from the moment that it becomes public property, it ceases to be a trade mark.

With respect to trade marks that may be contrary to morals, there is no necessity to make any reservation. That is comprised in Art. 1.

Certain laws prescribe, that the name of a person, or that of his firm, cannot be admitted as a trade mark, and other laws permit it; some legislations prohibit that the coat of arms of a state be used as a trade mark, and others do not; therefore when it is a question of importing a trade mark which is prohibited in the respective country, it is clear, that it will not be permitted, although it may be admitted by the laws of the country of its origin. I believe, therefore, that there is no necessity for establishing any other limitation to the importation of trade marks. Each country establishes its own conditions; regarding trade marks, it would have been impossible for the Committee to enumerate in a treaty the conditions of nullity established by all the legislations of the countries of America.

The Treaty of Montevideo took for its base the local legislation of each state; consequently, in order to admit a trade mark, it is necessary that it be in conformity with the legislation of the respective country. For that reason it would not be advisable to admit limitations, for the sole fact, that another state has decreed them.

Neither do I deem it just to give an extra-territorial effect to the declaration of nullity of trade marks. In the example cited by His Excellency Mr. Casasus, the loss of the trade mark in the United States was explained, but not so in Mexico; and because the party who came Mexico was the first to register it, and consequently had here acquired the property of the mark. There was no reason, why he should lose in Mexico the property of this mark, because the respective merchant or industrial had not been able to secure the priority in the United States. I cannot, therefore see any reason why the nullity of a trade mark, declared in one country, should produce any effect in another.

Respecting the international registry of trade marks, or their deposit, for example, in the Bureau of the American Republics at Washington, this really could not be admitted, because it must be considered, that the means of communication in Europe are very different from ours. Between the countries which have signed the Conventions of Paris and Madrid there are great facilities of communication, so that it is not difficult to establish an international depositary of trade marks there; but in the countries of America, where the communications are not so perfect, such an international depositary has seemed inadmissible to us. On the other hand, in many cases a trade mark may interest one merchant or industrial only in certain countries, and not in all the others. A merchant in Chili, for instance, is interested in the registry of his trade mark in Uruguay, Paraguay, in a word, in the neighboring countries; but that industrial or merchant will not register it in Washington because he is not interested there, because he has no business in the United States; what interests him, is to register it in the countries in which he has his trade.

From this it would seem, that this International deposit of trade marks, as a requisite for reserving the right, does not appear as advantageous in America as it may be in Europe.

Consequently, as the modifications or amendments proposed by His Excellency Mr. Casasus are not indispensable, it is my opinion and that of my colleagues of the Committee, that the Convention of Montevideo should not be modified in the terms proposed by His Excellency.

His Excellency Mr. Walker Martinez, Delegate from Chili.—The Delegation of which I form a part, Mr. President, accepts, in a general way, the project submitted by the Committee. This does not mean to say, that in the discussion in detail we should not be disposed to accept some of the amendments proposed by His Excellency Mr. Casasus.

My purpose in asking for the floor, is to call the attention of the Committee to the form of its report. As the proposition of the Honorable Delegate from Uruguay commenced by asking the adoption of the Treaties of Montevideo, the Committee has confined itself to proposing a declaration accepting the Treaty on trade marks of Montevideo. Well, now, why not make a new treaty, establishing the principles of that one?

I say, if the purpose pursued by the Honorable Delegate from Uruguay is that we advance a step in this matter, why do we do again what has been done in Montevideo? Why should we not change the form of the report, and in place of accepting the Treaty of Montevideo, convert its principles into a convention?

I have believed it proper to call attention to this point, now that the report is discussed as a whole, but in my own opinion, from the very words employed by the honorable member of the Committee it may be inferred, that its purpose has been to conclude a treaty, because it is very advantageous for the interests of industry and commerce.

I desire, therefore, to ask the members of the Committee, if they have any objection to giving it the form of a convention, without preventing that the discussion in detail should afterwards be entered upon, and the different ideas, which have been expressed, be discussed.

