der that opinions differ on the subject of prosperity.

There is increasing evidence from many quarters of the growing strength of the fiscal movement which has been officially inaugurated in Colorado by the "Bucklin bill," and which is known there as the Australasian system of taxation. One of the latest of these movements is reported from New Jersey. A meeting called by well-known residents of the eastern and northern part of the state is announced to be held at Belleville on the 15th. The call is addressed to all citizens of the state who believe in home rule in taxation, regardless of what form or method of taxation they prefer. Lawson Purdy, of the New York Tax Reform association, is to address the meeting, and its specific object is to form a New Jersey Tax Reform association. That this meeting is no tentative affair is indicated by the fact that only a few weeks ago the citizens of Franklin township, in Essex county (the Newark county), at their annual town meeting, unanimously adopted a report of the township committee which urges upon the legislature the establishment of local option in taxation, supporting the recommendation with the argument that it—

would permit the tax payers of each taxing district to decide for themselves which class or classes of property should be taxed and would make it possible to grant any desired exemption for the purpose of attracting capital and business enterprises. The advantages of this proposed method of securing tax reform are becoming universally recognized, the same having recently received the endorsement of the New York chamber of commerce, the League of American Municipalities (at its convention in Charleston, December, 1900), the New York state commerce convention (Syracuse, June 6, 1900) and the governor of Colorado in his message to the legislature.

The same report recommended the Purdy plan of equalizing state taxes by mathematical calculation as a substitute for the present unsatisfactory method of investing boards of equalization with discretionary authority.

Moses Hallett, dean of the law faculty of the University of Colorado, and federal judge for that state, faithfully described the kind of "progress" this nation is making under the spur of world-power enthusiasts and money-power devotees, when, in his address to the graduating class of the law school he said:

The spectacle presented is that of a nation in rebellion against absolute power; afterward a government established in protest against absolute power and professing to rule only by the consent of the people and disclaiming authority in other lands and over other people. Such were the United States of America at the end of the eighteenth century. One hundred years later the same nation and government, in total disregard of the principle on which it was established, repudiating every declaration of authority upon which it came into power, with shameless perfidy takes into its possession other lands and peoples with intent to rule them absolutely and with the power of the sword.

"Famous western novelists write the news for the Chicago American." This is a quotation from an advertisement. Novelists write the news! That explains the peculiar quality of the American's news department.

AN ANALYSIS OF THE SUPREME COURT DECISIONS IN THE PUERTO RICO CASES.

The text of the opinions of the judges in the Puerto Rico cases having now been published in some detail, an estimate is possible, not only of the scope of the decisions as precedents, but also of the leanings of the judges with reference to the McKinley colonial policy, and the probabilities, consequently, as to the action of the court in future cases involving that policy.

I

In determining the scope of a court decision as a precedent, the opinions of the judges, that is, the reasons which they present in support of their conclusions, are not essential. Though they throw light upon the question, they may be no more valuable for that purpose than the opinion of a text writer. They are not themselves authoritative. The decision (including, of course, the reasons upon which it rests necessarily), and not the particular line of reasoning which the judges advance, is what constitutes the precedent. A decision reaches no farther, therefore, as a precedent, than to cases the facts of which necessarily come within the same principle. It is not to be extended to other sets of facts merely because the opinions of the judges might warrant the extension. In other words, the opinions by which judges undertake to explain or justify their votes upon deciding a case, are something entirely different from the decision. The opinions are only the explanations of individual judges. They are nothing more even when all the judges of the court concur. But the decision is the official act of the court itself, applying to a given set of facts principles of law which are presumed always to have existed, and which, for the sake of uniformity if for nothing else, ought to be similarly applied to similar cases in the future.

With reference to the Puerto Rico cases, then, the first thing to consider is not what the judges said, but what the court officially and authoritatively decided. It was that determination that disposed of the particular cases, and which, as a precedent, should dispose of future cases that turn upon the same general facts or facts substantially analogous.

To ascertain what these decisions were, we must do two things. In the first place we must marshal the material facts of the cases; in the second, we must note the nature of the judgment with reference to those facts.

II.

There were two cases. One was decided against the government; the other was decided in its favor. The case in which the court decided against the government is known as the De Lima case. That in which it decided in the government's favor is known as the Downes case.

The De Lima case was a law suit brought by an importer against a custom house collector to recover tariff duties exacted of and paid by him upon an importation of goods from Puerto Rico into a state of the American union.

