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## The commissioners for claims on France and the case of the Baron de Bode, 1815–1861

MICHAEL LOBBAN

In October 1793, as the reign of terror deepened in revolutionary France, Charles Auguste Louis Frederick, Baron de Bode, fled east, taking refuge first with the advancing Austrian army, and then heading to Russia. For much of his life, Charles had enjoyed little wealth and had often been in debt. These debts had led him and his wife Mary – the daughter of Thomas Kynnersley of Loxley Park – to leave their home in Staffordshire and settle in the Franco-German borderlands, where he entered the service of Louis XVI's German regiments. It was here that fortune finally seemed to smile on them in December 1788, when he acquired extensive estates in the fief of Soultz-sous-Forêts in Alsace from the Archbishop of Cologne. As Mary (who had just given birth to their ninth child) put it, 'Tis a land flowing with corn and wine . . . If God has sent us a quantity of children, He has also sent us plentifully to provide for them!'<sup>1</sup> Thanks to the revolutionary events which commenced a mere seven months later, their happy life at Soultz was to be short-lived; but the family's attempts to recover compensation under a treaty between Britain and France for the value of the estates seized by the French authorities were to last nearly seventy years after Charles had fled.

The family's campaign was led not by Charles – who died in Crimea in 1797 – but by his son, Clement, born in Uttoxeter in 1777. After the family left Soultz, Clement entered the Russian military service, becoming a Colonel in a cavalry regiment which joined in the allied march on Paris. But when the war ended, he returned to England to pursue his claim for compensation from the French government for the confiscated lands. For

This essay was written in memory of my friend and former colleague Professor Kaiyan Homi Kaikobad.

<sup>1</sup> W.S. Childe-Pemberton, *The Baroness de Bode, 1775–1803* (London: Longmans, 1900) p. 68.

over thirty years, Clement pursued the claim through courts, parliament and the press.<sup>2</sup> In the words of *The Times*, ‘He gave up his brilliant prospects in Russia to prosecute his claim, and thus doomed himself to a life of hope deferred and pecuniary difficulty.’<sup>3</sup> Since he had to borrow considerably to finance his long campaign he remained in debt all his life, constantly fleeing his creditors and living in the hope of getting a fortune. In 1834, while heavily in debt, he drafted his will, in which he left his widow an annuity of £2,000 a year, his daughters and illegitimate sons £10,000 each, and his eldest son the residue of what he confidently expected to be an estate worth in excess of a quarter of a million pounds.<sup>4</sup> In the event, he received no compensation, and his estate was worth only £450 on his death.

He died at the age of 69 in October 1846, just after having lost yet another round in his battle. After his death, his son (also named Clement) continued to pursue the matter for the family. Born in 1806, young Clement made his career in Russia, the land of his birth, becoming a councillor of state and chief secretary of the Russian embassy at Teheran. He might have become an ambassador, but gave that up after his father’s death to pursue the claim. Like his father, he suffered a series of disappointments, and gave up the struggle in 1861, retiring to Russia, where he finally died in 1887.<sup>5</sup>

The Baron’s was one of a series of Victorian cases, where impoverished outsiders made claims to recover their lost natural inheritance.<sup>6</sup> De Bode’s was unusual in so far as he did not attract mass popular support (as the Tichborne claimant had), but he did persuade many influential figures in the political and judicial world of the justice of his cause. The Baron’s case was also unusual in that it involved more complex legal questions than other more popular claimants’ cases. These questions raised knotty

<sup>2</sup> The Baron himself wrote numerous pamphlets setting out his claims: *A Short Statement of the Case of the Baron de Bode* (London: T. Denham, 1828), *French Claims: A Few Words in Relation to the Funds Paid by the French to the British Government* (London: Mills, Jowett & Mills, 1830), *French Claims: an Address to the Honorable Members of the House of Commons* (London: T. Brettell, 1833), *French Claims. Appeal of the Baron de Bode to the Honorable Members of the House of Commons* (London: John Hearne, 1836), *French Claims in the Case of the Baron de Bode* (London: T. Brettell, 1837). See also John Hodgkin, *Case of the Baron de Bode in its Present Aspects* (London: W. Clowes, 1860).

<sup>3</sup> *The Times*, 18 June 1887, col. 7d.

<sup>4</sup> TNA PROB 11/2054/85. A codicil increased the sums to the illegitimate sons to £15,000.

<sup>5</sup> *The Times*, 18 June 1887, col. 7d.

<sup>6</sup> The most famous of the cases was the Tichborne case, for which see R. McWilliam, *The Tichborne Claimant: a Victorian Sensation* (London: Continuum, 2007).

problems of how individuals could assert rights they claimed to have as a result of treaties giving post-war reparation for wrongful expropriation of property. The case raised questions of how far the authority of law could be used by a private individual who sought to force reluctant political authorities to pay over money claimed.

## I. The claim before the commissioners

### 1. *The commissioners for claims on France*

In the Treaty of Paris of 1814, France agreed not only to pay an indemnity to the Allies and to pay the debts it owed to private citizens in those countries, but she also entered into separate articles with the British to pay compensation for the value of her subjects' property 'illegally confiscated' [*'indument confisqués'*] after 1792.<sup>7</sup> On 10 October 1793, the revolutionary government had issued a decree confiscating the property of British subjects. This decree violated a Treaty of Commerce signed by the two countries in 1786, which provided that in case of war, each country's subjects were to be allowed to remain and trade in the other's territory, or (if their conduct rendered them suspect) were to be given a year to 'remove, with their effects and property.'<sup>8</sup> The arrangements made in 1814 were confirmed by another Treaty of Paris, signed on 20 November 1815 by Viscount Castlereagh and the Duke of Wellington for the British, and the Duke de Richelieu for the French. This treaty annexed two conventions, which fleshed out the stipulations made in 1814.<sup>9</sup> 'Convention No. 7', which was relevant to the Baron's claim, dealt with claims relating to losses within the territory of France, and made specific reference to the Treaty of 1786. 'Convention No. 13', which did not mention that treaty, related to claims outside the territory of France.<sup>10</sup> The French government agreed to pay a capital sum producing 3.5 million francs annual interest to pay the Convention No. 7 claims (plus interest at a rate of 4 per cent per annum).<sup>11</sup> A separate fund was created for the Convention No. 13

<sup>7</sup> R. Lewis Hertslet, *A Complete Collection of the Treaties and Conventions at Present Subsisting between Great Britain and Foreign Powers, So Far As They Relate to Commerce and Navigation*, 2 vols. (London: T. Egerton, 1820), vol. 1, p. 263.

<sup>8</sup> George Chalmers, *A Collection of Treaties between Great Britain and Other Powers* (London: John Stockdale, 1790), vol. I, p. 517.

<sup>9</sup> Hertslet, *Treaties and Conventions*, pp. 273ff.

<sup>10</sup> These conventions were drawn up since the commissioners were at first unclear which claims could be dealt with: TNA TS 25/2045, f. 81.

<sup>11</sup> The capital sum was worth £2.8 million in English money, or £217,540,157 at 2013 values.

claims. Claimants were given limited times to submit their claims: those living in Europe had to make claims within three months; those in the 'western colonies' had six months; those in the East Indies twelve months. Claims were to be liquidated by four commissioners, two French and two English, who had power to call witnesses and examine on oath.

A number of similar 'mixed' commissions met in Paris after 1815, dealing with claims involving various countries. Practical problems with this arrangement – and the potentially open-ended liabilities it suggested – led the French government to ask Wellington to negotiate a new solution. He proposed that the French should pay a sum calculated to cover their liabilities to each country in final settlement of the claims, which would then be liquidated locally.<sup>12</sup> As a result, another convention was entered into on 25 April 1818, under which the French made over an additional annuity of 3 million francs to commissioners who would be appointed solely by the King of England. In 1819, three commissioners were appointed under a statute,<sup>13</sup> which gave dissatisfied parties an appeal against the decision to the Privy Council within three months.<sup>14</sup> Under the statute, the Privy Council was forbidden from considering any new evidence, but had to determine on the same evidence as that considered by the commissioners. For the government, the claims were to be dealt with as quickly as possible as an administrative matter, which required limiting the nature of any possible appeal. The statute also provided for any surplus to be paid to the Treasury.<sup>15</sup>

The commissioners dealt with a large number of claims. Before 1818, the mixed commissioners had liquidated 308 claims and rejected eleven. By 1821, the British commissioners had liquidated a further 265 claims, rejecting 49.<sup>16</sup> At this point, there remained 373 unadjudicated claims. The largest claims to have been settled came from a bank, Boyd, Ker & Co., which submitted claims worth 4,655,713 francs to the joint commissioners and a further 8,092,338 francs to the British commissioners. They were awarded 2,373,081 francs (in *rentes*) from the joint commissioners and

<sup>12</sup> *Parl. Debs.*, 1st ser. 39: 515 (19 February 1819).