His Excellency Mr. Elmore.—Mr. President: The Committee has no objection to giving the project the form of a treaty, as His Excellency Mr. Walker Martinez has just proposed, entertaining the same ideas as His Excellency, and for that reason Art. 3. says: (reading it.)

The Delegates who approve of this report and who find themselves duly authorized by their governments, or who should be so authorized before the work of the Conference terminates, will sign a treaty in the terms proposed.

With the object of not losing any time. I believe that this point might be reserved for the Committee on Engrossing.

Secretary Duret.—Nobody desires to discuss the question.—The Conference is asked if it approves the report as a whole.

His Excellency Mr. Bermejo, Delegate from the Argentine Republic.—I desire to make a few remarks regarding the project of the Committee.

According to my way of thinking, it is not likely to confer advantages either to merchants or industrials, not only, because the laws of each country have recognized in foreigners the rights which they grant to their citizens, but also because the project of treaty subjects the recognition of the property of a trade-mark to the requisites which establishes the legislation of each country.

It will be comprehended at once, that everything which is related to trade marks must be subordinated to a very special legislation, because the property of every mark is something akin to a creation of the will of the owner. An individual composes a design, prepares a drawing, something concrete, by which he desires to distinguish the article of his production from all other similar ones, and he adopts this design or this drawing as the trade mark of his products. This explains the origin of the trade mark, but owing to this circumstance, all the legislations have also required something concrete, which may make known the property of the mark, and which is the register, in which they are inscribed.

It is not sufficient, therefore, that an individual shouid desire to characterize an article of his commerce or of his industry by one form or another, by this or that figure, by this or that color, but it is required that the authorities recognize his property, which confers upon it the protection it may deserve, and all this shall be accomplished by means of the inscription in a register.

But if all this explains itself, because it is the consequence of the nature of the trade mark. I cannot see in exchange the object, which international conventions can have. The treaties on trade marks, in their origin, had for object to place citizens and foreigners in conditions of perfect equality. If my recollection is not at fault, the treaties which the United States concluded with some nations of Europe, established that the subjects of the contracting parties could make their rights effective in the same manner as citizens. But today, this clause of the treaties has already ceased to have a reason for its existence, in as much as the internal legislation of all the countries grants to foreigners the same rights that it grants to citizens.

In our country, the Argentine Republic, foreigners enjoy all civil rights, and in some cases, even certain political rights; in the other countries they enjoy, without doubt, the civil rights in the most ample manner.

Well, then, if this is so, what advantage would give to trade marks a treaty, which had for its object the placing of foreigners and citizens on an equal footing?

The second observation which I must make, refers to those marks, which their proprietors may have to solicit in each one of their respective countries. In order to explain my observation in a lucid manner, let us suppose a concrete case, the case of a citizen or foreigner, to whom in Mexico should have been granted the property of a trade mark by virtue of the respective register. In what manner can the project of the treaty favor this citizen or foreigner, owner of a trade mark already registered in Mexico. Will it be said, that by virtue of the treaty he will be able to obtain the property of his mark in the rest of the nations of America? I believe, that for the purpose of registering his mark, he does not need the said treaty, in as much as the legislation of every country establishes, that foreigners may register their trade marks in the respective country, whether they have obtained said property in any other country or not.

If any individual should present himself before the person in charge of the register of trade marks of any of our countries, in order to accredit the mark, which he may have adopted in order to distinguish his products, he is never asked, whether or not he has registered said mark in his own country, and it is only required, that there exist no other mark, equal or similar, previously registered, in order to have his own recognized.

Every person who invents a design or a drawing and carries it to the office of the register, in order to inscribe it as a trade mark, if there is no one to oppose it for having already deposited another design or drawing more or less analogous, he will procure that this property be recognized; and if there is any one, who could formulate an opposition, the controversy would follow its course in the judicial or administrative way, and in accordance with the final sentence which may be pronounced, he will obtain, or not, the property of his trade mark.

