

American counsel in this case shall argue on hypothetical evidence? Who asks that they shall be heard, either orally or on paper, on a mere hypothesis? Every fact and circumstance material to the case, both on the part of Her Majesty's Government and the United States, I assume, will have been presented before the counsel on the other side close their case. Then the counsel for the United States, as defendants in this case, will make their arguments, either orally or on paper, just as it seems best to them, supporting their own views of the case, and we, as counsel for Great Britain, will present to the Court our arguments in answer to the arguments which they have adduced in support of their case. It was perfectly idle for Mr. Dana to have taken up so much time in arguing that they would be called on a mere hypothesis. Is it not idle to say to your Excellency and Honors, that you do not know what the case is about? Do we not all know what the points in issue are; do we not all see them? So well do the learned counsel see them that they absolutely declare they do not intend to open the case—that it is wholly unnecessary, as the Court now understands every single view that is likely to be put forward. So they will understand, at the end of our case, every fact put forward by the British Government.

The points are salient and plain and are understood thoroughly by the agents and counsel of Her Majesty and of the United States. How, then, can it be said there is any hypothesis at all? My learned friend (Mr. Dana) says I am asking that an amendment to the rules should be adopted. I am not. So far from that the United States are coming in at this late stage of the proceedings and asking for an amendment of rules that were made in their present form not merely by consent of, but I believe at the instance of the learned Agent of the United States. Can it, then, be said we are asking for any amendment to be made. They are asking as a favor that the Court shall lay its hands on its own rules,—rules made at the instance (and in the form they now are) of the American Agent. They are asking that as a favor, and at the instance of Her Majesty's Gov't. and with the consent of the Minister of Marine, I come forward and say on behalf of the two Governments that they are quite willing so far depart from these rules as to consent to an oral argument if the United States Counsel think it is any advantage to have one, though the Government I represent can see no such advantage.

I can understand that a jury may be led away from justice, by specious arguments, but I apprehend that this tribunal will not be swayed by any such means, and that the epitomised statement of facts given by witnesses will have more effect than all the eloquence of the counsel on the other side. If the case is to be decided by the eloquence displayed in the oral arguments, then I admit that Her Majesty's Government would stand at great disadvantage, but I do not think that eloquence will have a feather's weight in this case. I desire the Court to understand distinctly that this is a motion made by the counsel of the United States to have the rules altered, and I come forward, for Her Majesty's Agent and the Minister of Marine, to state we are willing it shall be done as they wish, provided always they don't, in getting an inch, take an ell. They will have, if they think it is an advantage, the right to make a closing speech, but must immediately afterwards put in their closing printed argument. They are simply to support their own case. We are, then, simply called on to answer the case and argument in support of the speech they put forward, and nothing else. Not one principle of ordinary justice will be infringed or departed from. In conclusion, I must confess I cannot help feeling a little surprised at the manner in which Mr. Dana submitted the motion, for he put it in an almost threatening manner to the tribunal, that if it was not acceded to the counsel for the United States would withdraw the proposition altogether. That is not the usual mode in which a favor is asked by counsel before a tribunal.

MR. FOSTER:—I think I am entitled to a few words in reply. If the learned counsel (Mr. Thomson) had been present yesterday afternoon when I made the explanation which accompanied Mr. Trescott's motion, I think he would not have made the observations which he has made. This is what I said: When I came here I found myself met suddenly by five of the most eminent gentlemen who could be selected from the five maritime provinces—contrary to the expectations of myself and my Government, they were to be admitted to take charge of this case, and they were assisted by a very eminent lawyer, now Minister of Marine, who is spoken of by counsel as having largely the conduct of this case, I alone, a stranger in a strange land, having no reason to suppose counsel would be brought here to assist me, found myself, I say, by the unexpected decision of the Commissioners, placed in such a position that, instead of meeting the British agent I had to meet the British agent, the Minister of Marine and five counsel. Now, to avoid five closing oral arguments against one, I was well content with the original arrangement of the rules. But the rules provided that they might be changed if in the course of the proceedings the Commissioners saw fit to alter them; and as to our application being an application for a favor either from our opponents or the Commissioners, it is no such thing. It is an application to your sense of justice. Before a judicial tribunal there are no such things as favors. Decisions go upon the ground of right and justice, and especially so in regard to a treaty, under the oath which the Commissioners have taken equity and justice are made the standard of all their proceedings. Now, how are we placed? We have, in the first place, a much greater mass of testimony than I anticipated, or any of you anticipated, I presume. In the next place, we are on the eve of a much greater conflict of testimony than I anticipated; we see that very plainly. Then again, from prudential considerations, counsel on the other side saw fit not to open their case. It was a greivous disappointment to me; I could not help myself, as I saw at the time, and so said nothing. But it was a great disappointment to find they did not think fit in their opening, to explain the views they intended to enunciate. As the testimony has gone forward for more than a month, it has become obvious to all of us that in a printed argument, prepared within ten days' time, and compressed within the necessary limits of a printed argument, we cannot examine this testimony, and cannot render the tribunal the assistance they have a right to expect from counsel. It is, therefore, proposed that, instead of making opening oral arguments, which obviously would be quite inadequate, we should have the opportunity of making closing oral arguments, to be replied to by the British counsel, and then that the printed arguments should follow, giving them the reply then also. Whatever we do, we are willing they should have the reply—the reply to our speeches, the reply to our writings. Is it possible that any arrangement could be fairer than that, or any arrangement more calculated to render your Honors assistance in coming to a just and equitable conclusion? Now, I know my friend the British agent does not mean to deal with this case so that batteries can be unmasked upon us at the last moment. I know the Commissioners will not allow such a course to be taken. Unless that is to be done, it is quite impossible that any unfair advantage would result to us, or that the British counsel would be in the least deprived of their admitted right to reply, which always belongs to the party on whom lies the burden of proof, by the course which we propose to follow. What we do desire is, that we should have the chance to explain our views fully before your Honors orally; that we should then hear from counsel on the other side; and then that the printed summaries, which are to be placed in your hands to assist you, should be left with you when you go to make up your minds on this case. What do they lose by it? What can they lose by it? By omitting to make any oral arguments, as Mr. Dana has said, they can get the last word and unmask their batteries; but if printed arguments are to be made at all, does not common sense require that the printed arguments on both sides should follow the oral arguments on both sides? I put it to each member of the Commission, I put it to my friend the British agent—is not that the course which every human being knows will be most likely to lead to a thoroughly intelligent and just decision. If it was a matter of surprises—if we were before a jury, and a poor one, if it was one of those *Nixus Prius* trials, which we are sometimes concerned in, I could understand the policy of trying to have both