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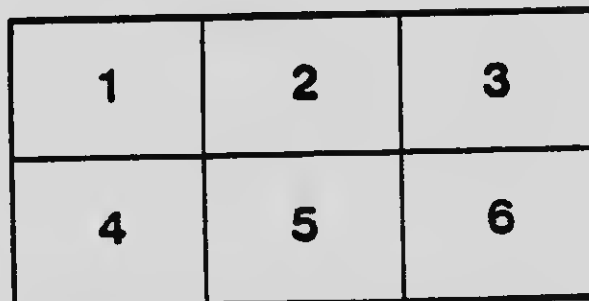
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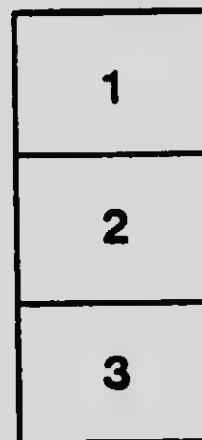
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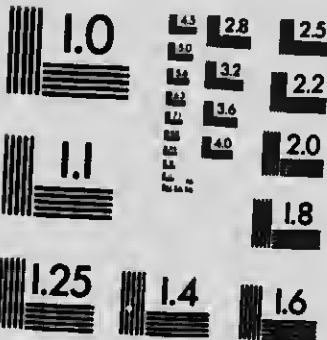
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THE RELATION BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE CANADIAN GOVERNMENT

ADAM SHORTT

Ottawa, Canada

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THE RELATION BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE CANADIAN GOVERNMENT

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Ottawa, Canada

As is well known, the Canadian system of government belongs to the British type of responsible parliamentary government in which there is the most intimate connection between the legislative and executive functions, and in which also the constitution is a flexible combination of laws and usages, many of the latter more hindering, and in some cases even more unalterable than the laws. However, the Canadian system of government was not always of this character, and even yet it differs in many more or less essential features from the central type. In the first place, the line of historic arrival in Canada, while presenting certain interesting though unconscious parallels with the development of the mother of parliaments, yet differs materially from the long, slow and tentative process by which the British government and its constitutional mechanism were worked out. In the second place, the colony of Canada, after its conquest from France, was first of all a definite dependency of the mother country, to which constitutional privileges were granted from time to time, and later the Dominion of Canada was a combination of several practically independent provinces and territories in varying degrees of economic and political realization. This involved a written constitution apportioning and defining the divided sovereignty assigned to the Dominion and the provinces, leaving that element of sovereignty which pertains to the mother country indefinite

and dehatable, a tide of imperial influence which ebbs and flows from day to day, and is subject to the high and neap tides of imperial sentiment.

Notwithstanding, however, the important differences between the written constitution of Canada and the unwritten constitution of the mother country, and the very considerable differences in the customs and usages of the constitution, due to different historical and local conditions, the relations between the legislative and executive functions are very similar in both countries.

To understand the present situation of the Canadian government, one must trace it, in outline at least, from that condition of autocracy whereunder all the factors of government, the legislative, executive and judicial, were combined in one sovereign authority imposed upon the colony from without, through the gradual concession of powers and privileges, under a constitutional government of checks and balances, to the final introduction of responsible parliamentary government in domestic affairs, wherein the system of checks and balances was abandoned, as regards the relations between the legislative and executive branches, and a government of men rather than of over-riding laws was established.

Canada, under the French régime, was a pure autocracy, built on a substratum of feudal institutions and customs imported from France, and which furnished the foundations of that colonial system upon which the French kings and their representatives in the colony might freely innovate. Laws were made and repealed in a very arbitrary fashion as the colony was administered. This naturally led to many inconsistencies and conflicts in law and authority. But the unlimited right of innovation and interference which brought about these difficulties was equally available for their adjustment, even though this involved the creating of new difficulties.