Well, now, if the treaty leaves in force all these provisions, if he who solicits a trade mark has to follow all these same proceedings, either by applying directly to the office of registry of each country, or that he should do so by virtue of this treaty, in what manner is his condition bettered by the existence of the convention which the Committee proposes to the Conference?

It is said, that he who has acquired the property of a trade mark in one country, can make it effective in another, in accordance with the internal legislation of such country; well, then, what is the advantage that this treaty grants?

Each country will keep on making laws for its own territory, with or without the treaty, and I cannot find any advantage in concluding it, if it is not possible to give an extraterritorial effect to the laws of each country.

For the reasons which I have just submitted, I desire that the Committee explain, what is the scope of the project which it has submitted for our examination.

Before concluding, I desire to call attention to a point which I consider of importance, although only very superficially, because it is a long time since I have studied this matter.

In the United States, the legislation on trade marks encountered serious difficulties to overcome. The law which has governed the subject in that country, dates, I believe, from 1870, which law, on a parity with all those in force in the rest of the countries, established the register of trade marks and patents in Washington, and provided, that everybody who should inscribe his trade mark in that office, would acquire the right of its property.

The first objection which was made against that law, was, that the Federal Congress had no authority to legislate on trade marks, because the constitution, in none of its articles had conferred such a right; and this objection caused a new difficulty: how to make the treaties effective, which had granted the right of property to foreigners?

The American government, which had concluded treaties with other nations, and was obliged to comply with them, found itself in serious difficulties by reason of the questions submitted to the Supreme court of that country for its decision.

I believe, that a law lately passed, solved the conflict between the Federal and the local legislation, caused by the treaties, by providing, that the fraudulent imitation of trade marks should be punished in accordance with the criminal law of each state.

From this may be inferred, that what legislation

really succeeds in guaranteeing in the treaty on trade marks, is, that the fraudulent imitations of the same or the criminal act which is committed by imitating and making use of them, must be punished according to the laws of the state in which the fraudulent imitation is committed.

Recapitulating the foregoing arguments: I ask to be permitted to request the Chairman of the Committee, if the trade marks granted in foreign countries which may desire to accept the treaty, what is the benefit that will result from its conclusion?

His Excellency the President.—The hour fixed by the rules having arrived, the session is suspended, to be continued in the afternoon, Their Excellencies Messrs. Casasus and Elmore having the floor.

SESSION OF DECEMBER 23, 1901.

(Afternon Session.)

Secretary Macedo.—The discussion on the report of the Committee on Patents of Invention and trade marks, as a whole, will be continued.

His Excellency Mr. Casasus.—Messrs. Delegates: My intention to be very brief, in order not to cause a long debate by reason of the Treaty under discussion, very likely has caused me to be not clear enough in expressing my ideas; but in as much as necessity compels me to again take part in the debate, the Conference will permit me to define my observations regarding the Treaty of Montevideo, as well as regarding the additions submitted by me for its consideration, because I believe, that if I can bring to the mind of all the conviction I have, perhaps it will be possible to arrive at a unanimous accord to modify the Convention of Montevideo on Trade marks in conformity with these additions.

I established, as a necessity, the reform of Art. 1. of the Convention of Montevideo, and in order to demonstrate this necessity, I cited two reasons: first, the expediency of establishing, in a new treaty, a more advanced principle than that which is contained in the said treaty; and secondly, the necessity of wording the text so as to employ juridical terms that are more appropiate.

Nobody can deny, that it would be an advance, with regard to the rights granted to foreigners with respect to trade marks, if in the new treaty, instead of reserving the right to deposit the marks already registered in the signatory nations of the convention, we should extend this provision to foreigners, whether they have registered their marks or not, and whether they are domiciled or not in the nation, where they may solicit the reservation.

