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both." But the dilemma did not paralyze his action. In his professional work he continued to go forward gallantly and courageously, firm in the belief, which he often expressed, that an essentially just cause will win in the end.

In his faith, in the works to which it led, and in the personality that all who knew him loved, Mr. Nagel represented the finest flowering of Western liberal culture. With variations in detail—often in such vital detail as readiness to resort to arms—it rules in the "democracies" today. Whether it can be adequate to the tasks that lie at hand, we shall soon know. Whether, if it proves inadequate, there can come to bloom a different flowering which preserves the most precious values of the old, presents the future's weightiest enigma.

CHARLES NAGEL: A SKETCH OF HIS PROFESSIONAL LIFE

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Any attempt to render an appreciation of Mr. Nagel as a lawyer runs risk of inadequacy. The risk is indeed great when the attempt is made by one who was in association with him only during the last seventeen years of his life. More than seventy years of an active and useful life had been spent and more than fifty years of active practice had preceded, of which the written record is largely obliterated.

The task is somewhat lightened by that charming volume "A Boy's Civil War Story" which Mr. Nagel wrote upon the insistence of his family and friends, by glimpses of his own past which he sometimes gave in reminiscence, and by the picture of the man in the age of his serenity.

He was born August 9, 1849 in Southern Texas of German parents. His father, Herman Nagel, was a physician, a graduate of the University of Berlin; his mother, the daughter of a Lutheran clergyman. They had come to this country in protest again "system" and in search of individual freedom. The son, until his fourteenth year, lived an unusual boyhood in a rugged frontier community. The impress of the great plain, its vivid

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light and color, affected, as we know, the artistic tastes of his later life. The expansiveness of its image, together with the individualism that was his heritage and the self-reliant independence of frontier people, not to speak of the constant invitation to adventure, were bound to have their counterparts in the makeup of the mature man.

During the Civil War, Mr. Nagel's father, owing to Northern sympathies, was forced to give up his frontier practice, and with his son, take flight from Texas. The course was a long one by horse and wagon, through southern Texas to San Antonio, and through Mexico to Monterey and thence to Matamoras. It was one of privation and hardship, punctuated by lasting impressions of Mexican life with its contrast of the religious ardors of the Christmas Carnival on one hand, and the brutality of bull fights and revolutionary riots on the other. These were the days when the throne of the unfortunate Maximilian was tottering.

At last, after a voyage by sea to New York, and by train to St. Louis, father and son in 1864 arrived in the community that was to be their permanent home. There were, no doubt, for the boy, problems of reconciliation of his early development with the environment of a more settled and already populous community.

The selection of the law as a career was not one that was premeditated. The impulse was described by him as having come after the conclusion of his general education at Central High School (then at Fifteenth and Olive Streets), and after his return from a trip to Europe with his friend, Washington E. Fischel, upon the reading of a sixty-cent second-hand volume of Goodrich's "British Eloquence." The volume passed into his hands at just the right moment of his life, and his reaction to what he termed the "unforgettable words" of Burke and Pitt, was spontaneous. Those who knew him will recognize that his response was to the call of a profession dedicated to the performance of a public service. True to the impulse which motivated his entrance into the profession he maintained throughout his life a profound respect for the English system of law. Its greatness he ascribed to its flexibility and growth and to the understanding by its judges of their problem as one of continuous, vital readaptation.[1]

He obtained his legal education in 1870-72 at St. Louis Law

1. 1 Heller, *Charles Nagel—Speeches and Writings, 1900-1928* (1931) 84.

School, now Washington University Law School, and served his apprenticeship in the office of Glover and Shepley, then an outstanding firm in the middle west. A second trip to Europe, this time with his parents, afforded opportunity for study at the University of Berlin, where he came under the influence of Rudolph Gneist, a great exponent in those days of the English system of law.

Early ventures in the practice of the law were in association with such men as Nathaniel Myers, Fred Wislizenus, and Henry I. D'Arcy.