<sup>13</sup> C.A. Mackenzie, G.L. Newnham Collingwood and George Hammond. The method of proceeding by commissioners appointed under statute was not new. A mixed commission had been set up under a treaty of 1794 between the British and American governments to settle the claims of Britons owed debts in America before the end of the War of American Independence, which had given way in 1803 to an entirely British commission set up under statute to distribute funds paid by the Americans in final settlement of any claims: see PP 1812 (134) II. 137.

<sup>14</sup> 59 Geo. 3, c. 91. <sup>15</sup> 59 Geo. II c. 31. <sup>16</sup> PP 1821 (728) XXIII 411, pp. 12–13.

a further 6,307,414 francs from the British.<sup>17</sup> The bank was of course claiming not only on behalf of itself, but of its clients. One of the largest private claims was put in by the heirs of Sir Elijah Impey, chief justice of Bengal, who claimed 2,933,851 francs from the joint commissioners and a further 1,309,591 from the British.<sup>18</sup> But this claim was dwarfed by that submitted by the Baron de Bode, who claimed 13,529,062 francs in principal and arrears. This claim, which exceeded even that put in by the bankers, amounted to over half a million pounds sterling.<sup>19</sup> His own claim was outstripped only by that of the British Catholic establishments in France, whose claims ran to 19,391,295 francs.

## 2. *Clement's claim*

Clement was not seeking to claim compensation for the loss of his father's land, but for the loss of his own. The estates in question comprised the lordship of Soultz in Lower Alsace, as well as estates in Bergzabern in the duchy of Deux Ponts in the Rhineland. The estates had been granted to the family by the Archbishop of Cologne. They were held as a *fief d'oblation*, a form of tenure which descended only to the male heirs of the grantee, on whose failure it reverted to the Archbishop to regrant. When the male line of the previous grantee failed in 1788, Charles had paid the Archbishop a sweetener of £14,600, raised from his wife's family,<sup>20</sup> and had been formally invested – along with his son and heir – in December.<sup>21</sup> The Alsatian properties were the most valuable. Besides a chateau, which Charles had built and furnished lavishly, there were mines for salt, coal, tar and asphalt. Once installed, the family invested in the mines, incurring more debts (amounting to 300,000 francs, or nearly £13,000), which were charged on the estate in Bergzabern. As a result of these improvements, the mines yielded an annual profit of more than £7,500 per annum.<sup>22</sup>

<sup>17</sup> The sums added up to £347,219 (or £29,282,135 in 2013 values). The firm appealed against some rejected claims: see e.g. *Genesse's Case* (1823) 2 Knapp 345.

<sup>18</sup> They were awarded 1,382,577 francs for the first claim, while the second was rejected.

<sup>19</sup> The sum in English money as £541,162, or £40,451,859 in 2013 values.

<sup>20</sup> The Baron claimed to have paid a smaller sum than a rival had offered, but was granted it because of his family's connections with the Habsburgs. For details see 'Baron de Bode: Case Respecting His Claim on the Funds for Liquidating British Claims on France' [Law Officers' Opinion, 30 August 1832], The National Archives (henceforth cited as TNA) TS 25/2045, ff. 64, 85; 'The Baron's Replies' [to the commissioners award], TNA T 1/3760, f. 27.

<sup>21</sup> 'Baron de Bode: Case Respecting His Claim on the Funds for Liquidating British Claims on France', TNA TS 25/2045, f. 64.

<sup>22</sup> 'The Baron's Replies', TNA T 1/3760, f. 28.

According to Clement, in 1791, the elder Baron – ‘being alarmed at the disturbances which had broken out in France’ – made a public cession of the land to the son in order to protect it from being confiscated. Charles calculated that it was safer in the hands of his son, ‘who was a British Subject, England being at that time highly popular with the Revolutionary party in France’.<sup>23</sup> Moreover, since Clement was only fourteen, he ‘would not be bound by any abandonment of any part of his rights as owner of the said Lordship’. Meanwhile, Charles would run the property on behalf of his son. The ruse did not work: in October 1793, after the two men joined the Austrian army, the land was confiscated, with the ‘Bode’ family in general declared to be émigrés whose land could be taken (pursuant to a decree earlier that year).<sup>24</sup> When the family left Soultz, the contents of the house were emptied and eventually sold.<sup>25</sup> The mineral mines fell into disuse, while the salt mines were leased (in 1806) by the government to the *Compagnie des Salines de l’Est* for a period of ninety-nine years. The French government at first appropriated all the revenues of the Bergzabern estate, and then sold it off.<sup>26</sup> At the end of the war some of the Alsatian property remained unsold – including the salt mine, the manor house and some coal pits.<sup>27</sup> Clement told the commissioners that the family had been offered restoration of these properties, but that he had to abandon them to his father’s creditors, since they had been charged with the Bergzabern debts.

The deadline for claims to be submitted was 20 February 1815. On 13 January, Clement gave the Russian ambassador in Paris details of his claim to pass on to the commissioners. He gave them to Richelieu (then the French Prime Minister), who thought that the Baron was not eligible, since he did not appear to be a British subject. Clement – who spoke hardly a word of English – then went to see the British ambassador in Paris, who assured him that he was British by virtue of his birth. Clement tried on several occasions to see the chief British commissioner, but only got hold of him the day after the deadline had passed. However,

<sup>23</sup> TNA TS 25/2045, f. 65. See also John Fonblanque’s explanation to the 1834 select committee: PP 1834 (583) XVIII 855, p. 59.

<sup>24</sup> This decree was issued coincidentally on the same day as the decree confiscating the property of Britons in France.

<sup>25</sup> Clement’s lawyer later claimed that his father’s prized libraries were left on the streets for three days, but that the family was so revered by the community that no book was taken: TNA TS 11/528: Petition of Right hearing (1st day [15 June 1842]), f. 6.

<sup>26</sup> TNA TS 25/2045, f. 66.

<sup>27</sup> TNA TS 11 535: ‘In the Privy Council: Case in support of the award of the commissioners’, pp. 2–3 at Soultz there remained the salt mine, the coal pit, the mansion house and a few pieces of ground.

he was told that if he obtained a certificate from Richelieu to confirm that he had preferred his claims before him, then his claim would be considered. The letters were eventually forthcoming in 1816, when the French commissioners expressed their view in December that no difficulty would be made respecting the Soultz claim, provided that the Baron's nationality was established. In the meantime, the commissioners made it clear to Clement that he would need to answer three questions: whether he was British, whether the properties were in France and whether they were in his possession when they were seized.<sup>28</sup>

Clement conceded early on that he could not be indemnified for the loss of the Bergzabern property, since it was not within the borders of France.<sup>29</sup> To settle the nationality question, he obtained an opinion from Sir Samuel Romilly in March 1817. The case submitted to Romilly stated that Clement had been born at Loxley, the son of a German nobleman, whose property at Soultz 'was confiscated by the Government under the pretence of its being the property of an emigrant although the Baron was a German & owed no other allegiance to France than that due from him as Commander of one of the German Regiments in the French service'.<sup>30</sup> Romilly's opinion, which drew on *Calvin's Case*,<sup>31</sup> was that Clement was a natural-born subject entitled to all the rights and privileges of all subjects, and that he could never shake off this allegiance.<sup>32</sup>

Clement met the commissioners in London on 31 March 1819, when he was first told in detail of what information they required.<sup>33</sup> What he did not then know was that his name had not yet been included on the register, but that the commissioners were still seeking the Law Officers' opinion whether the steps he had taken early in 1815 were sufficient to allow his name to be entered.<sup>34</sup> Having been satisfied on that score, the Board outlined the proofs required once more in a formal letter of 23 August 1821. Regarding the Soultz property, he was required to show that it had been formally ceded to him by his father before 10 October 1793, as evidenced by a notarial act (or a notarial act proving the loss of the

<sup>28</sup> 'The Baron's Replies', TNA T 1/3760.

<sup>29</sup> Letter dated 29 October 1816, TNA TS 11/535. He added that the French government had profited from the sale of the property.

<sup>30</sup> PP 1834 (583) XVIII 855, p. 17; the full case is also to be found in TNA C 206/90: the Baron's petition of right, f. 8.