The duties had been collected under the Dingley tariff act, upon the theory that, with reference to tariff

laws, Puerto Rico remained a foreign country notwithstanding the treaty with Spain which ceded it to the United States. They had been collected after the ratification of that treaty, but prior to the Foraker act setting up in Puerto Rico a government under American control. The question at issue, therefore, stated in general terms, was this: After the acquisition by treaty of foreign territory by the United States, but before congress legislates with reference thereto, are imports from that territory subject to duties under existing tariff laws imposing duties upon imports from foreign countries?

By rendering judgment for the repayment to the importer of the duties he had been compelled to pay, the court decided that question in the negative. As matter of precedent, therefore, it is now the law that acts of congress imposing tariff duties upon imports from foreign countries cease to operate with reference to foreign territory acquired by treaty, immediately upon the ratification of the treaty of cession. Reducing this precedent to its most comprehensive terms, it is a declaration by the supreme court of the legal principle that, with reference to existing customs tariff laws, the ratification of treaties of cession instantly and of its own force divests the ceded territory of its foreign character. Whether it divests it of that character in other and distinguishable respects, this case does not decide.

The Downes case, like the De Lima case, was a law suit brought by an importer against a custom house collector to recover tariff duties exacted of and paid by him upon an importation of goods from Puerto Rico into a state of the American union. But in the Downes case, the duties had not been collected under the Dingley act. Though collected after the ratification of the treaty, as in the De Lima case, they were not collected until after the Foraker act, and were in accordance with its provisions.

An essentially different issue from that in the De Lima case was presented, therefore, by the Downes case. The former case turned upon the question of the continued application of an existing tariff statute to a country to which it once constitutionally applied, after that country has been acquired by treaty. The latter turned upon the question of the constitutionality of so much of a statute organizing the territority acquired, as imposes tariff duties upon goods coming from that territory into a state of the union.

The constitutional clause in question in the Downes case was part of section 8 of article I., the part which, after empowering congress "to lay and collect taxes, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States," requires that "all duties, imposts and excises shall be uniform throughout the United States."

The essence, then, of the issue in the Downes case was uniformity of taxation. The question the court had to decide was this: After the acquisition by treaty of foreign territory by the United States can congress temporarily organize the acquired territory in such manner as to impose duties upon goods coming from its ports into one of the states, without infringing the uniformity clause of the constitution quoted above. That congress cannot impose duties upon goods coming from one state into another is clear. This is specifically prohibited by paragraphs 5 and 6, of section 9, article I., which read: "(5) "No tax or duty shall be laid on articles exported from any state;" (6) "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state, be obliged to enter, clear or pay duties in another." But even without these specific prohibitions there can be no doubt that congress would be prohibited by the uniformity clause, already quoted, from making tariff discriminations upon commerce between the states. The question presented to the court by the Downes case, therefore, required that tribunal to decide whether congress is held to this uniformity when legislating for the organization of newly acquired territory.

By rendering judgment against the claim of the importer for repayment of the duties exacted of him, the court decided that congress is not so bound. Consequently, as matter of precedent, it is now the law that the uniformity clause of the constitution with reference to taxation does not apply to acts of congress for the organization of newly acquired territory; but that in such cases congress may in its own discretion impose duties upon imports from those territories into the states.

Taking these two cases together we have precedents for the following principles of constitutional law:

1. The treaty-making power (consisting of the president and the senate) may acquire inhabited territory for the United States by treaty.

2. Territory so acquired ceases, instantly and by force of the treaty, to be foreign territory with reference to existing tariff laws imposing duties upon imports from foreign countries.

3. Congress has power to organize such territory, and in doing so may impose duties upon goods imported from it into a state, without regard to the uniformity clause of the constitution.

Nothing further seems to have been involved in the two cases. They do not appear to have required for their determination the adjudication of any other question. Nothing else, therefore, has been decided by them. Consequently, as precedents, they determine nothing more than that in future cases of the same kind, and in cases falling within the reasons upon which these decisions necessarily rest (which may be very different from the reasons advanced by the majority judges in their opinions), the court must either overrule one or both of these decisions, or decide in harmony with these principles.

III.

But the opinions of the judges, though they are not decisions and do not stand as precedents binding the court in future, are extremely luminous in their indications of how the court, if the personnel remains unaltered, would probably decide more vital questions of colonial policy.

The decisive vote in each case was cast by Justice Brown. Eight of the judges were equally divided. Four

stood for the government and four against it in both cases. By joining those opposed to the government in the De Lima case, and deserting them for those in favor of the government in the Downes case, Justice Brown dictated the judgment. His opinions, therefore, demand attention first.

