

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

JUNE 23, 1965, TO JANUARY 25, 1963

WM. NANKERVIS, JR.
REPORTER OF DECISIONS

VOLUME 63 2d

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1966

In Memoriam

HONORABLE MAURICE T. DOOLING, JR.

Judge of the Superior Court of San Benito County, 1928-1945; Justice of the District Court of Appeal, First Appellate District, Division Two, 1945-1960; Associate Justice of the Supreme Court of the State of California, 1960-1962.

The Supreme Court of California met in bank in its courtroom, State Building, San Francisco, January 31, 1966. Present: Chief Justice Traynor, presiding, Associate Justices McComb, Peters, Tobriner, Mosk and Burke, and Presiding Justice Murray Draper, District Court of Appeal, First Appellate District, Division Three, sitting pro tempore. Sullivan, Clerk; Janice Giovanni, Acting Reporter; Wambeke, Bailiff.

The proceedings were as follows:

CHIEF JUSTICE TRAYNOR: We meet this morning in memory of Maurice T. Dooling, Jr., who served with distinction as an Associate Justice of this court from June 30, 1960, to June 30, 1962. The memorial to Justice Dooling will be presented by his long-time friend and admirer, the Honorable Ben C. Duniway, Judge of the United States Court of Appeals, Ninth Judicial Circuit.

JUDGE DUNIWAY: Justice Maurice T. Dooling, Jr., whom we remember today, was, like many other distinguished Californians, a grandson of Irish immigrants. His grandfather Timothy Dooling came from Ireland to Boston, and from there he moved to California in 1850. He went first to the gold mines of Nevada County. In 1868, the year in which the city of Hollister was founded, he moved to what is now San Benito County. (It was then still a part of Monterey County.) He operated a ranch in the county until his death in 1895. His wife, too, was an Irish immigrant. She and her six brothers and sisters had been orphaned at an early age. They all managed to come to this country, and the story of the Manogue family is quite as remarkable as that of the Doolings.

Timothy Dooling was illiterate, not from lack of capacity, but because of the lack of opportunity that drove so many

of the Irish to emigrate in the mid-19th century. One of his sons, Maurice T. Dooling, was born at Moore's Flat, near Nevada City, in 1860.

The senior Maurice Dooling was a remarkable scholar who became a distinguished judge. He was a graduate of the old St. Mary's College, in 1880. He knew and loved Latin and Greek, as well as Spanish, Italian, Portuguese, French and German. In 1891, he published his own translation of the Second Book of Virgil's Aeneid. He also did his own translation of Dante's Inferno. It is a remarkable document, written in a clear and careful hand, on sheets of foolscap. He taught Greek, Latin, and philosophy at St. Mary's for a year. He became a lawyer, and was District Attorney of San Benito County from 1892 to 1897, when he was appointed Superior Judge. In 1913, President Wilson appointed him United States District Judge. From then until his death in 1924, he sat in the United States District Court, at 7th and Mission Streets. He was undoubtedly one of the best judges ever to grace that bench.

The second Maurice T. Dooling was born in Hollister on November 13, 1889. He graduated from San Benito County High School and entered the University of Santa Clara at the age of 16. He was active in student affairs and was editor of the "Redwood," a literary magazine. He was a debater, vice president of the student body association, and president of the graduating class of 8. At his graduation, he presented the class poem and the valedictory. He received his B.A. degree in 1909. He then proceeded to Stanford. Again he was a student leader and editor, this time of "Chapparal," the student magazine of humor. He did not suffer the fate of some editors of that paper, rustication, but was granted his second B.A., from Stanford, in 1911, and was elected to Phi Beta Kappa. He continued his studies at the Stanford Law School, and received his J.D. degree in 1913.

Maurice Dooling was one of the top students at the law school, and was recommended by the Dean to George Lull, San Francisco's city attorney. Upon his admission to the Bar in 1913, he joined the city attorney's office, where he remained until the mid-1920s.

One of the senior Judge Dooling's friends and ardent admirers was Francis J. Devlin, and he had a daughter, Mary. Eventually, Maurice Dooling, Jr., became an ardent admirer of Mary, and they were married in 1916, a most successful and happy marriage that was to last for 49 years.

