in the custody of the German prize crew, those authorities neither evinced the disposition, nor undertook in fact to make full and reasonable explanation of the privileges yielded to the German captor. Accordingly, there was much ground for the American contention that Russia had failed to indicate the existence of a situation that sufficed to excuse the giving of the succor that was yielded, and that in allowing the vessel to depart in the custody of the prize crew, there was unconcern for an obligation due to the United States, and which assumed the form of the bestowal of an improper benefit upon the captor of an American ship. It was the absence of a showing that the extended sojourn at Murmansk was in fact occasioned or demanded by needs of the *City of Flint* which the neutral territorial sovereign under the customary or conventional law (as exemplified by the provisions of Article XXI of the Hague Convention) could lawfully satisfy, which emphasized the impropriety of the benefit.

The Norwegian Government, in the light of information which it possessed when the *City of Flint* anchored at Haugesund on November 3, against the will of the territorial sovereign, is believed to have been warranted in releasing the prize from the captor, and in giving it over to its American crew. By such means, moreover, Norway respected the obligation which it owed to the United States with respect to the ship.[15]

Notwithstanding the obscurity surrounding the factual situation which for a time produced confusion of thought and perhaps also subtlety of statement, the case of the *City of Flint* revealed the zeal of the captor, regardless of the applicable law, to seek places of sequestration or succor for its prize, and the readiness of a European neutral state to smooth the way of the captor without much concern for the rights of that other neutral state to which the ship belonged.

CHARLES CHENEY HYDE

THE "NEUTRALITY ACT OF 1939"

In 1935, the United States adopted the view that its neutrality—in the sense of non-involvement in war—could best be preserved in future wars by the relinquishment of certain neutral rights which we had traditionally and vigorously maintained. A major part of this decision was the adoption of the embargo on arms, ammunition and implements of war. This decision was reached after thorough public discussion and amid much publicity, although Congressional debates were limited and rather inconclusive. The decision was under attack and was reargued in 1936, 1937 and the winter and spring of 1939. In each case it was sustained. After the outbreak of war in Europe in September, 1939, it was again debated and the conclusion reached in time

the steamship *City of Flint*, after the machinery had been repaired, left the port of Murmansk." (Dept. of State Bulletin, Nov. 4, 1939, p. 457.)

[15] See report from the American Minister to Norway, released Nov. 3, 1939, Dept. of State Bulletin, Nov. 4, 1939, p. 458.

of peace was reversed under the pressure of attitudes evoked by the war; the arms embargo was repealed. It is not the intention of this comment to reargue the wisdom or the legality of that action. It is proposed solely to outline some of the provisions of the new law.[1]

No one will maintain that the Act is well drafted. Its tortuous language and the involved interrelationships of its exceptions to exceptions have already led to conflicting official interpretations and to great confusion in business circles. Unless and until the Supreme Court decides the meaning of various provisions, no interpretation is final or authoritative.

The preamble to the Act states three objectives: (1) to preserve the neutrality of the United States by voluntary restrictions upon its nationals; (2) to reassert the rights and privileges of the United States and its nationals under international law; and, (3) to reserve the right to change this law as the interests of the peace, security or welfare of the United States may require.

Section 1 modifies the 1937 law in two ways: first, the power to find that a state of war exists is vested not only in the President, as in the former law, but also in the Congress acting by concurrent resolution; [2] second, the finding must include the conclusion that the security or peace of the United States requires the application of the statute. The invocation *vel non* of the statute, therefore, no longer is probative of a conclusion that war does or does not exist.

Section 2 eliminates the arms embargo. The new law contains no absolute prohibition on the export of any article. Exports are restricted by three types of controls: (1) the nationality of the carrier; (2) the terms of sale; (3) the destination.[3]

1. *The nationality of the carrier.*

According to subsection (a) of Section 1, no American vessel can carry any passengers or any article or materials to any belligerent state. But, subsection (a) does not apply—

(1) to transportation by air or water over lands and waters bordering on the United States [4] (subsection (f));

(2) to transportation of arms, ammunition and implements of war to be used by American carriers in connection with their own operation and maintenance (subsection (f));

(3) to transportation by American vessels ("other than aircraft") of mail, passengers or articles other than arms, ammunition or implements of war to defined geographical areas in the Western Hemisphere, Asia and the South Atlantic, including most of Africa (subsection (g));

[1] Public Resolution No. 54, 76th Congress [H. J. Res. 306] approved Nov. 4, 1939, 12:04 p.m. Printed in Supplement to this JOURNAL, p. 44.

