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## PROCEEDINGS ON THE DEATH OF MR. JUSTICE BREWER.

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DAVID JOSIAH BREWER, Associate Justice of the Supreme Court of the United States, died at his residence, 1923 16th Street, Washington, D. C., on Monday, March 28, 1910, while the court was in recess. He was buried in Leavenworth, Kansas.

A meeting of the Bar of the Supreme Court of the United States was held in the Court Room on Saturday, April 30, 1910. On motion of Mr. William F. Mattingly, Mr. Charles Curtis, Senior Senator of the United States from the State of Kansas, presided, and the Clerk of the Court acted as Secretary. Addresses were made by Mr. Curtis, Mr. William E. Borah, Mr. Henry E. Davis, Mr. Frank W. Hackett, Mr. Gardiner Lathrop, Mr. Aldis B. Browne, Mr. Hannis Taylor, Mr. R. Ross Perry, Mr. Frank C. Allis and Mr. Justin Morrill Chamberlin. Mr. George Grafton Wilson presented a resolution adopted by the American Society of International Law.

A committee consisting of Mr. William E. Borah, chairman, Mr. William Warner, Mr. J. P. Dolliver, Mr. C. D. Clark, Mr. R. Wayne Parker, Mr. Henry M. Teller, Mr. George R. Peck, Mr. John S. Runnells, Mr. Charles Blood Smith, Mr. Charles W. Bunn, Mr. Gardiner Lathrop, Mr. R. Ross Perry, Mr. Henry E. Davis, Mr. A. S. Worthington, Mr. Aldis B. Browne and Mr. J. J. Darlington, prepared and presented resolutions which were adopted, and The Attorney General was requested to present them to the court.

## SUPREME COURT OF THE UNITED STATES.

TUESDAY, MAY 31, 1910.

Present: THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE WHITE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY and MR. JUSTICE LURTON.

*The Attorney General* addressed the court as follows:

May it please the court, at the request of the Bar of this court I present the following resolutions adopted at a meeting held in this court room:

“*Resolved*, That the Bar of the Supreme Court of the United States deeply deploras the death of the late David J. Brewer, Associate Justice of the Supreme Court, and desires to place upon record an expression of the respect and esteem in which JUSTICE BREWER was held and of regret for the loss which the Court, the Bar, and the country have suffered in his untimely death.

“His judicial career was one of exceptional length and of marked distinction and success. Elected judge of the District Court of the First Judicial District of the State of Kansas in 1864; three times elected a justice of the Supreme Court of the State of Kansas; appointed in 1884 judge of the Circuit Court of the United States for the Eighth Circuit; appointed a justice of the Supreme Court of the United States in December, 1889, it will be observed that for nearly fifty years he discharged the high and sacred duties of a judge. In this long service, in the vast number of opinions which he wrote, the infinite variety of legal principles considered and treated, the learning and wisdom displayed, the consecration and fidelity ever and always evidenced, will be found his only fitting eulogy.

His remarkable grasp of the underlying principles upon which our whole structure of government rests, his unswerving fidelity to the fixed rules of order and stability so essential and so often sorely tested, his strong, positive, upright, fearless character, his power of sustained intellectual effort, place him easily among the great judges of his day and time. No one ever doubted his purity of life, his integrity of purpose, and all who read and consider his legal opinions pay homage to his profound intellect. Those who knew him are quick to testify to his tender and considerate nature, and those who must be content to find his character in his opinions scattered through many State, Circuit, and Supreme Court decisions will never doubt his probity or his power as a jurist.

“Resolved, That *The Attorney General* be asked to present these resolutions to the court with the request that they be entered upon the records and that the chairman of this meeting be directed to send to the family of the late JUSTICE BREWER a copy of the resolutions and an expression of our sympathy for them in the loss which they have sustained.”

JUSTICE BREWER'S period of service in this court covered twenty years. These two decades brought before this court some of the most important and far-reaching questions which have ever been submitted for its decision, and in the solution of these great problems JUSTICE BREWER took a leading part. In the reports of this period there are to be found 719 opinions written by JUSTICE BREWER, in 157 of which he dissented from the conclusions of the majority of the court. The limitations of this occasion will permit only a brief reference to a few decisions which illustrate the characteristics of his mind and the lucidity of his exposition.

One of the earliest of his recorded opinions was that in the case of the *Church of the Holy Trinity v. United States*, 143 U. S. 457, where the court was called upon to decide

whether or not the act prohibiting the importation of foreigners and aliens under contract to perform labor in the United States applied to an English Christian minister who had come to the United States pursuant to an agreement with a Protestant Episcopal Church in the city of New York. The opinion is of especial interest, not merely as a fine discriminating construction of the statute, and the application of the principle that laws must receive a sensible construction, and that where a literal construction leads to an absurd conclusion the letter of the law must give way to the presumed intention of the legislature; but because of the enunciation of the principle that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."

"If we examine the constitutions of the various States," said the learned justice, "we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community.

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"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people.

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"These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor

for a church of this country to contract for the services of a Christian minister residing in another nation?"