After the conquest and treaty of 1763, a British autocracy, with equal powers but more restrained in their execution, succeeded. Soon finding, however, that the French colonial system gave the British authorities more control than their own system, and with an eye to the increasing difficulties with the English

colonies to the south, the British government restored the French laws and institutions, under the Quebec act of 1774. But when, at the close of the American Revolution, the British government had to provide for many of the Loyalists in Canada, they found it difficult to persuade them that a fitting reward for their adherence to the British laws and institutions in the revolted colonies was their transfer to the Canadian wilds, where they must forego all British civil laws and institutions and become the feudal subjects of an English Bourbon. To avoid the danger of a second revolution on the part of the Loyalists, the constitutional act of 1791 was passed, dividing Canada into two provinces and adding to the previous autocratic system of an appointed governor and council, the democratic feature of a representative house of assembly. The French element being in the ascendency in Lower Canada retained the French system of laws and institutions there, whereas the British element in Upper Canada adopted the British laws and institutions. From this time Canada included two nationalities with their respective institutions and ideals.

Under the system of checks and balances between the representative assembly with legislative powers, the appointed governor and legislative council, also with legislative powers, and the governor and executive council with administrative powers, the Canadian provincial government had all the possibilities of an excellent conflict of authority without any definite location of responsibility. As these latent powers gradually revealed themselves in practice they were worked with great industry and zeal. The power of the purse, usually relied upon by democratic assemblies to promote sweet reasonableness on the part of executive governments, was only very partially within the control of the Canadian assemblies, inasmuch as earlier imperial laws and provincial ordinances had provided certain permanent revenues for the executive government, which, together with the advances made by the home government through the military chest, enabled the beleaguered executive to withstand a siege of considerable duration. Incidentally, many urgent needs of the country, in which the members of the assemblies were vitally interested, were also paralyzed for lack of funds.

Many were the devices planned by the assembly, when passing appropriations, to limit them to specific objects and services, in order to prevent their being diverted by the executive to the relief of those sections of the service which the assembly were endeavouring to starve with a view to bringing the executive government to terms.

Regarded from the vantage ground of the present, one cannot say that the struggle for responsible government in Canada was a struggle for progressive measures. It was simply a struggle for the control of the executive government by the house of assembly. The members of the assembly had little conception of all that was involved in such a change. It is true that even at present the party in opposition, not having to maintain its power by a well disciplined majority, may allow itself considerable freedom in discussion and laxity of organization. Nevertheless, there is no uncertainty on the part of its leaders as to what is involved on assuming the responsibilities of office. During the period of the struggle for responsible government, however, there was the most nebulous conception as to how the administration was to be conducted, should the control of the government pass from the governor to the legislature. Apparently what was contemplated by the more clear-sighted of those who were clamoring for responsible government before 1840, was not the British form of cabinet government, which was wholly unknown in Canada, and frankly regarded as impossible under the colonial status, but something more nearly akin to the American system than that which then prevailed. It involved the rendering of the legislative council an elective body, and thus amenable to popular sentiment. It involved also the continuance of the executive government as then constituted under the control of the governor, but, in all matters of domestic policy, subject to the general sanction of the legislature, through the power of the latter to grant or withhold supplies. In matters of legislation the governor might continue to have a limited veto, but, without the support of the legislative council and an independent source of revenue, it was reasonably assumed that he would be sparing in the use of it. There was little enthusiasm for the cabinet form

of government, with certain members of the legislature as members of the executive council. The assembly had already enjoyed that experience to a limited extent, but it had not proved very encouraging, inasmuch as the members of the executive chosen from the assembly had invariably employed their influence in the assembly to promote the interests of the executive, instead of using their influence with the governor to promote the objects of the assembly. The assembly, in conjunction with a reformed legislative council amenable to the people, much preferred, as a means of influencing the policy of the executive, the control of the supplies, to any harboring of executive officers in its midst.

In all practical discussion of responsible government, involving the popular control of both sections of the legislature and in consequence the virtual control of the executive through the power of the purse, the inevitable question always emerged, what is to become of the governor as head of the executive administration, and of his veto power on legislation, and ultimately of the British connection. The representative of the crown and of the imperial government could not become a mere servant of the legislature, under penalty of being starved out.

Had the British dominions in North America been fairly homogeneous in population and more compact geographically, the solution of the problem might have been rather obvious. But the maritime provinces were not prepared to unite with Canada and could not have effectively done so; while to have severed Canada from Britain, whether as one or two provinces, would have inevitably resulted in civil war between the French and English elements, and annexation to the United States as the only solution for either side. But while the French were not averse to separation from Britain, the all-powerful clerical element was even more averse than the English section to any prospect of annexation to the United States. They very naturally doubted the possibility of retaining their exceptional civil and religious powers and privileges within the American Union. Canada therefore must remain a British province, even under the penalty of more or less continual deadlock between the popular assembly and the executive government.