<sup>31</sup> *Calvin's Case* (1601) 7 Co Rep 1.

<sup>32</sup> 'Pleas before the Lady the Queen in Her High Court of Chancery on the 2nd day of Februy AD 1839', TNA C 206/90, ff. 9–10.

<sup>33</sup> 'The Baron's Replies', f. 19. <sup>34</sup> PP 1834 (583) XVIII 855, p. 10.



formal act of cession). He had to prove that he was known to the French authorities at that time to be the sole and *bona fide* owner of the property, and that it was confiscated on account of his being a British subject, by virtue of the decrees of confiscation.<sup>35</sup> The evidence required was detailed and comprehensive, and Clement complained repeatedly that the commissioners – having delayed in telling him what was needed – were setting impossibly tight timetables. However, the commissioners were unsympathetic to his requests for more time, and in April 1822 told him that unless he produced the necessary documentation within a fortnight, his claim would be rejected.<sup>36</sup> The commissioners' sympathy for the Baron had been seriously damaged by his habit of referring potential creditors to them and even giving promissory notes payable at their offices.<sup>37</sup>

They drew up their award rejecting the claim on 26 April. It contained two main conclusions. First, his claim relating to the mines was rejected, since a law of 12 July 1791 had placed all minerals at the disposition of the state, and there was no proof that either the father or the son had been granted the right to operate the mines. Second, his claims relating to the other property were rejected since there was no proof that the cession 'was admitted and recognised by the French authorities as valid and legal'. On the contrary, they concluded that it was his father who was in possession of the estates, which were seized on the grounds that the elder Baron was an émigré.<sup>38</sup> The commissioners felt that Clement's own case appeared to concede that the property had remained in the hands of his father: for as they read it, the wording both of the case submitted to Romilly and of a covenant drawn up by one of Clement's creditors, Thomas Richmond (to whom he had assigned part of the expected proceeds of the case), suggested that the land was confiscated as that of his émigré father. Although the Baron had struck out the passage in the covenant with Richmond, its presence alone was said to be 'fatal to the claim'. All this seemed to make it clear that the son was only entitled to inherit after the death of his

<sup>35</sup> PP 1834 (583) XVIII 855, p. 11.

<sup>36</sup> In February 1822, Clement's agent agreed to abandon part of his claim amounting to 3,023,306 francs, which represented the Bergzabern property, and feudal rights which had been abolished in 1789. The capital claim now valued at 3,903,600 francs. Letter from J.M. Brackenbury, 21 February 1822 TNA TS 11/535. The claim is broken down in the 'Case in support of the award of the commissioners' before the Privy Council in TNA TS 11/535.

<sup>37</sup> Letter 15 July 1819, TNA TS 11/535; Letter 14 September 1820, TNA TS 11/535, cf. PP 1834 (583) XVIII 855, p. 42.

<sup>38</sup> The award is given in 'Case in support of the award of the commissioners' before the Privy Council in TNA TS 11/535, p. 6.

father. The commissioners did not consider the question of the Baron's nationality in this award, although in an abstract drawn up five years later (which may have reflected considerations in their minds arising in other cases at that time),<sup>39</sup> they noted that 'although born in England, [he] was not such a British subject as was in any way contemplated by the Treaty of Commerce between England and France'.<sup>40</sup>

Clement appealed to the Privy Council in June. He reiterated his claim that the land had been ceded to him in 1791, and argued that while the documentary evidence of the cession had been lost in the revolution, he could offer additional evidence from witnesses. The Baron felt that he had been given an impossibly short timetable by the commissioners in which to obtain evidence from Alsace, which was a sixteen-day journey from London. However, the Privy Council upheld the award, refusing (as they were bound under the statute) to admit any new evidence. Lord Stowell held 'that the claimant had completely failed in regard to the ownership of the property': for the cession, while by no means an improper 'contrivance originating in the mind of the father' had 'proved ineffectual'.<sup>41</sup> In effect, there was no question of law for the Privy Council to consider in this case – since the commissioners' decision was based on questions of fact – but only matters of fact on which no new evidence could be admitted. The Privy Council, therefore, did not express a view on legal questions which would be debated in future in regard to his claim, namely, whether the Baron was English for the purposes of the treaty, and whether his property had been taken under the laws sequestering English property.

If the Privy Council did not pronounce on the legal aspects of Clement's claim, it did discuss legal issues in the few other cases which came before it. In a number of cases it took a more liberal view of how the treaty was to be applied than the commissioners had.<sup>42</sup> For instance, in *Pilkington's Case*, Sir William Grant MR noted that compensation under the treaty was for

<sup>39</sup> It was at this time that they rejected the claim of the heirs of the Count de Wall, discussed below.

<sup>40</sup> PP 1834 (583) XVIII 855, pp. 42–44. In this document, they added (five years after their award) that Clement could have had no rights since '*we are informed* that no minor can be invested with a German fief' (emphasis in original).

<sup>41</sup> PP 1834 (583) XVIII 855, p. 106. Stowell was later quoted as having said 'that the claimant, who, no doubt, has been much excited by this engrossing object, seems to labour under some strange delusion'. Quoted in *Parl. Debs.*, new ser., vol. 19, col. 1574.

<sup>42</sup> Only eighteen appeals were heard, brought by only eleven sets of appellants: PP 1826–1827 (428) XXII.637.

property seized ‘unjustifiably’, rather than property taken ‘illegally’, since a sovereign’s actions within his own domain could not be illegal. Grant consequently felt that ‘property may be said to be indument confisqué with reference to the Treaty of 1786, with reference to the modern usages of nations at war, or with reference to the conduct of this country towards the subjects of France’.<sup>43</sup> The Privy Council also seemed to take a less strict view than the commissioners on the question of nationality. In September 1820, it heard the appeal of the heirs of the Comte de Fanning, an Irishman who had settled in France and whose estates had been confiscated in 1792, after his return to Britain. The commissioners had rejected their claim on the grounds that Fanning was a naturalised Frenchman, whose property was seized as that of an émigré. However, the Privy Council held that it had not been proven that he had been naturalised and in the absence of proof, he was to be taken as a British subject whose property was seized after the decree of confiscation.<sup>44</sup> The Privy Council also took a generous approach when it came to French women who had married Englishmen.<sup>45</sup>

However, the Privy Council confirmed the commissioners’ rejection of the largest claim of all, that of the Catholic colleges which had been set up in France after the Reformation to educate the children of English, Scottish and Irish Catholics. They had been treated under the revolution as distinct from French ecclesiastical houses and their property had been seized under decrees against British property. Although these claims attracted some sympathy from the British commissioners,<sup>46</sup> they were rejected on the ground that the property confiscated belonged not to individuals, but to bodies incorporated in France. In the Privy Council, Lord Gifford upheld this decision, holding that the parties to the treaty could not have intended ‘that the British Government should demand, or

<sup>43</sup> *The Rev Charles Pilkington, William Thomas Williams, and J Newland v. Commissioners for the Claims on France* (1821) 2 Knapp 7, at 13.

<sup>44</sup> *Hill v. Reardon* (1826, 1827) 2 Russell 608. By contrast, the commissioners refused the claim of Count O’Mahoney for property seized in Nancy (under laws against émigrés and sold in January 1793), since it was seized under laws passed long before the decrees of confiscation and sequestration of British subjects’ property, and before war broke out between Britain and France. PP 1861 (502) XI 513, at p. 175.

<sup>45</sup> The French-born Marie Girardot, who had married a naturalised Englishman, and the Marchioness of Wellesley, who had long been resident in England, but only married the Marquis after her property was confiscated, were both compensated, the first after an appeal to the Privy Council, the second after an opinion from the King’s Advocate based on that decision: See *The Marquis du Bouchet, Executor of the Comtesse de Conway: The Award of the Commissioners for Liquidating British Claims on France* (1834) 2 Knapp 365; PP 1861 (502) XI 513, at p. 171.