From it came two daughters, and in the course of time, 6 grandchildren.

Deputies in the city attorney's office were then permitted to practice law, and Maurice Dooling and Frank A. Devlin, Mary's brother, practiced together in San Francisco, with offices in the Hobart Building, until Dooling became a judge. According to Mary, the only complaint about Maurice that she ever heard from her brother Frank was that, when he was needed at their office, he was always at the city attorney's office. He always placed public duty ahead of private gain.

The senior Dooling had been succeeded as superior judge at Hollister by Judge John L. Hudner, a close friend of the Doolings. At the time of Judge Hudner's death in 1928, the Doolings were in New Mexico. By night letter, Maurice was offered the position. He felt compelled to decline, as the salary was only \$4500 per year, and he feared that Mary would not care to move to Hollister. Governor Young and many of Maurice's friends were persistent, however, and, with Mary's encouragement, he finally accepted the post. He was sworn in on August 29, 1928, at the age of 38. He liked to joke that the County of San Benito has always owed him two days' salary, as his first check was for the month of September.

As a superior judge of one of the smaller counties, Judge Dooling became one of the band of able men who have done so much for the administration of justice in California because they were able to sit all over the state, both as trial judges and as appellate judges. Judge Dooling was assigned to sit with the District Court of Appeal, First Appellate District, Division Two, shortly after he took office. His first appellate opinion, written for that court, was filed on October 24, 1928, in the case of *Wolf v. Drew*, 94 Cal.App. 449. It is prophetic of one of his great virtues as an appellate judge. It is less than one page long!

Throughout his career on the superior court, Judge Dooling spent about 90% of his judicial time away from home. He usually returned to Hollister on Friday evening, heard law and motion calendar on Saturday morning, tried such cases, if any, as were to be tried, beginning the following Monday, and then went away again. He drove about 25,000 miles a year on judicial assignments. There was one week during which he sat in six counties—San Benito, Stanislaus, Santa Cruz, Monterey, San Francisco, and San Mateo—the last two on the same day! He was handed many of the hot

potatoes that local judges were disqualified from trying. As an example, in the early 1930s he was designated, with Judge (now Mr. Justice) Bray of Contra Costa County, and the late Judge Trabucco of Mariposa County, to investigate charges of improper jury selection in San Francisco.

One of the first trials in the Superior Court in which I participated was before Judge Dooling at Redwood City; one of the first appeals that I argued was before Judge Dooling, sitting as a member of the Appellate Department of the Superior Court of the City and County of San Francisco. Many who are here have had similar experiences.

In 1945, Governor Warren appointed Judge Dooling to the District Court of Appeal, First District, Division Two, and the Doolings returned to San Francisco. He frequently sat pro tem. with this court and in 1960, Governor Brown appointed him to its bench. He retired on June 6, 1962. But his judicial career did not end. He again tried cases, and he sat several times with this court. His last opinion, filed January 22, 1965, *Albers v. County of Los Angeles*, is reported at 62 Cal.2d 250. It settled an important question as to the meaning of the provision in our Constitution that private property shall not be damaged for public use without just compensation.

Justice Dooling did not confine his interests to the practice of law, or to judging. He was an active member of the Commonwealth Club for 40 years, a member of its Board of Governors for 15, and its president in 1952-54. In Hollister, he served for 20 years as president of the Board of Trustees of Hazel Hawkins Hospital, was past exalted ruler of Hollister Lodge 1436 of the Elks, and was a member of the Hollister Rotary Club and the Knights of Columbus. The chairmanship of the hospital board was particularly demanding. Mrs. Dooling was secretary for 18 years. The board met once a month, on Saturday, so that the judge could be there. This covered the war years, with their shortages of nurses, and also two rebuilding and enlarging jobs. He was active in the affairs of the alumni of Santa Clara and of Stanford, and president of the Stanford Law Society in 1931-33 and of the Santa Clara Law Society in 1952-54. He was president of the Conference of California Judges in 1934. He taught law at St. Ignatius for 7 years. One of his pupils was Justice Preston Devine, who says that Justice Dooling was the best teacher he ever had.