But, if there was no hopeful solution in sight from the Canadian side, there might be from Britain, and it was ultimately from this direction that relief came. Lord Durham's report of 1838, presenting an interesting and striking picture of the impasse at which Canada had arrived, and indicating the necessity for some change which would afford the people more power in their domestic affairs, came at the psychological moment, following a rather serious rebellion in Lower Canada and an abortive one in Upper Canada. The British government, realizing that something decisive must be attempted, in spite of the vigorous protests of practically all the imperialistic elements in both Britain and Canada, decided to attempt the bridging of the gap between the legislative and executive branches of the Canadian government. Convinced that this must be accompanied by some remedy for the fundamental mistake of the past in dividing Canada on racial lines, the British government passed an act for the reunion of Upper and Lower Canada into one province. Recognizing in this the likelihood of a British instead of a dual national future for the country, the French section opposed the measure most strenuously, and when it was passed adopted as its policy in the first legislature the repeal of the union. This naturally prevented the French members being admitted to that share in the executive government to which their numbers and influence would otherwise have entitled them, and to which they were subsequently admitted, when the policy of disrupting the union was largely abandoned. The ultra-conservative party in Upper Canada also strongly opposed the union on account of the professed intention of the British government to meet, as far as possible, the aspirations of the popular party for a voice in the executive government.

The first governor of United Canada had, therefore, to find, if possible, a practical solution for the new Canadian problem which confronted him, and which involved, on the one hand, the attempt to maintain a united Canada with nearly half the population bent on its disruption, and, on the other, an attempt to construct an executive government whose personnel and policy would satisfy the majority of the popular representatives in the

assembly, prove acceptable to the legislative council, and at the same time meet the approval of the home government. Such was the task entrusted to Lord Sydenham. In addition to a fortunate combination of personal qualities, he was the first Canadian governor who was a trained politician, a member of the British parliament and a member of the British cabinet. Practically all of the imperialists in Britain and in the colony itself, regarded the parliamentary system of cabinet government as quite impossible of operation in the colonies. It was held to be indispensable that the executive government should hold itself aloof from the popular branch of the legislature, and that some such system of distinct powers with mutual checks and balances as that of the United States was the only workable one consistent with the retention of the colony as a part of the British Empire. All these predictions, however, Lord Sydenham completely belied, for he boldly introduced the British parliamentary system into Canada, thus completely revolutionizing the previous system of colonial government. This he accomplished by personally undertaking its introduction, directly combining in himself the duties of governor-general, prime minister, and party leader. He initiated his personally selected cabinet into the mysteries of cabinet government, dependent for its life upon retaining the support of a majority of the legislature including the assembly and the council. To accomplish this, he organized and maintained for the first time in Canada a government party, of which he was the recognized leader and upon which he depended for getting his numerous and important bills through the legislature, for voting the necessary supplies, and supporting his executive government.

It must be admitted that the government party was dependent largely upon the personality of the governor for its numerical strength and cohesion. Nevertheless on his untimely death, he left to his successor, Sir Charles Bagot, a fairly united government party, to which Bagot was able to add a certain French element which had agreed to abandon the policy of disrupting the union. Of course the maintenance of an organized government party led to the formation of an opposition party on fairly definite lines. This was evidenced when Lord Metcalfe, disagreeing with the

leaders of the government left to him by Bagot, virtually accepted the leadership of the opposition and defeated the party organized by Sydenham and Bagot. He formed a new government which held office until the arrival of Lord Elgin in 1847. By this time the two parties were fairly well defined and the essentials of party government sufficiently well organized. The party formed by Lord Sydenham and reorganized by Bagot had naturally gravitated to the Liberal side, while the Metcalfe party, taking its color from its leader, as naturally gravitated to the Conservative side.

