Hayden Starke won a scholarship to Scotch College where he completed his last year at school. He went into the legal office of Weigall and Dobson where he remained while pursuing his course for admission to practice, doing the Articled Clerks' Course. He was the first person to come to the Bar after completing that course. That was in 1892, at a time when the Bar faced extinction. Legislation had just been passed amalgamating the two branches of the profession, and it appeared likely that the separate Bar would disappear. However, despite the absence of any legal warrant for its continued existence, and although the legislation is still in force, the Bar has survived and prospered.

There was not much evidence of prosperity for young Mr Starke. Indeed, while serving articles and during his early years at the Bar, it was his practice to walk both ways between his home at Clifton Hill and his office or chambers to save the penny fare. It was the time of the bursting of the land boom, and there was not much prosperity anywhere.

During some part of his student days and his early years in practice Starke was Secretary of the Law Students' Society and its records show that he was very active in its affairs. To judge from his later years he was strongly individualistic and self-reliant, and did not much care for working on committees. He rowed a little, but not in competitive rowing, and was for a year President of the Rowing Association.

Work came slowly, but it was inevitable that it would come. Great qualities of mind, great industry and an imposing presence gradually brought him prosperity and he was able to buy for his family use the home in Toorak where he lived until a few years before his death. He suffered a tragic loss when his mother and sister were lost in the ill-fated *Waratah* between Australia and South Africa. For many months he refused to abandon hope that the ship would be found.

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Until his appointment to the High Court Bench in 1920 he enjoyed an extremely busy practice and became one of the remarkable group dominating the Bar. He was not gifted with a strong voice, but his commanding presence, impressive appearance, powerful personality, great industry and brilliant abilities made him a most formidable advocate. He appeared in most of the important cases of those years. His opinion work was enormous. In those days typists and secretaries had not invaded Selborne Chambers, and all opinions were written by hand on the fold of the brief. They were therefore brief and to the point, and were often illegible. Starke would write as many as twenty opinions at a weekend. Like most of his contemporaries, such as Mann and Schutt, he never took silk, although two Chief Justices had suggested that he should apply—Sir John Madden in 1912 and Sir William Irvine in 1918. He charged what appear to us today, and even appeared to some of his contemporaries, extremely low fees for his services.

A man of such intellectual stature and personal integrity was destined to reach the High Court, and in 1920 the appointment came. For the next thirty years he was a most distinguished member of a Bench which included other great lawyers. An assessment of his personality and of his contribution to the development of the law was made by the present Chief Justice, Sir Owen Dixon, in the Court on the occasion of his death in May 1958. I cannot attempt to add to this eloquent tribute which is printed at the front of volume 97 of the Commonwealth Law Reports.

I would add a few personal impressions from my many appearances before him. Despite an apparent gruffness of manner and a direct and lucid mind he was always courteous and helpful to Counsel. I only once saw him lose patience with Counsel, a well-known silk from another State, and I thought he showed admirable restraint in the circumstances. Every one of us at the Bar was nervous and apprehensive when we first had to appear before him; but this quickly disappeared.

His long and arduous life at the Bar with and opposed to men of outstanding ability had given him a supreme understanding of the advocate's art, and great legal knowledge. He had, as Sir Owen Dixon has remarked, a talent for getting to the central point of a case. One curious illustration of his individuality was that in latter years he never wore a wig in court. Somehow it ceased to be noticeable that he alone on a Full Bench was uncovered. He rarely joined in judgments with his brethren, but in general delivered a separate judgment of his own. He could not be persuaded to join in judges' conferences.

He was expert in patent law in which he had considerable experience. He was quick to appreciate the inventive merit of some really

ingenious apparatus or machine, but caustic in criticism of some of the so-called inventions which obtained grants. Thus, in a judgment dissenting from two colleagues who upheld as patentable a method of flavouring sausages, he said, 'I deplore the legal ingenuity which enables the applicants to obtain the grant of a patent for their method of seasoning sausages, but there is, in my opinion, no other ingenuity or novelty in the case.' Another example of his forceful expression of his views was in his comments upon the first *Uniform Tax Case*, in which he dissented as to one part of the case. In a later case he said, 'I must leave to those who were responsible for the decision of this Court in *South Australia v. Commonwealth* the task of expounding and explaining it. I do not profess to understand that part of it which relates to the *Income Tax (Wartime Arrangements) Act*.'

But his shafts were usually for his colleagues, and not spoken in malice. He was never outspoken at the expense of inferior courts; and never did he treat Counsel with anything but complete courtesy. He looked a robust and formidable figure, but the Bar soon learned to expect from him a fair trial, few interruptions and a sound judgment. He was extremely popular as a trial judge. During the war years the High Court on occasions exercised criminal jurisdiction, and some of our experienced criminal lawyers discovered what a perfect trial judge Starke J. was. To his associates and tipstiffs he was the kindest and most considerate of men and won their affection to a remarkable degree.

Throughout Australia his reputation stood high. Men from other Bars admired and respected him. His strong personality, vigorous mind and independent judgment, his sound, sturdy common sense attitude to the problems engaging his attention were his outstanding characteristics.

He retired in 1950, greatly regretted, and lived quietly in Melbourne until his death in 1958. All of us who knew him regarded him as a great man, a wise judge and a sincere friend to lawyers everywhere.