<sup>46</sup> Note from C.A. Mackenzie, 19 December 1822; TNA FO 27/278.

the French Government grant, compensation for property held in trust for establishments in France, and for purposes inconsistent with British laws, and which were subject to the control of the French Government'.<sup>47</sup>

When the Catholic claims were rejected, it became clear that there would be a surplus in the funds paid by France, amounting to nearly half a million pounds.<sup>48</sup> With this in mind, the Treasury decided that the commissioners should now consider the claims of those who had failed to register their claims in time in 1816, but that they should not reopen closed cases.<sup>49</sup> Under these circumstances, the Baron wrote to the commissioners asking them to retain in their hands a sum sufficient to satisfy his claims; and in April he returned to the Privy Council. However, this appeal failed, for Lord Gifford held that the statute gave only one final appeal.<sup>50</sup> When the last appeal to the Privy Council was handed down in July 1826, the commission announced that it had completed its existing business and turned to the new cases.<sup>51</sup>

## II. Political pressure

Having failed to persuade the Privy Council to reopen his case, Clement turned to France, which had passed a law in April 1825 to indemnify those who had lost lands in the law confiscating émigré property. However, he was told that he could not claim, since British subjects were excluded by the law of 1825: since he had been a registered claimant under the conventions, his claim had been included in the money paid over to satisfy the British claims.<sup>52</sup> With the French claims blocked – and with an opinion of Launcelot Shadwell that ‘although his case has miscarried before the Commissioners and upon the Appeal, the Baron is entitled, in the view of moral justice, to indemnification for the loss of his property’<sup>53</sup> – he set about reviving his claims in England in the wider political realm. There were three prongs to his attack. The first was to attempt to get

<sup>47</sup> *Rev John Daniel, Rev John Beu, Rev Francis Tuite, Rev John Yates and Thomas Cleghorn v. Commissioners for the Claims on France* (1825) 2 Knapp 23, at 49.

<sup>48</sup> PP 1828 (417) XVI 573 gives the figure of £482,752. The figure of £455,319 is suggested by calculation from the figures in PP 1830–1 (320) XIV.5.

<sup>49</sup> Treasury Minute, 2 May 1826, PP 1834 (76) XLI.497.

<sup>50</sup> TNA T 1/3760. He followed this up with a petition to the House of Commons on 8 May, which was ordered to lie on the table. Gifford’s judgment is in PP 1834 (583) XVIII 855, p. 136.

<sup>51</sup> Besides the 308 cases settled by the mixed commission, the second commission had settled 439 cases.

<sup>52</sup> PP 1860 (482) XXII 151, pp. 33–34. <sup>53</sup> TNA T 1/3760.

the government to use its discretionary power over the remaining funds to pay his claim on the grounds that the commissioners had treated him unjustly. The second was to obtain a parliamentary investigation. The third was to keep the matter before the public mind through the production of pamphlets.

### 1. *Pressuring the Treasury*

In May 1827, Clement submitted his case once again to the Treasury, in the hope that it would pay him his claim out of the surplus. However, the Treasury simply referred it back to the commissioners, who reiterated the view they had taken in 1822. Rejected once more, the Baron submitted a lengthy response, which he also forwarded to his parliamentary supporters. In this reply, he pointed out that the commissioners had never considered that he had a vested right to the reversion of the property, which gave him an interest even if the cession had not been valid (as he continued to insist it was). He also reminded his readers that other cases before the Privy Council had settled that British subjects could obtain compensation for land seized as émigré property: it did not (as the commissioners had said) have to have been taken solely by virtue of the decree confiscating British property. He also sought to answer some of the commissioners' other suspicions. They had pointed out that he had claimed £540,000 for a property for which his family had recently paid only £14,000, by way of a 'bribe' to the Archbishop of Cologne. Answering this, he retorted that the *douceur* 'has nothing to do with the point in discussion', but was simply 'proof of the misrepresentation and malice' of the commissioners. Even if his father had bought the estate for so small a sum, he said, 'it would not be a reason why the Estate should not be worth the sum I claim'.<sup>54</sup> In Clement's view, the commissioners were biased against him, and their report was a 'tissue of misrepresentations'.<sup>55</sup> '[T]hey are the party I complain of', he wrote to Edward Littleton MP, 'and can therefore hardly be called upon to give an opinion in their own

<sup>54</sup> 'The Baron's Replies', TNA 1/3760. In his proceedings before the Privy Council, the Baron had also submitted a sworn statement from Richmond admitting the error in the document and asserting that Clement had always claimed the property as his own: 'Report from the Select Committee of the House of Lords appointed to inquire into the allegations of the Baron de Bode's Petition', Parliamentary Papers (House of Lords) 1852 (194), p. 32 (TNA TS 11/535).

<sup>55</sup> Letter to the Duke of Wellington, dated 2 May 1828, TNA 1/3760.

case.<sup>56</sup> They looked for any technical reason to reject his name, to enable them to allocate his money to others. Where he was held to an impossibly strict timetable, ‘how different were their proceedings in other cases, amongst others Mr Boyd the Father in law of Mr Baldwin the Secretary of the Commission’, who was given time after the rejection of an award to obtain fresh evidence.<sup>57</sup>

In the meantime, the commissioners had progressed with settling the late-registered claims (distributing a further £191,589),<sup>58</sup> and determined to close the commission in March 1828.<sup>59</sup> Anticipating another surplus, Sir Robert Inglis sought a mandamus from the King’s Bench to compel the commissioners to consider the case of claimants under Convention No. 13, who wanted the surplus funds received for Convention No. 7 claims to be used to pay theirs.<sup>60</sup> Alarmed by this, Clement immediately urged the Treasury not to pay any surplus out until all the claims under Convention No. 7 had been satisfied, and he added that his own case could not be regarded as having been decided ‘until it has been investigated afresh with the additional evidence, which he was so arbitrarily prevented by the Commissioners from laying before them.’<sup>61</sup> In his correspondence with the Treasury, the Baron once again stressed the injustice done to him, the fact that a surplus remained and the legal point that the Treasury had discretion over the fund.<sup>62</sup>

However, the question whether a surplus still existed was in doubt in June 1828, when a parliamentary return revealed that £250,000 of the funds had been paid to the Commissioners of Woods and Forests, to help pay for the exorbitant cost of refitting and extending Buckingham Palace.<sup>63</sup> M.A. Taylor had followed this up with a motion condemning this as a ‘misapplication of public money’. The motion failed, but it led to many petitions from various claimants on the funds. It also generated much publicity, and much sympathy, for the Baron’s cause. *The Times*, for instance, printed Clement’s, commenting that it revealed ‘that unsightly palaces are to absorb immense sums, while just creditors go unpaid.’<sup>64</sup> Clement’s petition was presented to parliament on 1 July by E.G. Stanley, who also moved that it be referred to a select committee. His motion was

<sup>56</sup> Letter, 7 June 1827, TNA 1/3760. <sup>57</sup> ‘The Baron’s Replies’, TNA 1/3760.

<sup>58</sup> PP 1830–1 (320) XIV.5. <sup>59</sup> PP 1828 (417) XVI 573.

<sup>60</sup> *Morning Chronicle*, 6 May 1828. <sup>61</sup> Petition 7 May 1828, TNA T 1/3760.

<sup>62</sup> Petition 19 May 1828, TNA T 1/3760.

<sup>63</sup> PP 1828 (444) XVI 575. This disposed of all but £5,240 of the original money.

<sup>64</sup> *The Times*, 23 June 1828, col. 6c. For Taylor’s motion see *Parl. Debs.*, new ser. 19: 1476. Numerous other claimants also presented petitions to be paid out of the surplus. See *Journals of the House of Commons*, 25 July 1828.

lost, however, in the face of the opposition of MPs who felt that this was not a matter for parliament, since it had already been determined by a court of law.<sup>65</sup>

The outcry compelled the government to restore the money advanced to the Commissioners of Woods and Forests. With the fund standing at £278,336, the government began in 1830 to consider once more how to dispose of the money.<sup>66</sup> Those staking claims on the fund now included some of the original claimants (including the Catholic establishments), as well as claimants under Convention No. 13, whose funds had run out. This alarmed Clement. When he saw the return of unsettled claims made by Charles Baldwin in March 1830,<sup>67</sup> which omitted his name but included the Irish Colleges, he suspected the government of including unsustainable claims to give the appearance of doing justice, while secretly planning to keep the money. ‘The only legal and equitable unsettled claim existing, and which ought to have been on that return, was *mine*’, he fulminated, ‘and that was *omitted!*’<sup>68</sup> Having held back from publishing another pamphlet in 1829 (anticipating a helpful attitude from the government), he now rushed into print with a response.<sup>69</sup> He was also alarmed by the fact that the Irish colleges might be allowed to appeal to the Privy Council, since success on their part would sweep away the fund, and asked Stanley to present another petition in the Commons.<sup>70</sup> In June, a Treasury Minute clarified the government’s intentions. The original claimants whose cases had been rejected (such as the Irish) were not to be allowed to reopen their cases; and those who had not registered their claims before May 1826 were not to be allowed to claim. However, the late claimants admitted under the May 1826 Minute were to be allowed to appeal to the Privy Council in cases of rejection; while those who had claims under Convention No. 13 should also be allowed to claim.<sup>71</sup> This would exclude the Baron’s claim.