When Lord Elgin took over the government, finding the political parties sufficiently organized, and not being particularly enamoured of the party then in power, conditions were at a convenient stage for his adopting a neutral attitude towards both parties. He therefore declared that he would accept as his ministers the leaders of any party able to secure the support of the popular majority. This new attitude on the part of the governor was bitterly resented by the members of the government then in power, who expected him to continue the role of party leader as well as of governor-general. Shortly afterwards at the general election the Metcalfe or Conservative party was decisively defeated, the Liberal party being returned to power. The governor-general was thus able to practically demonstrate the validity of his position. He freely accepted the change of government with Messrs Baldwin and Lafontaine jointly assuming the functions of the premiership and party leadership, while Lord Elgin confined himself to the functions of governor-general. Thus from 1848 the Canadian system first definitely assumed its present form, the governor taking virtually the same position in the Canadian parliamentary system as the sovereign does in that of Britain.

By simply standing aloof from the strife of parties, the governor threw on his ministers the whole responsibility of the government, both legislative and executive. While accepting their advice and sanctioning their program, so long as they had the confidence and support of the majority of the legislature, he yet declined to fight their battles or shield them from the consequences of adverse

criticism resulting in adverse votes. One of the most important and far-reaching consequences of the change effected from Sydenham to Elgin, was the fact that the executive government, including the whole civil service, found itself transferred from the service and protection of the governor-general, to the service and disposal of the cabinet composed of the party leaders, who were chosen more frequently perhaps for their political power and influence than for their administrative experience and capacity. Favoritism of a very pronounced character had existed under previous administrations, but it was a social and personal favoritism as contrasted with one dictated by party considerations and the necessity for maintaining a political majority. Further interesting consequences resulted from the fact that the party leaders, who now became the heads of the different sections of the executive government, did not necessarily follow common standards in the detailed administration of their departments. So long as they agreed on the essentials of the party program, they might assume a considerable range of freedom in departmental administration, including the character of appointments and promotions.

It is to be noted that the field of Canadian politics to which the responsible parliamentary system applied, did not as yet extend beyond the strict confines of domestic affairs. Foreign relations and the regulation of external trade were still dealt with by the home government, subject, of course, to such influences as petitions and addresses from colonial interests might exercise. At the very time, however, when Lord Elgin was placing the keystone on the structure whose foundations Lord Sydenham had laid, questions of fiscal tariffs, trade relations with Britain and the United States, and the reconstruction of the navigation acts, were profoundly agitating the Canadian people and were the subjects of endless petitions to the crown and parliament of Britain, on the part of both houses of the legislature, the executive government and the leading commercial interests. In consequence, from this time forward, the definition of domestic affairs has been steadily widening, nor is the end even yet in sight.

As regards the actual relations of the legislative and executive features of the Canadian government at the present time, certain fundamental considerations are to be recognized. In the first place, the Canadian system is a thoroughly democratic one, exhibiting all the strength and most of the weaknesses of such a government. Democratic bodies extending over considerable areas are singularly inarticulate. They are apt to render verdicts on simple isolated policies, or more commonly on general administrations with a certain rough vigour, but they cannot give clear expression to their wishes in advance. It is, therefore, the function of the party leaders, after listening to a babel of voices, public and private, corporate and personal, to carefully balance, analyse and estimate them, and to piece together from these sporadic symptoms of the popular will a policy of legislation and administration which will admit of being successfully commended to public support. Rival policies are thus constantly commended to the public, and that is the most successful form of democracy where the public will can be most constantly and thoroughly tested as to its acceptance or rejection of these rival policies, not only in their inception but, where enacted, during the whole course of their execution.

Where responsibility for the framing of public measures, for their financing from the public treasury, and for their practical realization, is divided between different governmental bodies and even between different political parties, it is impossible to fix responsibility directly, rapidly, and effectively. It is perhaps the chief merit of the Canadian system that the same body, the party government for the time in power, has all these functions to perform. It therefore can neither escape responsibility for any particular measure or policy, nor prevent the accumulation of responsibility for all that transpires both in the legislature and the administration of the country during its term of office. Nor can the party as a whole escape this responsibility, for the power of the cabinet is derived entirely from the support which it receives from the rank and file of the party members constituting the majority of the house of commons. Any defection, therefore, among the supporters of the government is at once a public

indication of doubt or disapproval of the government's course and the nature and importance of the interests, or of the sections of country which the disaffected members represent, are the measure of the importance of their criticism upon the government. If, however, the defection is serious enough to destroy the government majority in the house, the cabinet goes out of office and the defeat of the cabinet means the defeat of the whole party for the time being.