In the case of *Kansas v. Colorado*, 206 U. S. 46, perhaps one of the most important decisions in which MR. JUSTICE BREWER wrote the opinion of the court, he was called upon to deal with riparian rights and to determine whether or not one State has the right to the continuous flow of the waters of a river flowing to it through an adjoining State, or whether the latter State has the right to so appropriate its waters as to prevent such continuous flow; and whether the amount of the flow is subject to the superior authority and supervisory control of the United States.

In considering at the outset the foundations of the jurisdiction of this court over controversies between States, JUSTICE BREWER laid down the proposition that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto.

"These considerations," he said, "lead to the proposition that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power."

One of the ablest opinions of MR. JUSTICE BREWER is

that in the case of *In re Debs, Petitioner*, 158 U. S. 564, in which he expressed the unanimous views of the court in affirming that the relations of the general government to interstate commerce and the transportation of the mails are such as to authorize a direct interference to prevent an obstruction thereto, and that a court of equity has jurisdiction to issue an injunction in aid of the performance of such duty.

Perhaps in no other opinion of this court is there a better summary of the principles upon which rests the power of the Federal Government to maintain its sovereignty than that with which JUSTICE BREWER concludes his opinion in this case:

“ . . . We hold that the Government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the National Government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the Government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one

recognized from ancient times and by indubitable authority."

JUSTICE BREWER was always noted as a man of deep religious conviction. We have seen that one of the first questions which he was called upon to deal with after his elevation to the Supreme Court involved the relation between religion and the National Government. He was keenly interested in the position of woman in our modern society, and one of the latest of his decisions (*Muller v. State of Oregon*, 208 U. S. 412) involved the right of a State to regulate the working hours of women. After reviewing the laws of Oregon, he observed:

"It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers."

Yet he held, and in so doing voiced the unanimous opinion of this court—

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating that from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

"Still, again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and

this control, in various forms, with diminishing intensity, has continued to the present. . . . Education was long denied her, and while now the doors of the school-room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right."

Your honors know better than any but his immediate family the personal qualities which endeared JUSTICE BREWER alike to his associates on the Bench, to his friends, and to the Bar. Nothing better can be said of any man, however high his place or great his deeds, than that throughout his life he was not only esteemed, but beloved of all who knew him, and, indeed, that praise is greater in proportion as exalted station and high career tend to isolate from one's fellows. JUSTICE BREWER everywhere and always won affection. It was so in his life at the university. His activities as a judge of his adopted State, Kansas, and then as judge of the United States for the largest circuit in the country, were made easier and more effective by the warm and lasting regard of his Bar; and when advancement to this court widened his contact from the lawyers of the West to the lawyers and, indeed, to the people, of the nation, he soon gained the love of his countrymen generally, and it remained with him to the end. Reasons need not be sought. They would not be difficult to find or to declare, but such continued and ever extending hold upon the hearts of men proves, without analysis, the worth and beauty of the personality that gains it.

JUSTICE BREWER was a son of a Christian missionary, and the son's life, like the father's, was one of service. For six and forty years he served the people, hearing causes and judging "righteously between every man and his brother and the stranger that is with him." And in the discharge of his great office he did ever obey the injunction laid upon the judges of Israel by their great lawgiver:

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man, for the judgment is God's." (1 Deut. 17.)

THE CHIEF JUSTICE responded as follows: <sup>1</sup>

During the years of my occupancy of a seat upon this Bench it has been my sad duty to accept for the court tributes of the Bar in memory of many members of this tribunal who have passed to their reward. As our BROTHER BREWER joins the great procession, there pass before me the forms of Matthews and Miller, of Field and Bradley and Lamar and Blatchford, of Jackson and Gray and of Peckham, whose works follow them now that they rest from their labors. They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike. They differed as "one star differeth from another star in glory." Their names will remain illustrious in the annals of jurisprudence. And now we are called on to deplore the departure of one of the most lovable of them all.

He died suddenly, but not the unprepared death from which we pray to be delivered. When the unexpected intelligence was conveyed to me I could not but think of Mrs. Barbauld's poem on "Life," and seemed to hear our dear friend exclaim—

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<sup>1</sup> These remarks were delivered on the last day that MR. CHIEF JUSTICE FULLER presided over the court. October Term, 1909, adjourned the same day, and during vacation the Chief Justice died at his summer home in Sorrento, Maine, on July 4, 1910.

“Life! we’ve been long together,  
Through pleasant and through cloudy weather;  
’Tis hard to part when friends are dear;  
Perhaps ’twill cost a sigh, a tear;  
Then steal away, give little warning,  
Choose thine own time;  
Say not, Good night, but in some brighter clime  
Bid me, Good morning.”

The resolutions of our Bar and the discriminating remarks of the Attorney General adequately cover the magnificent judicial labors of MR. JUSTICE BREWER, but it is the ineffable sweetness of his disposition that chiefly impresses itself upon me and is indicated by the serenity of the verse I have quoted.

He was a truly eloquent man. The fountain of tears and the fountain of laughter ran close together and carried the hearer away upon the mingled current of their waters. And like Mr. Lincoln, he evidently found great comfort from the inevitable trials and tribulations of the world in the humorous anecdotes which brought the relief of merriment.

But I cannot prolong these remarks. The resolutions and the observations of the Attorney General will be spread upon our records.

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