<sup>65</sup> *Parl. Debs.*, new ser., vol. 19 (1828), cols. 1563–1588. The Baron later claimed that the government had secured the victory by making false statements of fact: Memorial of 28 November 1830, TNA T 1/3760. Over the summer, Clement continued to write to Duke of Wellington, asking him to intervene: TNA T1/3760. He also published *A Short Statement of the Case of the Baron de Bode* (London, 1828).

<sup>66</sup> *Parl. Debs.*, n.s. 24: 453 (6 May 1830). This had been discussed in 1829: in the debate on 28 May of that year, Dr Phillimore had asked the Chancellor of the Exchequer whether the Baron was to be included among those for whom the surplus was intended, but no answer was given. See letter from de Bode to G.R. Dawson, 8 June 182, TNA T 1/3760.

<sup>67</sup> PP 1830 (200) XXIX 457. <sup>68</sup> Memorial 28 November 1830, TNA T 1/3760.

<sup>69</sup> Baron de Bode, *French Claims* (London, 1830). He also paid for advertisements in newspapers detailing his claims: e.g. *The Times*, 11 March 1830, 6 c.

<sup>70</sup> *Parl. Debs.*, ns 23: 1277. Sir James Graham and Dr Phillimore also spoke in the Baron’s favour.

<sup>71</sup> PP 1834 (76) XLI 497.

In the event, no new commission was issued in 1830, and the arrival of a new government in November gave Clement brief hope that his claims would be more favourably viewed.<sup>72</sup> Once again, he submitted a case to the Treasury arguing for his right to compensation, which expanded in a new way on the legal nature of his rights. The lordship of Soultz, he said, was an inalienable male *fief de protection*, regulated by the feudal law of the Empire rather than the law of France; for when Alsace became a part of France in 1648, the rights of the Alsatian nobility had been reserved in the Treaty of Münster.<sup>73</sup> Moreover, the decrees of 1789 and 1790 relating to feudalism had reserved the rights of the Alsatian nobles. Having been formally invested in the property with his father in 1788, and been ceded his father's rights in 1791, he was the legal owner of this feudal property. Moreover, the decree confiscating the property had simply listed the proprietor as 'Bode', omitting both the forename and the profession of the owner: it was not at all evident from the decree that the French had regarded it as his father's property, rather than as his.

Given these new arguments, the Treasury referred the question back once more to Charles Baldwin, the secretary of the commission. In a detailed report refuting the claims with far more detailed legal arguments than had been presented before, Baldwin noted that the agreement with France contemplated granting an indemnity for losses resulting from breaches of the 1786 treaty. The Baron's property was clearly not commercial property. It consisted largely of feudal and seigneurial rights, which were abolished in 1790, without any reservation for Alsatian rights. But even if such rights had been reserved, he asserted (referring to Philippe Antoine Merlin's *Repertoire de Jurisprudence*) that no British subject could hold such estates.<sup>74</sup> Even if the Baron was British by birth, he could therefore not be considered as British for the purposes of the treaty. As to the cession, it was void both for failing to comply with formalities required by an ordonnance of 1731 and for purporting to be a transfer to a minor lacking contractual capacity. The property consequently remained that

<sup>72</sup> Memorial of 25 November 1830, TNA T1/3760.

<sup>73</sup> 'The effect of the treaty upon the possessions of the immediate Nobility of the Empire situate in Alsace was to unite these possessions politically with France and at the same time to reserve their connection with Germany in respect of all the feudal incidents of tenure', TNA TS 25/2045, f 63.

<sup>74</sup> Under the title 'Droit d'Aubaine', Merlin had said that those born outside France were treated harshly by seigneurs: 'dans plusieurs provinces du Royaume, il était d'usage que les Seigneurs les reduissent à l'état de Serfs'. TNA TS 25/2045, ff. 87–8. However, a convention between the French crown and the Archbishop of Cologne in 1769 had abolished the Droit d'Aubaine in those areas: PP 1834 (583) XVIII 855, p. 154.



of the elder Baron when it was seized as émigré property. He concluded, '[s]hould their Lordships consent to reopen the case it would produce most serious circumstances as every claimant who has not been successful in his appeal to the Privy Council would naturally expect the same indulgence'. In a separate letter to Thomas Spring Rice (secretary of the Treasury), Baldwin wrote, 'I trust that I have completely shewn the Baron has not even the shadow of a claim.'<sup>75</sup> The report was sent to the Law Officers, who opined in August that 'no sufficient proof of mistake is given to authorize their Lordships to unravel the judgment that has been pronounced',<sup>76</sup> while adding that the government could compensate the Baron by an exercise of their equity, if they were clearly convinced that the decision had been wrong. They were not.

At the end of 1832, with doubts over Clement's case finally settled, the Treasury decided to appoint a new commission, to dispose of the remaining money, and in January three new commissioners were appointed: Dr Joseph Phillimore (who had been one of Clement's supporters), William Empson and Andrew Martin. A Treasury Minute in March reiterated the government's view that there should be no reopening of old cases, particularly when (as in Clement's case and that of the Catholics) the decision had been confirmed by the Privy Council. The Treasury was also now prepared to allow wholly new cases, provided that the delay had not arisen from circumstances over which the claimant had had any control.<sup>77</sup> Appeals would be allowed to go to the Privy Council, using an informal process.<sup>78</sup> The three commissioners would later acquire more powers to settle claims under different conventions: a Treasury Minute of November 1834 authorised them to examine the claims of British subjects whose property was confiscated by the Danish government in 1807, and another Minute of June 1837 directed them to examine the claims of subjects trading with Spain whose commercial property was sequestered by the Spanish government after 1804.<sup>79</sup>

## 2. *Hill's select committee*

With the government resolute on not exercising any discretionary power in Clement's favour, and with a new commission looking to dispose of the surplus, he returned to the parliamentary route. The Baron's

<sup>75</sup> Letter dated 19 July 1832, TNA T 1/3760. <sup>76</sup> TNA TS 25/2045, f. 93.

<sup>77</sup> PP 1834 (76) XLI 497. <sup>78</sup> PP 1861 (502) XI 513, at p. 119.

<sup>79</sup> PP 1861 (257) XXXIV. 393; PP 1842 (449) XXVI 373, p. 9. For the background to these claims see *Parl. Debs.*, 3rd ser. 24: 408 (12 June 1834).

continuing publicity campaign – which included placing large advertisements in the daily press, detailing the ‘misappropriated’ money received from France<sup>80</sup> – finally bore fruit in 1834, when a select committee of the House of Commons was appointed on the motion of Matthew Davenport Hill to investigate his claims.<sup>81</sup> The news of this committee being appointed was soon met by petitions from claimants under the other conventions, who feared that the Baron might sweep away all the remaining money, and who wanted to be allowed to be represented by counsel before the select committee, to oppose the Baron. Two representative claimants from other classes – Arthur Rondeau and James Bourdieu – were selected to oppose the claim.<sup>82</sup> The government clearly had a hand in this, for it agreed to pay the legal costs of these claimants (one of whose claims was rejected by the Privy Council while the select committee was sitting).<sup>83</sup> Moreover, their arguments (presented by Sir William Follett, soon to be Solicitor-General) reflected the position of the government. Although the committee never issued a final report with conclusions, it produced an interim report in August of over 150 pages, which gathered together much of the documentation which had been discussed over the years. It was before this committee that the most sophisticated legal arguments pertaining to the claim were to be heard.

Two arguments dominated the discussion, neither of which had been regarded as particularly important before the commissioners. The first concerned Clement’s nationality. The issue of nationality had recently been debated once more in the Privy Council in cases arising from the late claims, where the issue had been explored in greater detail than previously. In April, the Privy Council heard the appeal brought by the siblings of James Drummond, whose claim amounted to 1,041,200 francs (£41,648). Born in Avignon, Drummond was the great-grandson of the Earl of Melfort, who had fled Britain with James II after the Glorious

<sup>80</sup> For example, *The Times*, 25 April 1834, col. 2e, 29 April 1834, col. 6d.

<sup>81</sup> *Parl. Debs.*, 3rd ser., vol. 23 (1834), col. 397. In 1832, Clement convinced a new MP, Thomas Wilde, to take up the matter in 1832, with a view to getting a select committee to investigate, though none had been appointed. Letter, 7 May 1832, TNA T 1/3760; *The Times*, 13 August 1832, col. 3f.