It is not necessary, therefore, to await a general election, at the end of a given period, to test Canadian public opinion. At any time circumstances may arise, accompanied by various manifestations of popular sentiment, forcing the government to submit its policy to the people for their verdict. Or the government may lose its support in the house of commons and be defeated without a specific appeal to the people at large. In the latter case, with the consent of the governor-general the cabinet may appeal to the people as against their representatives in parliament. But without any such decisive measures, which occur only at rare intervals and on special issues, the executive government, being held responsible for every law passed and for all acts of administration, is constantly on trial before the people. Its parliamentary supporters are equally on trial, though in a somewhat minor degree. Every member of parliament is a touchstone of public opinion in his district and if a supporter of the government he is not backward in admonishing it as to any unpopular line of action which it is taking. The very government itself may be divided in opinion on this or that policy. These differences may be due either to personal convictions or to the popular sentiment of the districts which the members of government represent. If they can compromise their differences well and good, but if not, more or less radical reconstruction of the cabinet may be necessary. Thus a continual process of adjustment to public opinion is going on, alike in the ranks of the government and of the opposition. It is in this connection that the Canadian parliamentary system provides a very effective barometer of public opinion and is therefore a very effective instrument of democracy.

Now it does not follow, of course, that only the higher and more worthy aspects of public opinion are alone effective in this process of parliamentary government. The very effectiveness of the Canadian system of government as a democratic instrument renders it capable of expressing the worst as well as the best elements of public life. Indeed the very necessity for the executive government to maintain itself in power through the support of a majority of the members of the legislature, while it largely frees it from the control of a sinister element limited in numbers but powerful in instruments of corruption, at the same time forces the government, especially when its majority is narrow, to employ the greater part of its political and administrative influence to maintain itself in power. It is thus often sorely tempted to forego the higher and more far-reaching interests of the country and of itself in favor of local, special and temporal interests, calculated to carry constituencies individually, rather than by appeals on wider and more national grounds. In this respect the calibre of the ministry of the day is an important factor in deciding which of these avenues to popular favour and support shall be followed. The majority of an Anglo-Saxon democracy may be made up through many different combinations of its constituent elements. Out of the same people may be built up a majority in support of a narrow, sectional and potentially corrupt administration, or in support of a more public spirited wide-visioned and normally incorruptible administration. That the majority of the electorate may be so educated, organized, and accustomed for a number of years, as to accept one or the other of these types for a considerable period of time is unquestionable.

Such being the latent frailties and virtues of Canadian democracy, the chief factor of success in the Canadian system of parliamentary government is the concentration of power and responsibility. In the first place this means the concentration of responsibility at any given time upon one political party, the party in power. Within the party in power there is a concentration of responsibility and control in the hands of the cabinet, or executive government, and within the cabinet there is an increasing

accumulation of power and responsibility in the hands of the prime minister. This is due to no thirst for power on the part of recent prime ministers. It is forced upon them to a greater extent than they altogether relish. Deputations seeking new legislation, or urging the enlargement of old or the assumption of new administrative functions, must see the prime minister, under the conviction that his will is the last word in accepting or rejecting amendments to the government policy. It is the premier who has the right to select the personnel of his cabinet, and, therefore, he is held responsible for their actions. The cabinet, apart from the few advisory members without portfolios, conduct the whole administration of the country through the various departments, of which they are the chiefs. In virtue of their command of the national policy, they require to control the legislative machinery as well. They may not originate all legislation, but before new legislation of any importance can be introduced with any certainty of becoming law, it must be approved and adopted by the cabinet as a government measure. Naturally, the cabinet will adopt as government measures only such bills as are likely to meet with public favour, and thus add to their political prestige and augment their political capital. These are the conditions also of enlisting the support of the party both within and without parliament and thus ensuring the passing of Government bills. The government may, of course, permit considerable legislation of a private nature, not involving government expenditure, to go forward under the direction of individual members, but it must keep a very close watch on all such bills, for, if anything of an objectionable nature slips through parliament as a private bill, the whole responsibility is laid at the door of the government, inasmuch as, in virtue of its command of the government majority in the house, it had the power to prevent the passing of objectionable measures. Nor, as experience has repeatedly proved, will it avail the government to show that a private measure was passed by a combination of opposition and government votes, since the government had the power to make the issue a government question, when its followers would have had the option of defeating the measure or defeating