This is not the time or place for an analysis of his many

hundreds of opinions, or of his contributions to the progress of the law in many fields. He was imaginative, humane, forward looking, a liberal. His opinions are clear, pithy, and as brief as the circumstances permit. He early demonstrated his ability to state a legal principle in simple and direct English. In his third reported opinion, filed December 6, 1928, in *Mauzan v. Stefanich*, 95 Cal.App. 327, he said this:

“The gist of appellant’s fraud in this case was not that he promised to do something which he could not do, but that he promised to do something which he did not intend to do.” (P. 333.)

Justice Dooling’s legal philosophy, and his views as to the business of judging, are well expressed in statements that he has made about other judges whom he admired. In a letter about one such judge, whom I will not embarrass by naming him, Justice Dooling described him as “a judge of great ability, fearlessness and the capacity to carry forward the law, treating the decisions of the past, not as stumbling blocks in the way of judicial progress, but as building blocks upon which to erect a better structure of justice for the future, in the great and best traditions of the common-law.” I submit that this is, in fact, an accurate description of Justice Dooling himself.

Speaking at the inauguration of Mr. Justice Tobriner as a member of the District Court of Appeal, First District, Division One, he said: “The appellate judge in his day to day work is applying settled opinions to the fact patterns presented by particular cases. Any good journeyman lawyer can adequately do this job. It is the novel case, the case in which the established rules do not appear to do justice between the parties and in which the decision may govern the rights and conduct of our citizens for untold years to come, that truly tests the mettle of an appellate judge.

“The appellate courts, to use a metaphor, stand, in cases of this sort, in the middle of the stream. They must look backward to the precedents which should guide them in their decision of the particular case, but they are doing their work poorly if they do not look forward as well. For depending on the choice which they then make, the waters of the stream may flow forward clear and unsullied or muddied and befouled, to soil the robes of justice in the cases of tomorrow which are not envisioned by the court which with too little thought decides the problems of today.” Justice Dooling, in deciding such cases, never failed to look forward.

He loved life and lived it fully. He and Mary traveled widely. They had a host of friends, and were ideal companions. Like his father before him, whom he resembled in many ways, he liked to write verse, some serious, some light. One in a lighter vein saw print some years ago in the *Chronicle Sporting Green* under the title "The Saga of Elmer Dowdy." It describes, in delightful and sometimes surprising rhyme, how Dowdy, for many years the County Clerk of San Benito County, came from the stands as a pinch hitter and won a game for Hollister against Santa Cruz. It is too long for this occasion, but the first verse gives the flavor:

"In Hollister fifty years ago
 When the town was young and rowdy
 There was a famous baseball player
 And his name was Elmer Dowdy."

I give you another sample, written in pencil on a scrap of paper, and quite recently:

"Like a rare old wine
 In a Paris bar
 The older you get
 The more priceless you are!
 Is an Aging Man like Rare Old Wine?
 Though the tender young lamb
 Makes a wonderful pet
 When it grows to a ram
 My, how tough it can get!"

What, then, can one say of him? That he was the fulfillment of everyman's ideal of what a judge should be? Every lawyer who ever appeared before him, as many here have done, every judge who ever worked with him, as many here have been privileged to do, knows that he was.

That he was the most delightful of companions and friends? Everyone who ever knew him knows it. He was so rare a combination of mind and heart, of the spiritual and the earthy, of dignity and humor, of modesty and knowledge of his own ability—in short, of all the qualities that make a great judge and a great man, that words are quite inadequate to do him justice.

He himself, writing some years ago about his father, said what all of us would say of him:

"I see him now as in that long ago
 He must have been—young, eager, passion swept;

The tender heart, the spirit all aglow
With fires that flamed and leapt.
I see him now as to her ardent gaze
He must have seemed—so fine, so good, so true,
So noble. It was so in after days
I found the man I knew.”