<sup>82</sup> *Journal of the House of Commons*, 89 (1834), p. 286 (13 May), 290 (14 May), 321 (22–23 May). *Parl. Debs.*, 3rd ser. 12: 1248 (22 May 1834). See also the Baron’s claims regarding the Treasury’s part in this: *Baron de Bodev. The Queen*, Appendix to the case of the plaintiff in error [House of Lords], TNA TS 11/528, p. 47.

<sup>83</sup> Rondeau’s lawyer, Edward Richardson, was paid £1,584.3.8 by the Treasury: letter from George Maule, 18 March 1836, TNA T 1/3760; *Bourdieu’s Case* (1834) 2 Knapp 353.

Revolution. He inherited the title of Duke of Melfort from his father, and an estate in Languedoc from his French mother. This estate was sequestered by the French government in October 1792 as the land of a French émigré, and subsequently sold. The commissioners had rejected the claim in 1827 on the grounds that he was not British, and the loss was hence not in consequence of the decrees against British property.<sup>84</sup> His family challenged this conclusion. Although he was born in France and had never lived in Great Britain, Drummond was claimed to be British by virtue of a series of eighteenth-century statutes, which enacted that the grandchildren of natural-born British subjects were themselves such subjects 'to all intents, constructions and purposes whatsoever'.<sup>85</sup> In the Privy Council, the King's Advocate, Sir Herbert Jenner, argued that even if Drummond were technically British by statute, he could not qualify under the conventions. When 'a treaty speaks of the subjects of any nation', he noted, 'it must mean those who are actually and effectually under its rule and government, not those, who although living out of its dominions, and never having been subject to its government, it may choose to designate its subjects, in its own municipal laws and statutes'.<sup>86</sup> Sir Launcelot Shadwell, giving the judgment of the Judicial Committee, upheld the commissioners' decision. Although 'formally and literally' British, Drummond was also French, according to the definition in Pothier's *Treatise on Persons*.<sup>87</sup> Since he was a French subject in French law by virtue of his birth, 'no act done towards him by the Government of France could be considered an illegal act, within the meaning of the treaty'.<sup>88</sup> This case seemed to provide a clear precedent for the Baron's opponents, in that it suggested that a person who was both French and English could not claim.

However, the question of nationality was also raised in June<sup>89</sup> in *Count de Wall's Case*. This case was brought by the heirs of an Irishman, who had

<sup>84</sup> *Drummond's Case* (1834) 2 Knapp 295.

<sup>85</sup> The Acts were 7 Anne, c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21.

<sup>86</sup> *Drummond's Case* (1834) 2 Knapp 295, at 305.

<sup>87</sup> 'Les Citoyens, les vrais & naturels François, suivant la définition de Bacquet, sont ceux qui sont nés dans l'étendue de la domination Française', R.J. Pothier, *Traité des Personnes et des Choses*, Book 1, tit. ii, sect. 1, in *Oeuvres Posthumes de M. Pothier*, vol. 2 (Orleans: J. J. Massot, 1777) p. 573.

<sup>88</sup> *Drummond's Case* (1834) 2 Knapp 295, at 311–312.

<sup>89</sup> In the same month, the Privy Council held that the foreign-born wife of a British subject could not obtain compensation for the loss of her property, unless she could be shown to have been domiciled in Britain. *The Marquis du Bouchet, Executor of the Comtesse de Conway: The Award of the Commissioners for Liquidating British Claims on France* (13 June 1834) 2 Knapp 522.

settled and married in France, and acquired properties which were seized in the revolution as that of an émigré. There were strong parallels with the position of the Baron's case, since he had joined the Irish Brigade in the French army, and had been made a Knight of the Order of St Louis. Arguing for the family, Dr Lushington insisted that members of the Irish Brigade had never been regarded as French nationals. Indeed, he added that the commissioners had in three other cases not regarded membership of the Irish brigade as fatal to a claim to compensation. Jenner countered that the Count had acquired French nationality by joining the order, and argued that the court should not be swayed by the fact that the commissioners may have given awards in similar claims, 'for they are the decisions of a tribunal determining without legal discussion, and most probably unappealed against, only because by the Act of Parliament no appeal lies where the determination has been in favour of the claimant'. However, in this case Shadwell held that there was no evidence that the Irish-born Count had ever lost his British nationality and assumed a French character.<sup>90</sup> This case seemed to confirm that compensation could be granted for the seizure of émigré property, which was more helpful to Clement's case.

As a result of these recent cases, when Hill's select committee sat the question of Clement's nationality became a crucial question for discussion. John Fonblanque sought to answer the doubts raised by *Drummond's Case* by distinguishing between natural-born subjects of the king and those (like Drummond) who were by statute allowed to enjoy the rights and privileges of a natural-born subject, such as inheriting property, but who would not, for instance, be regarded as a traitor if he fought for his native country in a war against Britain. Against this, Follett argued that the fact that 'a party born in England may, by the maxims of the old feudal law, owe allegiance to the sovereign of this state' did not mean that 'he is a British subject within the meaning of the contracting parties to this convention'. Had the Baron been domiciled in England, but had his French properties confiscated, he might have claimed: but the mere fact of his birth did not entitle him to claim.<sup>91</sup> This was simply the case of a French citizen having his property confiscated by a French law.

<sup>90</sup> *Count Wall's Case* (1834) 3 Knapp 13. The claim was for 1,119,050 francs (£44,762). Litigation in this case continued, insofar as the heirs sought to obtain compensation for the confiscated properties which had belonged to thier mother. In this they failed: *The Case of the Representatives of Angelique Michael Joseph Wall* (1848) 6 Moo PC 216.

<sup>91</sup> PP 1834 (583) XVIII 855, pp. 76, 85.

The second argument turned on the nature of the Baron's property. Fonblanque's main argument was that Clement had a vested interest in the property, since it was an inalienable male fief, with which neither his father nor the French state could interfere. He rejected the commissioners' argument that all feudal rights had been abolished before 1793, arguing that because of the provisions of the Treaty of Münster, the French revolutionary government had no power to abolish his feudal rights under Imperial law.<sup>92</sup> The power to break the feudal succession was only acquired by the French state under the Treaty of Lunéville of 1801, which ceded the Rhineland to France, but this was something which had occurred well after the confiscation. In short, although the French revolutionary state was free to abolish all feudal rights in France, thanks to the rules of international law, it could not abolish them in Alsace.<sup>93</sup> 'To state that a breach of the Treaty of Westphalia shall be an answer to a claim founded on a breach of the Commercial Treaty', Fonblanque declared, 'seems to me so monstrous a proposition, that no ingenuity can sustain it'.<sup>94</sup> Follett dismissed these international law claims. In his view, the idea that a country to which land was ceded could have no right to alter the laws of that land was in his view 'an absurd proposition'. While foreign states might complain about the breach of a treaty, and might even go to war over it, they could not prevent the new law in acquired territories taking effect.<sup>95</sup> In his view, the sovereign power of a state within its borders could not be limited by treaty. This did not settle the matter for the committee's chairman, Matthew Davenport Hill, who pointed out that the compensation commission's task was to establish whether property was taken in violation of international law, not whether it was taken in breach of domestic law. '[W]e are', he said, 'considering treaties as something above laws'.<sup>96</sup> Follett's answer to this was that the commission was concerned only with any breaches of treaties with Great Britain. Since she was not a party to the treaty between France and Austria in 1648, she had no standing to complain about it, and certainly could

<sup>92</sup> In his view, this gave the Baron a claim, even if the cession was not proved. This issue had not been raised in the original claim. However, it was raised before the Privy Council in the Baron's second appeal by Henry Brougham (see the letter of 'A Constant Reader', in *The Times*, 10 April 1830, col. 3c). The Baron, in his petition to Parliament in 1828, stated that he had not put his case properly initially, thanks to errors by his lawyers.

<sup>93</sup> He conceded that the French state could abolish feudalism within the rest of France, since those feudal rights derived from original French grants. This explained the Duke of Richmond's case: PP 1834 (583) XVIII 855, p. 52.

<sup>94</sup> *Ibid.*, p. 53. <sup>95</sup> *Ibid.*, p. 87. <sup>96</sup> PP 1834 (583) XVIII 855, pp. 89–90.

not use it to show a domestic French law was invalid. Quoting Vattel, he argued that if two contracting parties to a treaty broke their contract, a third party could not complain. The British could only complain about breaches of the 1786 treaty, not of wider breaches. The Barons's case thus raised complex issues over whether international obligations should have more authority in a tribunal deciding whether property had been taken 'unjustifiably' (in Sir William Grant's phrase) than domestic laws within a sovereign (if revolutionary) state.