the government. It is safe to say that they would never accept the latter alternative on a measure which was not of primary importance and could not be fully justified before the country. This will account for the limited volume and generally restrained character of the legislation, which emanates from the Canadian parliament, and indeed from most of the Canadian legislatures. And inasmuch as the same body which shapes and promotes the legislation has also to undertake the enforcement and administration of it, not many Canadian acts are permitted to become dead letters or mere means for clogging the wheels of justice and administration. To this in turn may be attributed the very general respect for law and justice throughout Canada, and the lack of any definite tendency on the part of the people to take the law into their own hands, whether by the milder and more decorous avenue of the referendum and recall, or the less patient methods of lynching and mob violence.

From what has been said it will be recognized that it is the executive branch of government, as represented by the prime minister and his cabinet, which controls the legislative branch. And yet it would not be fair to say that this control is one of dictation: it is simply one of leadership wherein the followers have the latent power to desert or depose their leaders. In addition to the constant interchange of views between the leaders and their supporters in both political parties, formal party conferences take place from time to time during the sessions of parliament. In these private gatherings, known as party caucuses, the more important features of party policy are discussed. In the case of the government caucus, the ministers explain and defend their proposed measures and departmental administration, where the latter may be called in question, and receive such commendation or admonition as the private members of the party feel moved to deliver. But whatever curtain lectures may be administered in these family gatherings the party appears in public, and especially in the presence of its political opponents, as a cheerful and united family wherein discipline is well maintained.

It may be asked whether in the face of this concentration of

power and responsibility in the hands of the prime minister and his cabinet in control of a well disciplined majority of government supporters, the opposition is reduced to mere futility. In reply, one may say that, while the party in opposition is entirely futile as regards administrative authority, or even the passing of laws, it is nevertheless a far more important factor in both legislation and administration than if sections of it had the power, by log-rolling combinations with various elements of the government party, to secure the passage of certain measures for the acquiring of private or corporate privileges concerning which the parties were not pledged before the country. The very monopoly of responsibility by the party in power, with the consequent rewards of credit and discredit, gives to the opposition corresponding advantages and disadvantages, the former of which enable it to be most effective in criticism of the government, at least on all matters which appeal to the public interest. The opposition can effectively check the mistakes, inefficiencies and tendencies to corruption on the part of the government, if it takes the pains to do so. In fact, given the persistent pressure put upon the government by the forces of selfishness, whether individual, corporate, or sectional, in all its shades from enterprising self-reliance to cynical and unblushing corruption, the safety of the government and of the country depends more upon the vigilance of the opposition than upon the good intentions of the government supporters. The prime minister is often more indebted to a vigorous, alert and intelligent opposition for the maintenance of harmony in the cabinet and discipline among his followers, than to the domestic resources of his party outside of his own personality. But the assistance from the opposition is not merely in the line of adverse criticism. Certain of its members contribute valuable constructive features, gladly accepted and applied by the wiser ministers, to the improvement of their departments and the enhancement of their reputations. Indeed, the readiness of far-sighted ministers to accept and apply the more valuable suggestions of the opposition, is not always appreciated by the ministerial critics, who frequently present the suggestions as alternative propositions, which, it is hoped, may

be approved by the public and aid in their return to power. When accepted by the government, however, this advantage is lost and the credit goes to the wrong side of the nation's account with the parties. This merely serves to indicate that the motives of the political parties in their respective contributions to the public welfare are apt to be of a mixed nature. All that I am disposed to claim for the Canadian system of party government, with its increasing concentration of responsibility, is that to a larger extent than in most other systems it forces the party politician, with his mixed motives, including, on the lower levels, purely selfish interests, and in the higher regions personal ambitions of a more or less laudable character, to find that the safest and surest road to success is along the line of service most acceptable to the public.