In the late eighties when Mr. Nagel was practicing on his own, Daniel N. Kirby became associated with him. This association ripened into a partnership in 1894 which was remarkable not only for the harmonious counterpoise of the two men, but also for its duration. It continued, with various additions to and changes in its membership, until Mr. Nagel's death on January 5, 1940, with only the interruption occasioned by Mr. Nagel's services in the Cabinet of President Taft from 1909 to 1913. From 1903 upon the addition of Judge Finkelnburg to the firm until the latter's appointment to the Federal Bench, the firm existed as "Finkelnburg, Nagel and Kirby." It continued at the date of Mr. Nagel's death under the name "Nagel, Kirby, Orrick and Shepley."

Like his professional associations his relationships with clients were mainly of long enduring nature. Of these, his relationship with the late Adolphus Busch was indeed remarkable. During the early days of his independent practice, Mr. Nagel had become acquainted at a stockholders' meeting with Mr. Busch, and it was not long thereafter that the latter began to entrust him with matters of increasing importance. That relationship continued through three generations of the Busch family, and it gave Mr. Nagel profound gratification in his later years to be able to acknowledge what he termed an "underwriting for his life" by the grandfather and to be able to meet the grandsons "with trust and confidence as of yore."[2]

From 1895 to 1909, Mr. Nagel lectured at the Washington University Law School, whose faculty then consisted of leading members of the practicing bar. Among his courses was Consti-

2. Response at dinner given June 8, 1939, in honor of Robert McKittrick Jones and Charles Nagel.

tutional Law, which he later recalled with the comment that he was not confident that his students became impressed with the precise conclusions of the Supreme Court but was confident that they went away with more respect for our institutions than they had had before.

His membership on the Board of Trustees of Washington University, his services in the State Legislature, as President of the City Council, and in the Presidential Cabinet, and his services to many educational and charitable causes, belong to another story.

Mr. Nagel, despite his reputation as a public speaker, was not frequently active in court work. More often his services were directed, with an eye to the ultimate good of his clients, toward the composition of their difficulties, if at all possible. There was, moreover, a natural distaste for the machinations which are so often met in the court room practice.

However, there were several cases of note whose substance are available in the reports, which can scarcely go without mention even in so short a sketch.

The case of *Anheuser-Busch Brewing Ass'n v. Fred Miller Brewing Co.*,[3] involved the question whether the name "Budweiser," which in the public mind had become associated with the product of Anheuser-Busch Brewing Association and under which the latter had built up an extensive business, might be used by another competing brewer where such use was unaccompanied by any other imitation. That case had a profound influence upon the later development of the law of unfair competition, establishing that geographical names, although not capable of registration as trademarks, could acquire secondary significance in connection with their use to designate a particular product, which would be protected so as to prevent fraud or imposition upon the buying public.[4] To Mr. Nagel is attributable the conception of the now familiar, but then novel, principle announced by the case. As in the case of most new principles, unsupported by precedent, it met in the first instance with expressions of doubt, even by those whom he had associated with him, but its advocacy was an example of that faith which he had

3. (C. C. E. D. Wis. 1898) 87 Fed. 864.
4. See Note (1908) 12 L. R. A. (N. S.) 729, 733; Note (1910) 26 L. R. A. (N. S.) 73, 77.

in the elasticity of the law reacting under the influence of ethical proprieties and its continuous readjustment to new conditions. Characteristic of Mr. Nagel's personal deference, his name does not appear of record in the case,—since it had arisen in a foreign jurisdiction, he declined to have his name appear with that of local counsel.

Shortly afterwards came the litigation in which Mr. Nagel represented the Cherokee Nation of Indians, in its assertion of claims against the Government under a treaty of removal between the United States and the Cherokee Nation made in 1838.[5] In this litigation he was successful in obtaining for groups of the Nation large sums of money which had been promised for the removal of members of the Nation from their original homes in Southeastern United States to Indian Territory. The situation of these Indians, deprived for many years of the enjoyment of their treaty rights as a result of governmental red tape, was one which had an undoubted appeal to Mr. Nagel's interest.