Considering the Baron's property rights also involved looking into the question of the cession. Fonblanque argued that although there was no formal documentary evidence of the cession, there was sufficient evidence from witnesses to raise a moral presumption that it had occurred, and he argued that the commissioners were entitled under the treaty to use their discretion over such matters of evidence. Follett countered that only a formal cession could transfer property in French law. He sought support for this point from the French litigation Clement had been involved in regarding the unsold properties, notably the salt mines at Soultz. Follett argued that Clement had originally claimed these unsold properties (under a French law of 1814 reinstating confiscated émigré property) in his capacity as heir rather than as owner, suggesting that his father was owner until his death. He added that Clement had only obtained standing in the French courts in his capacity as a Frenchman, and that the French courts had rejected his subsequent claims to be the owner of the lands by virtue of a cession,<sup>97</sup> since the purported cession had not complied with the requirements of the 1731 ordonnance. In Follett's view, this did not only dispose of Hill's claim (when moving for the select committee) that the French had recognised his feudal rights in 1815 in restoring the unsold properties to him (prior to the Baron's having to abandon them to his father's creditors). It also showed there were no foundations to his claims to be owner by virtue of the cession.<sup>98</sup> His conclusion (like the Privy Council's) was that the purported cession was simply a ruse to convince the French authorities that there had been a transfer of property, when there had not. The Baron's lawyers challenged this version of events, but argued that they needed more time to get documentation to prove their claims, including the restoration of the unsold properties and the cession. In fact, at the time of the select committee's sittings, the litigation over

<sup>97</sup> Clement argued that the agent who submitted the first claim in 1816 had erred in describing him as heir.

<sup>98</sup> PP 1834 (583) XVIII 855, p. 104. The documentation pertaining to the mines is at pp. 109ff.

these properties was still ongoing in France, between Clement, his father's court-appointed administrator and the heirs of his father's creditors. It was not a settled question.<sup>99</sup>

With the hearings interrupted, Clement set out to gather new evidence, spending £3,000 in obtaining 132 new documents to support his claim. However, the select committee was not reappointed in 1835, after Hill lost his parliamentary seat. When Thomas Gisborne moved for a reappointment of the committee to consider this evidence,<sup>100</sup> it was opposed by Thomas Spring Rice (now Chancellor of the Exchequer), who said that the Baron had had quite enough time hitherto to establish his claim and that it would be unfair on other claimants not to distribute what remained of the fund. The Solicitor-General, Sir Robert Rolfe, described the Baron's claim as 'the most Quixotic that ever came before the House', and the motion was heavily defeated.<sup>101</sup> But Clement did not feel defeated: he pressed on with more explanations in the newspapers, and persuaded Daniel O'Connell to present yet another petition.<sup>102</sup> That the House of Commons had had enough of this claim can be seen clearly from the reception of O'Connell's announcement of two motions he was bringing:

Mr. O'CONNELL gave notice, that on the 21st of June he would move for leave to bring in a bill to reform the House of Lords (laughter), and to make the constitution of that body elective; and that on the 23d of that month he would bring before the house the case of the Baron de Bode (Great laughter).<sup>103</sup>

<sup>99</sup> In 1836, Clement obtained a judgment in his favour in Wissembourg, though on grounds not helpful to his English claims. Answering his adversaries' argument that he could only inherit as a French citizen (whereas he was British), the court held that the registration of his birth in Soultz had shown his father's intention to recognise his status as a Frenchman. On the issue of the cession of the property to an English subject, the court held that this cession was simply effected 'for the needs of the moment' and (in light of the registration of his birth at Soultz) did not disprove his French citizenship. TNA TS 11/535, 'Extrait des minutes du greffe du Tribunal civil de première instance de l'arrondissement de Wissembourg', sitting of 3 June 1836. Clement's success was short lived: having failed to pay his father's debts, he lost the estate in 1837 when his father's creditors (the heirs of Thomas Schwendt) successfully pressed their claims. TNA TS 11/535, 'Extrait des minutes du greffe du Tribunal civil de première instance de l'arrondissement de Wissembourg', sitting of 23 June 1837.

<sup>100</sup> *Parl. Debs.*, third ser., vol. 29 (1835), col. 581.

<sup>101</sup> *Parl. Debs.*, 3rd ser. 29: 582 (14 July 1835). Hill later compared the decision not to reappoint his committee with a decree of the Committee of Public Safety in Robespierre's era: *The Times*, 25 June 1844, col. 7a.

<sup>102</sup> *The Times*, 17 August 1835, col. 3c, 20 August col. 3e, 12 September 1835, col. 1f.

<sup>103</sup> *The Times*, 21 May 1836, col. 4a.

When another Radical, Henry Warburton, sought to have the select committee reappointed in 1838, setting out various aspects in which the commissioners had acted in harsh if not underhand ways, his opponents did not mince their words. One MP said the Baron had pursued his claims with ‘a pertinacity approaching to monomania’, while the Chancellor (Spring Rice) accused the Baron of making false statements about his dealing with the Treasury, suggesting that ‘from rumination on one point for twenty years he had become insane’.<sup>104</sup> The motion was lost, with the Baron only getting support from the Radicals.

### 3. *Debts and desperation*

As he told the Duke of Wellington, Clement had, by the late 1820s, been ‘reduced to a state of destitution, and absolute beggary’.<sup>105</sup> In October 1831, the barrister Robert Langslow implored the Prime Minister, Earl Grey, to ‘make some allowance to him from the Treasury to enable him to support himself till his case can be brought before Parliament’.<sup>106</sup> The government was not minded to help out, however, and in 1833, he was imprisoned for debt. After 1835, he lived ‘within the rules’ of the King’s Bench prison, and thereby was able to avoid paying his creditors,<sup>107</sup> surviving largely through the help of the Russian community in London.<sup>108</sup> Eventually, his friends paid his debts to secure his release, after a creditor sought a vesting order against him in 1842, which threatened to upset legal proceedings which at that moment promised to give the Baron the compensation he sought.<sup>109</sup> During this period, he continued to seek to raise credit, protesting to the Treasury in 1834 that potential creditors were being told by them that he had no claim, and that ‘I am not the person I describe myself to be’.<sup>110</sup> Clement was happy to give bonds far

<sup>104</sup> *Parl. Debts.*, third ser., vol. 41 (1838), cols. 27, 31 (22 February 1838). The Baron protested against Rice’s aspersions: *The Morning Post*, 1 March 1838.

<sup>105</sup> Petition, 9 July 1828, TNA T1/3760.

<sup>106</sup> Letter from Robert Langslow to Earl, 27 October 1831, TNA T1/3760. Langslow, later Attorney General at Malta, was a long-time friend and supporter of the Baron, who was to be left £10,000 in the Baron’s will (in which Clement wrote that ‘no one knows my case so well as he and sees it in the same light I do it myself’).

<sup>107</sup> For a case against one of his guarantors see *Hodges v. Pritchard*, *The Times*, 1 December 1834, col. 3d.

<sup>108</sup> Letter from Count Nesselrode, 5 November 1836, TNA T 1/3760.

<sup>109</sup> See *Liverpool Mercury*, 1 July 1842; *The Standard*, 28 July 1842.

<sup>110</sup> Letter from de Bode to the Lords of the Treasury, 16 September 1834, TNA T 1/3760. For litigation giving an insight into his finances see *Hodges v. Pritchard*, in *The Times*,



in excess of the money he actually received, in order to keep his case afloat. Many others found their own financial well-being tied up with Clement's. In 1836, his younger brother William, another Russian army officer, who had interrupted his military career in 1831 to help Clement, petitioned the Insolvent Debtor's Court to be freed from his imprisonment for debts amounting to nearly £31,000.<sup>111</sup> Clement's own creditors repeatedly wrote to the Treasury, asking it not to pay the Baron until their debts had been paid. One of these was Edward Willies,<sup>112</sup> who had to petition the Insolvent Debtors' Court himself in 1838.<sup>113</sup> Despite such tales, the Baron continued to be able to raise credit from lenders who felt confident that one day their claims would be paid, but who in the meantime pestered the Treasury not to pay out the Baron first.<sup>114</sup>

By the late 1830s, Clement's behaviour appeared increasingly erratic. When, in 1836, an actuary friend of one of his creditors offered to intercede with the government, Clement took the approach as an admission by the government that there was a large surplus out of which they were prepared to pay a compromised sum. When questioned by the government about it, the actuary, John Finlaison, corrected the mixture of truth and falsehood which had come from Clement and raised the suggestion (soon to be repeated by Spring Rice in the debate) that he had gone mad.<sup>115</sup> With both the government and parliament deaf to his cries, Clement wrote to the Queen,<sup>116</sup> complaining that Spring Rice's 'base and scandalous calumnies on my character imputing to me falsehood, fraud or insanity'

1 December 1834, col 3 d; *Brunskill v. De Bode*, in *The Times*, 4 February 1835, col. 4b; *Toone and Halton v. The Baron de Bode*, in *The Times*, 25 January 1836, col. 4a. See also *The Times*, 31 July 1838, col. 7a.