When I referred to the four stages which may be signalized in the progress of the right of property of trade marks, I recollect having indicated as the third one, that, by reason of which it was granted to foreigners to reserve the property of their marks, under the condition that they had already secured that right in the country of their origin, and I stated, that in my judment, the fourth was that, which granted, without discrimination, to all foreigners the rights granted except to citizens. However, I expressed some doubt, with regard to the interpretation which could be given to the text of the convention of Montevideo; but His Excellency Mr. Elmore the Chairman of the reporting Committee, has relieved me of that doubt, because he has stated, that in effect, that right could not be granted, except to a mark already registered in the country of its origin, and that the meaning expressed in Art. 1. of the convention had always been so interpreted. As therefore there can be no doubt whatever in this respect, I am compelled to oppose it, and oppose it openly, because I am of the opinion, that if we are to accomplish anything useful and practical, it is necessary that we should make an advance in comparison with what has been done at Montevideo.

Juridical science is not a stranger to progress, because it advances steadily and continuously obtains modifications useful for those who have to take advantage of the principles established by them, and if there has been any progress made, it is necessary, that when we are making a new convention, recognizing and establishing juridical principles, that we should enunciate those that demonstrate a positive advance, which signify a real progress, instead of enunciating those that already have been modified.

His Excellency Mr. Bermejo, Delegate from the Argentine Republic, evinced today some scruple with respect to the advantage which might be secured by establishing the principle, which places foreigners on an equal footing with citizens in a new treaty. His Excellency says correctly, that the laws of almost all the nations of America, have already established the principle, by reason of which foreigners enjoy the same rights as citizens, and that it is the political constitutions, in their greater part which have established that principle.

Consequently, it is asked: What advantage will be obtained by establishing that principle in a new convention regarding trade marks? Without doubt, His Excellency forgets, that the nations can change their internal legislation, according to their own convenience, and that in exchange, every convention limits that right for the time which it will be in force. If we desire therefore, that during the period designated for the convention, foreigners and citizens should enjoy equal rights, with respect to their trade marks, it is a matter of obvious expediency, it is almost necessary, that we should so declare it; because, if we reserve to the nations the right to modify their legislation, they can, by making use of their liberty of action, change the principle which we are discussing and which we consider as a safeguard of the Convention which is to be concluded.

His Excellency Mr. Bermejo will permit me to refer to some antecedents of our Mexican legislation on trade marks, in order to demonstrate thereby the expediency of establishing this principle in the new convention as a fundamental one.

Until a short time ago, the Mexican legislation accepted a principle, sanctioned, if my memory does not betray me, by the French law of 1857 that is to say, it granted to foreigners the right to reserve the property of their trade marks, under the condition of having an agency for the sale of their products established in the country. The Mexican legislation has caused that impediment to disappear, and has in 1897 proclaimed the principle, by virtue of which foreigners enjoy the same rights as the citizens; but tomorrow it may reverse this and may return to adopt the principle of our former law; and if we do not incorporate this principle in the new convention, any modification of the internal legislation will not produce any other effect than that of depriving foreigners of the right which we should secure to them in the new convention.

To be more explicit: if the right to reserve a property only is to be granted to the trade mark which is already deposited, in accordance with the text of the Convention of Montevideo, and if we leave the consignatory nations of this Convention with the power to modify their internal legislation, and they come, by such liberty of action, to change it in the sense of requiring the existence of an agency for the sale of the products, in order to deposit the mark, the precepts which establish the objects of the Convention, will be violated; or expressing it better, they will prove nugatory, because no foreigner can deposit his mark and reserve his rights, without having an agency for the sale of his products.

In my opinion, the necessity of establishing this principle is demonstrated hereby, if we believe that it is more advanced than the other, and if it signifies a positive progress in legislation on trade marks.

In my conception, it is necessary to rectify the opinion stated to the Conference by our respectable colleague, Mr. Elmore, the Chairman of the reporting Committee, regarding the wording of Art. 1 of the Convention of Montevideo. His Excellency believes, that the words «every person to whom in one of the signatory states the right to use a trade mark is granted shall enjoy the same privileges which in the other countries,» are not improperly employed.