When already over the age of eighty, Mr. Nagel again appeared in the Supreme Court of the United States in *International Shoe Co. v. Federal Trade Commission.*[6] The Federal Trade Commission had proceeded against the Shoe Company for violation of the Clayton Act in purchasing the capital stock of a moribund shoe company, the McElwain Company, located on the eastern seaboard. It had been shown that in fact the purchaser had produced a product differing as to quality and price from that of the McElwain Company, and that the markets of the two companies were in different sections of the country and in different types of communities. The McElwain Company, being in failing circumstances would, but for the transaction, have been eliminated as a factor in competition. Yet the Federal Trade Commission had found that the effect of the acquisition was to lessen substantially competition and ordered divestiture. The Circuit Court of Appeals had affirmed the order of the Commission and the Supreme Court had in the first instance declined to take jurisdiction. Upon motion for rehearing the Supreme Court finally took jurisdiction. The record and briefs were voluminous, and the legal issues which the Government came prepared to argue were many and involved. Then, as one Govern-

5. United States v. Cherokee Nation (1906) 202 U. S. 101.
6. (1930) 280 U. S. 291.

ment attorney is reported to have said,—"A dignified old gentleman arose and told a story." That story in its essential equities was so compelling that it resulted in a complete reversal by the Supreme Court of the rulings below.

Remarkable as may be some of Mr. Nagel's rare appearances in the court room, the emphasis, in an appreciation of his services as a lawyer, justly belongs upon his work as a counsellor, rather than upon that as a barrister. In the office it was recurrently his function to point the way when the issue seemed beclouded or the proper policy to be pursued seemed to be in doubt. Unfortunately, such a contribution, while it suffers in dignity and value by no comparison, lends itself neither to monumentalizing nor to adequate exposition. This is true because the services, for the most part, would take on meaning only in relationship to situations difficult, if not incapable, of reconstruction. Moreover the element of confidence attached to much of the work of the counsellor renders it, in a peculiar sense, the exclusive property of the client. The most that can or may be here attempted is of necessity closely limited to generalities.

Although the nature of the talents which make for a man's success often defy analysis, certain powers might, in Mr. Nagel's case, have been clearly discerned,—the powers to perceive the true issues in a case and to see them in their larger perspective.

The power to analyze the facts of the case and to find in them the real issue,—the issue whose moral implications could lead only to one result or conclusion,—existed in him in a remarkable degree. To the assimilation of the facts of a case he gave patience and receptiveness. His was not an approach in which tentative conclusions, invoked by the application of this or that principle of law, are drawn and altered, but rather an approach characterized by complete suspension of judgment until all available facts were comprehended. The case became formulated in the suggestion of an issue (often interposed in the form of a question), which might previously have been overlooked, but which in his way of putting it assumed undoubted persuasiveness.

The method, in a word, was clearly empirical. The facts must be sifted, the issues reduced to simplicity, and then the solution followed as of course from the application of a few principles of law. The method was not characterized by the bringing to

bear upon the problem of multiple abstract principles of law. In fact his disparagement of the thought that a case could have many dominant abstract principles involved is well illustrated by his comment upon his meeting a learned practitioner absorbed in the intricacies of his case. The man had answered, in reply to a question as to how he was progressing, that he had eleven reasons why the Court could not do other than decide in his favor. Mr. Nagel commented, "I am afraid you will lose." That remark was far from a disparagement of diligence, for no man knew better than the speaker a lawyer's anxiety for his case, nor was capable of a greater dedication to the task.

The striving to discern, to grasp and to throw into relief the morally appealing issue derived from an abiding conviction that, however much the practical function of the law demanded its reconciliation with administrative expediency on the one hand and economic and social needs on the other, its guiding forces were moral. By this was meant, not that the law evolved directly in conformity with the lofty moral standards of the idealist, but that it developed under the influence of that "sense of propriety upon which every community insists for itself."[7] Lord Haldane referred to such force as that of *"Sittlichkeit."* The conviction in a sense finds counterpart in the observation that the judicial process first selects the right and wrong and then rationalizes it.