Speaking on the occasion of his own retirement from this court, Mr. Justice Dooling said :

“None, I suppose can fully appraise the effect on his own life of the example of his father; but I know, at least, that my father’s example furnished me an exacting yardstick of warm-heartedness, judicial and personal rectitude, a passion for justice tempered with human compassion, and a fierce intellectual honesty against which to measure my own conduct. Whatever little I may have contributed to the cause of Justice under the Law owes some real, if immeasurable, part, to the memory of his example. I first learned from him that the Law is the guardian of those sacred rights of person and property which ennoble and enrich the lives of men, and I hope that I have always tried to the limit of my power to be her faithful servant.”

He more than measured up to that exacting yardstick; he more than fulfilled that hope. There are many judges on the bench of California today, and many fine lawyers, who owe a similar debt to Justice Dooling.

We are here in remembrance; we shall not forget.

CHIEF JUSTICE: Justice Raymond E. Peters will respond on behalf of the court. Justice Peters.

JUSTICE PETERS: We join with Judge Duniway in his splendid tribute to Justice Maurice Dooling. It certainly is fitting and proper that those who had the privilege of knowing Maurice Dooling, those who admired and loved him should pause today to pay him tribute. It gives us the opportunity to express publicly our affection for him and to express publicly our appreciation for the rich legacy of legal lore he has left us. From the day he first ascended the bench until his death, he fought valiantly against greed, intolerance, bigotry, injustice and discrimination. For these things we will never forget him.

He served the people of this state as one of California’s greatest judges for 34 years. As Judge Duniway told you,

17 of those years were spent as the Superior Judge of his beloved San Benito County, and 15 as a Justice of the First Appellate District, Division Two. On the appellate court he wrote nearly 800 opinions, which appear from volume 71 Cal.App.2d to 181 Cal.App.2d. In 1960 he was appointed to this court, retiring as of June 30, 1962. Volumes 54 Cal.2d to 58 Cal.2d are full of his magnificent opinions. But even after his retirement we could not dispense with his services. He was frequently called back as a pro tem. to assist us in some of the most important and difficult cases pending before us. The last case he wrote, as Judge Duniway has told you, was *Albers v. County of Los Angeles*, 62 Cal.2d 250. It was filed just about a year ago. That opinion is a great one, unraveling some of the most difficult problems in the field of inverse condemnation. With his usual clarity and brilliant analysis he worked his way through the confusion in this field. The opinion is a fitting climax to a great career.

Maurice brought to the judiciary a brilliant and well-trained mind. His opinions are outstanding for their clarity of expression and keenness of reasoning. His power of expression was remarkable. He could state in a few words a principle that it would take most of us pages to express.

But he was not only a great opinion writer. His discussions in conference were always clear, lucid and restrained. He frequently, by sheer brilliance of his presentation and keenness of his argument, induced us to change our minds. He would fight fiercely for what he thought was right, even in support of an unpopular cause. He always would give courteous attention and consideration to his associates, but he was not easily swayed. He was sympathetic, understanding and tolerant. Few men have left a better record of achievement, both as a judge and as a citizen. In his death San Benito County has lost its first citizen, California one of its great public servants. I have lost a great and cherished friend. I know I am a better man for having known him.

He was a loving husband and father. The court joins with me in expressing sincerest sympathy to his beloved wife Mary, and to his family, at their sad loss.

I can think of no better way to close this tribute than by quoting from one of the finest opinions I have ever read. It was Judge Dooling's special concurring opinion in the case of *Long v. Mountain View Cemetery Association*, 130 Cal. App.2d 328, at page 330. The opinion indicates the subject

under discussion. It illustrates, as my poor words cannot, the true measure of the man. It reads:

“I concur, but I cannot resist a word of protest. I cannot believe that a man’s mortal remains will disintegrate any less peaceably because of the close proximity of the body of a member of another race, and in that inevitable disintegration I am sure that the pigmentation of the skin cannot long endure. It strikes me that the carrying of racial discrimination into the burial grounds is a particularly stupid form of human arrogance and intolerance. If life does not do so, the universal fellowship of death should teach humility. The good people who insist on the racial segregation of what is mortal in man may be shocked to learn when their own lives end that God has reserved no racially exclusive position for them in the hereafter.”

CHIEF JUSTICE: Thank you Judge Duniway and Justice Peters. It is ordered that this memorial be spread in full upon the minutes of the court and published in the official reports.