[2] The constitutionality of this provision has been questioned.

[3] *Cf.* Department of State Bulletin, Nov. 18, 1939, Vol. I, p. 551 ff.

[4] Especially Canada and Mexico, but, according to Sec. 16, including also Panama.

(4) to transportation by aircraft of similar persons or things to certain differently defined geographical areas (subsection (h)).

In these four "exceptional cases" the American nationality of the carrier is no limitation upon export.

2. *The terms of sale.*

According to subsection (c) of Section 1, nothing (except copyrighted articles or materials) can be exported or transported from the United States to a belligerent state until all right, title and interest therein has been transferred to alien ownership. Methods of proving the passage of title are described, but, according to newspaper reports, not with sufficient clarity for the business men concerned. But, this restriction does not apply:

(1) to transport by American or foreign carriers to lands bordering on the United States of anything except arms, ammunition and implements of war (subsection (f));

(2) to transport by American carriers of arms, ammunition and implements of war used for their own operation or maintenance (subsection (f));

(3) to transport by American vessels ("other than aircraft") of mail, passengers or articles other than arms, ammunition and implements of war, to defined geographical areas in the Western Hemisphere, Asia and the South Atlantic, including most of Africa (subsection (g));

(4) to transport by American aircraft of similar persons or things to certain differently defined geographical areas (subsection (h));

(5) to transport by neutral vessels (including aircraft) of articles other than arms, ammunition and implements of war to the areas described in subsection (g) (subsection (l)).

In those five cases, title may remain in American citizens.

According to Section 7(a), credit cannot be extended to a belligerent government, its subdivisions or a "person acting for or on behalf" thereof. Section 3 of the 1937 Act gave the President general power to make an exception for ordinary commercial credits and short-time obligations; this authorization is not now included. The new Section 7(a) makes it clear that there is no ban on credit extended to private persons in belligerent countries covering the sale of anything except arms, ammunition and implements of war. It should be understood therefore that the "cash and carry" principle is only partially included in the Act. Some goods can be carried in American vessels, to some belligerent ports with title remaining in the American vendor, the sale being on a credit basis. Even arms, ammunition and implements of war may be sold on credit extended to a neutral government or persons in a neutral state, provided the vendee is not an agent of a belligerent state. The tests in extending such credit are belligerent agency and belligerent location of the vendee. A British merchant in Norway, if not a government agent, may, therefore, purchase arms on credit.

3. *The destination.*

According to Section 3, no American citizen or vessel may enter a combat area as defined by the President.[5] Therefore, there can be no export in an American vessel for a destination which would have to be reached by passing through such an area. But an American vessel could carry goods to Bergen (outside the combat area) for transshipment to a foreign vessel which would carry them to London (inside the combat area).

The foregoing is like an attempt to simplify a complex equation to one reading $a + b = c$. To be accurate, one would need to say, $a + b = c$ if $a > c$ and $b < c$ but if $a < c$ or if $c < b$, then $a + b \neq c$. Almost any interpretation of the statue is just about as helpful as that to an American exporter. An illustration of the fine points involved in the administration of the Act is found in the reported decision that while American-built aircraft cannot be flown into Canada, they can be landed at an airport on the American side, pushed across the line and then flown again to any point in Canada.[6] The Merchants Association of New York, in describing its understandings of applicable regulations, has been careful to point out that they were not necessarily applicable to exports from ports other than New York.

Among other new provisions of the Act, that in Section 14 deserves mention. This section is brief and clear and may be quoted:

> Sec. 14. (a) It shall be unlawful for any vessel belonging to or operating under the jurisdiction of any foreign state to use the flag of the United States thereon, or to make use of any distinctive signs or markings, indicating that the same is an American vessel.
>
> (b) Any vessel violating the provisions of subsection (a) of this section shall be denied for a period of three months the right to enter the ports or territorial waters of the United States except in case of force majeure.