Many of the views expressed by Mr. Nagel hark back upon his underlying philosophy of the growth of the law—for instance, the view that a statute is bound to fail if it provides a rule of action which the public cannot be compelled or is unwilling to adopt, or the view that the English judges were great because "they were able to raise the standard of conduct to the highest point that the people would stand."[8]

However, what concerns us the most here is that his philosophy was a living thing, and furnished a guiding principle for the day's work. With such orientation he stood in contrast not only with those who subordinated the moral element to precedent, but also with those who subordinated it to economic or social philosophy. Both forgot and forget that the end of law is a moral one. He never forgot that, nor could have been fairly

7. 1 Heller, *Charles Nagel—Speeches and Writings, 1900-1928* (1931) 43-44.
8. Id. at 84.

accused of abandoning the respect for tradition which occasioned his entry into the profession or of abhorring adjustments to a changing world.

Probably the facility for bringing the real moral issue to the fore motivated the incident about to be told. Many years ago one of our esteemed citizens, prosecuted for alleged participation in a bribery of public officials, sought to employ Mr. Nagel to defend him. Mr. Nagel listened to the story, and then modestly said, "You know, I'm not a criminal lawyer." The reply was, "But, I'm not a criminal." Upon trial of the case, the Court directed a verdict of acquittal. It may be imagined that there were instances of the reverse,—where a prospective client, with none too good a conscience, checked an impulse to come to Mr. Nagel. But of those instances we will probably never know.

To his early self-development, to his diversified experience, and to the breadth of his interests may be attributed his power to see a problem in deeper perspective, and to visualize the ultimate consequences of an act. There are those who struggle for an immediate principle to its vindication, and then find that with their eyes on the immediate rather than the ultimate, they have won victories without accomplishment. Sometimes such a struggle is motivated by vindictiveness or obstinacy. More often it is the unhappy manifestation of failing to perceive a situation before it has arisen. In Mr. Nagel the power of such perception was a rare gift.

To some will be suggested by these remarks the somewhat typical picture of the man sitting at his desk in the midst of a group, scarcely participating in the conversation passing to and fro, alternating his apparent attention between the Mississippi River and a bit of licorice being broken on an ever present mortar. In the developing heat of the conference, someone might determine upon a course of action or raise an issue with another. Time after time in such a conference, when the parties had spoken, there would come from Mr. Nagel, in quiet voice, a simple question, and then there would be a lull, in which the parties came to realize a shortsightedness in their course of action or ultimate futility in their disagreements.

Whether as barrister or counsellor the attitude was always thoughtful and serious,—so much so that many missed the essential truth that he could rejoice in a circus, or make a companion

of a child. The seriousness with which he approached a task may be appreciated from his confession that he never made a speech not preceded by hours of apprehension and begun with tremor. Nor did he ever seek to overcome the symptoms,—they were to him the normal symptoms of an earnest man.

Whether as barrister or as counsellor he spoke with conviction,—the objective conviction of his cause,—but viewed his accomplishment with modesty.

Throughout his life Mr. Nagel stood as an example of a lawyer who placed his professional calling above personal gain, a conception which was perhaps first inculcated by the precedent of his father, who as a country doctor, alone of his profession in a large radius of plain, fulfilled many a mission without personal gain, and which matured in Mr. Nagel's studies of great lawyers of the more distant past. Whatever the origin of the conception, it was evidenced by sincere efforts, particularly in his later life, on behalf of people in trouble whose limited means made the employment of any lawyer prohibitive. Often he may have been seen devoting hours of time to such a person. Often, of course, his known willingness made him the object of imposition.

More basic principles of professional ethics in the relationship of lawyer and client need not be discussed in the case of a man who in fact went to quixotic extremes to avoid a position that might seem equivocal or a gain that might seem improper. Most of us will smile in affectionate memory when we recall that he kept meticulous account of what he received by way of salary as President of the City Council, and saw to it that he spent not less than the amount so received for pictures to be given to a public museum; that he refused to charge travelling expenses, and that in at least one known instance he wanted to take into consideration, in fixing a fee, personal gratification derived from a task well done.

In public and professional life, he espoused the sanctity of individual rights, a doctrine suffering from eclipse at the present time, when it is popular to prefix with "rugged" the term "individualism" and to abandon it as thereby condemned. But it represents a trend of centuries, that struggle of the individual, when not impinging upon the rights of others, to live freely and fully, and who may say that, when calm is restored, those who