In the De Lima case Justice Brown's fundamental postulate is that a constitutional treaty is the supreme law of the land, except in so far as subsequent acts of congress may conflict with it, an exception which applies to acts of congress themselves as well as to treaties. One of the ordinary incidents of a treaty, he then observes, is the cession of territory. Consequently, territory acquired by treaty is acquired as absolutely as if it were done by act of congress. Upon this basis he rests his conclusion that Puerto Rico "became territory of the United States, although not an organized territory in the technical sense," by the ratification of the treaty with Spain. Therefore it belonged to the United States and was subject to the disposition of congress. Having determined that point, he inquires whether the island remained subject to the existing tariff laws, that being the issue in the De Lima case. This depended, he thought, upon one or the other of two theories, namely, either (1) that the word "foreign" in the tariff laws continues to apply to such countries as were foreign when these laws were enacted, notwithstanding a change in their actual condition; or (2) that acquired territory remains foreign under the tariff laws until congress formally admits it to the tariff rights of the states. Justice Brown rejected both theories. He set aside the first upon familiar principles of statutory interpretation. The second he disposed of upon the ground already taken by him, that ceded territory loses its foreign character by the mere act of cession.

The opinion of the same judge in the Downes case adopts the De Lima decision for its foundation, namely, that upon the cession to the United States Puerto Rico ceased to be foreign territory. And it concedes that if upon ceasing to be foreign territory it became part of the United States, the Foraker act is unconstitutional. But it argues at length that in the uniformity clause of the constitution the words "United States" are intended to describe not the nation or republic or empire, but the federated states as distinguished from the outlying national domain. Incidentally Justice Brown intimates the possibility of certain constitutional restrictions upon congressional legislation for outlying territory. But his most significant expression is in these words: "If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territory is the same power which other nations have been accustomed to exercise with respect to territory acquired by them." Since, therefore, it is not only conceded but asserted by Justice Brown that the United States is at liberty to acquire foreign territory, it follows that he would hold, if the question arose, that the power of congress over such territory is as free from constitutional restrictions as the power of Great Britain over a crown colony.

So Justice Brown may be counted on the side of the colonial policy, on the side of the crown colony system, on the side of the doctrine that the constitution does not follow the flag, on the side of the empire and imperialism.

Three of the justices who disagreed with Justice Brown in the determination of the De Lima case, but agreed with him in the determination of the Downes case, were totally at variance with him in his reasoning. These were Justices McKenna, Shiras and White. They concurred in a dissenting opinion by McKenna in the De Lima case and in a supplementary opinion by White in the Downes case. From these two opinions, therefore, we may infer the probable attitude of McKenna, Shiras and White toward future questions of colonialism.

Justice McKenna's opinion in the De Lima case leads up to the conclusion that Puerto Rico did not cease to be foreign territory within the meaning of the tariff laws immediately upon ratification of the treaty of cession. He argues that the controversy is narrower than is implied by setting off the word "foreign" against the word "domestic." It is whether the constitutional provision as to revenue uniformity applies to territory acquired as Puerto Rico has been acquired. On this issue Justice McKenna distinctly declares his opposition to the theory that the country can be crippled as a world power by the necessity of making revenue regulations uniform.

Justice White's opinion in the Downes case, in which McKenna and Shiras concurred, makes the decision depend upon whether Puerto Rico had at the time of the passage of the Foraker act "been incorporated in and become an integral part of the United States." Considering that question he argues that the United States has in virtue of its sovereignty the same powers of acquiring territory and of determining its relation to the territory acquired that any other nation enjoys; but that the treaty-making power, though it may acquire, cannot incorporate, territory without the assent of congress. This assent may be implied. When, for instance, a treaty of cession contains a provision for incorporation, if it be not repudiated by congress that provision has the force of law. It is a self-executing provision. But when the treaty either contains no provision for incorporation, or expressly provides to the contrary, there can be no incorporation until congress so declares. Such being the character of the treaty ceding Puerto Rico, and congress not yet having incorporated that island and made it an integral part of the United States, it remains a territory of which congress may dispose at pleasure, of which the inhabitants are not American citizens, and to which the uniformity clause of the constitution consequently does not apply.

From these two opinions it is sufficiently clear that Justices McKenna, Shiras and White would sustain the crown colony policy. They would evidently balk at no constitutional restrictions, if the colonial enterprises in which this country is seeking to rival Germany, France, Russia and Great Britain were at stake. So long as congress refuses or neglects to "incorporate" Puerto Rico and the Philippines, Justices McKenna, Shiras and White may be depended upon to hold that those countries, though not "for-

eign," yet are not integral parts of the United States, and that, subject only to express limitations of the constitution, the power of congress over them and their inhabitants is absolute. Whether they would go so far as to hold that this power is so far absolute as to be capable of being delegated by congress to an individual, as with reference to the Philippines has been done, cannot be predicted.