The rule is a desirable one and the penalty is appropriate.[7] It is not certain, however, that the belligerent use of a neutral flag or markings is today a violation of international law. If it be not, it is doubtful whether a statute of the United States can make it "unlawful." The question is academic because in any case it may be admitted that the United States has sufficient right and interest in its flag and distinctive markings to justify the application of the type of penalty here proposed.

The other sections of the Act do not present notable differences from the 1937 law. It may be remarked that the President has exercised some of the authority conferred upon him by Section 11; he has excluded submarines but not armed merchant vessels from the ports and waters of the United

[5] See Department of State Bulletin, Nov. 18, 1939, Vol. I, p. 553; Supplement to this JOURNAL, p. 63.

[6] See Department of State Bulletin, Dec. 9, 1939, Vol. I, p. 679.

[7] *Cf.* Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War, Art. 20 and Comment, this JOURNAL, Supplement, Vol. 33 (1939), p. 353.

States.[8] The action in regard to submarines is in accord with the resolution adopted by the Inter-American Conference at Panama on October 3, 1939.[9] The Panama resolution in regard to armed merchantmen accepts the position taken by the United States in its reservation to Article 12 of the Havana Convention of 1928, rather than the text of that article which more closely reflected the sound position under international law.[10]

Although it is impossible to review here all aspects of the neutrality policy of the United States during the present wars and conflicts, one cannot mention the repeal of the arms embargo without also calling attention to the imposition of a "moral embargo" on shipment of aircraft to states charged with bombing of civilians. The Soviet Union and Japan are the anonymous and undeclared-belligerent objects of this "moral embargo." [11]

PHILIP C. JESSUP

THE DUTY OF IMPARTIALITY ON THE PART OF A NEUTRAL

During the recent debate over revision of the neutrality legislation of the United States, the position was taken by certain distinguished international lawyers that it would constitute a violation of international law for the Congress of the United States to change its legislation, during time of war, by repealing the arms embargo for the purpose of helping the enemies of Germany.[1]

It has frequently been said by text-writers that impartiality is the essence of neutrality; and from this it might be deduced that, since many changes in domestic law made during wartime would work to the benefit of one or other of the belligerents, any such change would violate the duty of impartiality and is, therefore, prohibited. Practice, however, does not support such a statement of the rule, which is believed to be better expressed in the draft convention prepared by the Harvard Research in International Law:

[8] Department of State Bulletin, Nov. 4, 1939, Vol. I, p. 456; Supplement to this JOURNAL, p. 56.

[9] *Ibid.*, Oct. 7, 1939, Vol. I, p. 328; Supplement to this JOURNAL, p. 9.

[10] See the Draft Convention cited *supra*, note 6, Art. 28 and Comment, p. 435, at 446.

[11] See Third Annual Report of the National Munitions Control Board, For the Year Ended November 30, 1938 (76th Cong., 1st Sess., H. Doc. No. 92), pp. 79–80, and New York Times, Dec. 3, 1939.

[1] See the letter signed by Charles Cheney Hyde and Philip C. Jessup, in the New York Times of Sept. 21, 1939. Subsequent debate over this letter in the same journal is to be found in the issues of Sept. 25 (Eagleton); Oct. 1 (Breckinridge); Oct. 5 (Hyde and Jessup); Oct. 7 (Breckinridge); Oct. 14 (Laporte); Oct. 15 (Eagleton); and in the New York Herald-Tribune, Oct. 26 (Kuhn).

The New York Herald-Tribune asked of certain international lawyers who had been connected with the study made by the Research in International Law the following question: "Would a repeal of the arms embargo at the present time constitute, under existing international law, a violation of the neutral obligations of the United States?" In its issue of Oct. 25, it listed replies as follows: Borchard, Hyde and Jessup in the affirmative; Briggs, Burdick, Coudert, Dulles, Eagleton, Fenwick, Kuhn, Turlington, Woolsey, Q. Wright, in the negative.