And he believes this, because he doubts that all these juridic creations which the XIX century has established, and which we know under the name of industrial property, are really property. His Excellency could not ignore the radical difference which exists between the right of use and that of property, and he declares, then, that the notions which he entertains regarding this class of property, do not authorize him to modify the text of the Convention, because, although the usufruct of the property is a different thing, they might be almost confounded in this case.

I do not know, whether I have been able to state the opinion of His Excellency with the exactness that I should have wished; I ask his pardon, if I do not attain to the exactness which in this case is to be desired, but more or less, this has been the thought that has governed his argument. I differ radically with His Excellency, and am of opinion, that this property has been justly established, because, whether it is considered to be founded upon the principles of the Roman Law, which bases property upon the possession of things that have no owner; or that it finds its support in the economic theory which that law establishes on the just appropriation of the product of labor; or that we agree, as modern jurists do, that property is only the creature of law,—industrial property has had a just right to be recognized. All the theories regarding property can be cited for justifying the recognition of industrial property. The Congress of 1878 could say, with reason: «Industrial property is a real property.»

From the merely international point of view, we have three theories to justify the property of trade marks, which theories extend to all the other kinds of property of that character: the artistic property, that of patents of invention, literary property, etc.; the theory of Chaptal, presented to the French Chambers in the luminous report which accompanied a projected law on this subject in 1824; the theory of Bar and the theory of Schaffner. The first named justifies the right of property in the same manner as that of any other article or product which is the object of commerce among people. It declares, that one property is equal to another, and from this the necessity is derived to respect it, as every right of property has come to be respected on the part of the legislation of all civilized countries.

The defect in the theory of Chaptal consists in this, that he carries his confusion of the two kinds of property to the extreme of losing sight of the differences which distinguish the one from the other. Bar has established, in my opinion, the really true theory in that respect, because he has succeeded in demonstrating, that if property has for its base the liberty which we enjoy for appropriating the product of our labor, industrial property carries with it the limitation of that liberty, which limitation comes to serve as the fundamental basis of the right of industrial property; or. what is the same, that all industrial property has for its basis the establishment of a privilege of a period of more or less duration.

Schaffner completed the theory of Bar, by demonstrating, that by the fact that a legislation recognizes the principle of that property, it is guaranteed by reason of such recognition, and all other nations should respectfully bow to it.

In conformity with these theories, we are in the necessity of employing expressions, in conventions of this character, which correspond to the intentions that we desire to express in them, and not to confound the right of property with that of the usufruct. This is so certain, so just, that in Art. 2. of the Convention of Montevideo it is said. «The property of a trade mark of commerce or manufacture comprises the faculty to use it, to transmit it or sell it;» or, what is the same, that Convention establishes the radical difference which exists between property and the usufruct, and establishes that one depends upon the other. Let us be consistent with the precepts of that Convention, and let us try to express these two juridic precepts clearly, and let us say in Art. 1. what we have established in Art. 2.: let us guarantee, then, the right of property, and not that of the usufruct.

And let it not bc said, that this is a frivolous requirement, because those who desire to frustrate a right of property in order to appropriate for their own benefit the efforts and the work of others, may base themselves on the text of the Convention, if it only guarantees the reservation of the property of the trade mark to those, who in accordance with the national legislation only have the right of the usufruct. The owner who should have entered into a contract with another in order to authorize the latter to make use of his trade mark, cannot avail himself of the Convention, according to its terms, so that in the signatory nations the right of property which the internal legislation of his country guarantees, may be recognized. It is sufficient that it is possible that such a case may occur, to make it necessary that the matter should be investigated and that we should agree to the necessity of employing precise terms, so that these cases cannot occur. If it is intended to recognize the right of property, if it has not been desired to do something else, in employing the phraseology, which has been used in that Convention, then let us adjust the language to the intention, so that it may only serve to express what we think with the greatest clarity possible.