Over against these four justices—Brown, McKenna, Shiras and White—are four who hold diametrically opposite views. They are Chief Justice Fuller, and Justices Brewer, Peckham and Harlan. All concur in the opinion of the chief justice, and Justice Harlan adds an opinion of his own. Both these opinions justify the inference that the four justices last named would be hostile to any sort of colonial or imperial legislation.

Only one of the nine justices refrained from joining in the opinions on either side in either case. This was Justice Gray. He concurred in the judgment in the Downes case and dissented from that in the De Lima case, standing with the administration in each. But the only clew to the reasoning that guided him is a report of his remarks announcing his concurrence in the judgment in the Downes case. In substance those remarks were:

> The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the president as commander in chief. Civil government cannot take effect as soon as possession is acquired under military authority or even as soon as that position is confirmed by treaty. It can be put in operation only by the action of the appropriate political department of the government at such time and in such degree as that department may determine. There must of necessity be a transition period. So long as congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory in the sense of the revenue law. But those laws concerning "foreign countries" remain applicable to the conquered territory until changed by congress. . . . If congress is not ready to construct a complete government of the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the constitution. Such was the effect of the act of congress of April 12, 1900, entitled: "An act temporarily to provide revenues and a civil government for Puerto Rico and for other purposes." The system of duties temporarily established by that act during the transition period was within the authority of congress under the constitution of the United States.

It would appear from that deliverance that Justice Gray is to be classified with the judicial supporters of a colonial policy. True, he exempts congress from constitutional restrictions only with reference to temporary legislation, but as he also declares that permanent organization of a territory depends upon the action of the political department in its own good time, the temporary exemption from constitutional restraint might, with his full assent judicially, be perpetuated by perpetuating the transition period.

Summing up these opinions it may fairly be inferred that any crown colony policy of congress which did not flagrantly violate the express constitutional reservations in favor of personal liberty would be sustained by Justices Brown, McKenna, Shiras, White and Gray, and that Chief Justice Fuller and Justices Brewer, Peckham and Harlan would oppose crown colony policies altogether. By five to four, therefore, the imperialists have the supreme court on their side.

IV.

But this situation is not altogether without encouragement to anti-imperialists.

In the opinion of the majority of the justices the whole matter is within the domain of congress. To congress, therefore, let the anti-imperialists turn. By educating the people to an understanding of what a crown colony policy means, by reminding them of its inconsistency with American ideals, and by showing them that it is borrowed from autocratic governments, their love of their country's honor may revive, and a new congress with a new president may be commissioned to confer upon "our new possessions" that independence which they crave and of which our republic should have been the last to deprive them.

Should congress adopt that course, Justices Brown, White, McKenna, Shiras and Gray are obligated by their opinions, which recognize congress as supreme, to give it judicial sanction; and Chief Justice Fuller and Justices Brewer, Peckham and Harlan would doubtless concur, though for different reasons. Through congress the American people may yet, with the unanimous assent of the supreme court, remedy the wrongs that American imperialism has done to weaker peoples, restore American ideals, cleanse the flag, and, relinquishing their unholy ambitions for world power, reestablish the republic in the eyes of the world as the great exemplar of personal liberty and local self-government.

NEWS

Senator Depew startled the leaders of his party one day last week by giving out a serious and argumentative interview advocating the nomination and election of Mr. McKinley as president for a third term. The interview was treated at first by the republican press as a "jest of the genial Chauncey." But when, on the 9th, an interview was given out at Cincinnati by Congressman Charles H. Grosvenor, of Ohio, which appeared in the papers of the country on the 10th, and in which Mr. Grosvenor seconded Senator Depew's proposal, the matter took a serious turn. As Mr. Grosvenor has acted as the special representative of the administration on the floor of congress, his interview had an air of authority. And there was no mistaking its earnestness. "There has been no time in our history," said he, "when conditions would so justify the election of a president to a third term as in the case of Mr. McKinley. McKinley is personally the most popular president we have had in a long time, and he has certainly most creditably performed the duties of his high office. I think it is time, furthermore, to demolish the fiction that there is an unwritten law, established by Washington, that no president of the United States may accept a third term. The facts are, as any student of the times may discover, that it was fear of defeat which impelled Wash-