<sup>111</sup> See *Morning Chronicle*, 5 January 1836, and the letter from William de Bode in *The Standard*, 7 January 1836, p. 1. See also *The Times*, 5 January 1836, 4c; *The Times*, 7 January 1836, col. 4b. The case revealed that Clement had actually received far smaller sums than the value of the bills given for them.

<sup>112</sup> See letter from Charles Baldwin to J. Stewart, 23 January 1829, TNA T1/3760, and letter from De Bode to the Treasury 2 November 1833, TNA T 1/3760.

<sup>113</sup> *The Times*, 31 July 1838, 7a; cf the letter from Francis Thomas Champneys in *The Times*, 10 August 1838.

<sup>114</sup> For instance, between 1841 and 1842, Clement raised £58,846 from John Wade, who on 9 May 1842 requested the Treasury not to pay Clement until he had been paid: TNA TS 11/534. For further evidence of continuing confidence in the Baron's debts see *Reay and Reay's Bankruptcy*, *The Times*, 27 November 1845, col. 7f.

<sup>115</sup> PP 1837–1838 (163) XXXVII.305, p. 5. Finlaison's wording was 'that this miserable man, by the mere circumstance of ruminating on one idea for a period of 20 years, has become finally insane'.

<sup>116</sup> This was not the first time he had written a personal letter to the sovereign. See his memorial to the King, 22 October 1830, TNA T 1/3760.

had prevented the reappointment of Hill's committee. Not only had there been a defalcation in the funds amounting to £2 million, but rumour had it 'that the disappearance of these funds is attributable to Your Royal predecessor King George the fourth through the agency of those who were then entrusted with the care of them!!!' Having insulted the Queen's uncle, he turned to constitutional theory. 'If I have formed a correct idea of the origin of the Prerogative as to appointing or dissolving an administration at the Royal pleasure; – it was intended for the purpose of watching and acting as a check of superior power over the proceedings of Ministers . . . to protect the subject from the malpractice of an administration in cases where redress is difficult or cannot, from being beyond the jurisdiction of courts of Law, be obtained in the ordinary way'. While the sovereign could, according to the maxim, do no wrong, she was morally responsible for good government, 'And we learn from history that the non observance of this moral Royal obligation has but too often sown the seeds of deep rooted discontent ending in the overturn of the then existing form of government'.<sup>117</sup> If only the Queen would sack the ministry and refer his case to a competent body, all would be well. Victoria's response was to pass the letter over to Lord Melbourne. In the following decade, Clement would once again attempt to get redress from the sovereign, but in a more formal way.

### III. The claim in the Common Law courts

With the parliamentary route apparently blocked, Clement turned for the first time to the common law at the end of the 1830s. He was to find these courts far more receptive to his arguments relating to the validity of his claim. However, they ultimately proved of little practical help, for he found himself frustrated by the rules of English public law, which prevented him from getting the crown to disgorge money to which he was held to be entitled under the treaty. As time passed, the amount remaining in the hands of the commissioners steadily diminished. The new commissioners had continued to examine French claims (as well as Danish and Spanish) in the 1830s. In 1839, £150,379 remained in the hands of the Treasury,<sup>118</sup> which now ordered that the claimants who had only received a proportion of their claims hitherto should be paid in full. The government was clearly intent on winding down this operation. In March 1841, the number of commissioners was reduced to one –

<sup>117</sup> Letter to the Queen, 28 February 1838, TNA T 1/3760.

<sup>118</sup> PP 1841-I (362) XIII.369.

Phillimore. By then, £56,855 had been awarded by the commission to eighty-two 'Spanish' claimants for whom no fund existed: in their case, the money to cover these claims had been voted specifically by parliament. Five years later, a sum short of £40,000 remained, waiting to be distributed following the final settlement of Privy Council cases.<sup>119</sup> By 1848, the sum remaining had diminished to £16,067.<sup>120</sup> If the Baron was finally to be paid, it would have to be from new money, voted by parliament.

### 1. *Seeking a mandamus*

The tone was set in his first foray into Queen's Bench, where in June 1838 he sought a mandamus to compel the Lords of the Treasury to pay the claim. In order to claim that the court had jurisdiction to hear a case which had already been rejected by the Privy Council in what the statute said was a final appeal, the Baron's counsel, Matthew Davenport Hill, put forward a new argument. The 1819 statute which gave power to the commissioners to settle the claims was premised (he argued) on the assumption that all claims which had been submitted on time had been registered; and the act only gave the commissioners (and the Privy Council) power to decide on registered claims. However, the Baron's claim had only been formally registered on 21 June 1819. According to Hill, Clement's claim was a *casus omissus*, and while all the registered claimants had a statutory preference over those who were not registered, the commissioners had no jurisdiction over his claim. However, the Baron had a claim on any surplus which remained, which derived from his 'original rights as created by the convention itself'.<sup>121</sup> The surplus money which had come (under the statute) to the Treasury had to be regarded as being held for his benefit, and the only remedy he had to obtain it was by a mandamus. Coleridge was not convinced that he had a case on the merits,<sup>122</sup> but held that, even assuming all his claims were true, he could give no remedy. To begin with, it was not clear that Clement had a *legal* right against the government, for although the government was fulfilling a duty owed to its people in negotiating with France for compensation of their property,

<sup>119</sup> PP 1846 (187) XXV.299.      <sup>120</sup> PP 1849 (597) XXX.283.

<sup>121</sup> *In the matter of Clement De Bode, Baron de Bode* (1838) 6 Dowling Practice Cases 776, at 785.

<sup>122</sup> Attempting to convince him, Hill reiterated the point that the Baron did not claim to be a French citizen, and observed that thirteen claimants had been compensated by the commission, all of whom had had their land seized as émigrés, and all but one of whom had been naturalised in France. *The Times*, 30 May 1838, 6f, 11 June 1838, col. 6d.

this was not the kind of obligation which a court could enforce. Moreover, the statute had left the surplus absolutely at the discretion of the Lords of the Treasury, and consequently no individual could complain about how they used it. But even on the assumption that money had found its way from France into the Treasury ‘charged with a solemn trust’, there were two obstacles to Clement’s recovery. The first was that his claim had never been liquidated – the Baron was in effect asking the Treasury to calculate what was due to him. The second was that the Lords of the Treasury took the money as mere servants of the crown, and it was settled law that mandamus did not lie against the crown. Coleridge ‘entertained great regret at being obliged to come to this conclusion’, but felt the law was clear.<sup>123</sup>

## 2. *The petition of right*

The Baron’s next step was to seek a procedure which could give him a remedy against the crown. The procedure he alighted on was that of a petition of right, which he presented on 2 February 1839. Although writs could not be brought against the sovereign in his own courts, subjects had long been allowed to bring petitions of right, which allowed claims against the crown to be discussed in court. At the time the Baron sought to use this procedure, it was seen primarily as a restitutionary remedy, requiring the king to restore lands or goods which he had no right to retain. In showing a better title to the property in question, the suppliant prayed that the king should remove his hands – *amoveas manus* – from the property.<sup>124</sup> It was also settled that the remedy could be used to recover financial debts and annuities.<sup>125</sup> However, petitions of right were rarely used, and the ambit of the remedy remained very unclear. The Baron’s case – a pioneering one in reviving its use<sup>126</sup> – would explore how far it could be used.

The procedure used was that a petition was made to the crown, which endorsed it with the words, ‘Let right be done’. On this being done, the petition was sent to the Lord Chancellor, who would issue a commission

<sup>123</sup> *In the matter of Clement De Bode, Baron de Bode* (1838) 6 Dowling Practice Cases 776, at 790–793, *The Times*, 15 June 1838, col. 7b.

<sup>124</sup> J. Chitty, *The Prerogatives of the Crown* (London: J. Butterworth, 1820), p. 353.

<sup>125</sup> See *The Bankers Case* (1690–1700), in *A Complete Collection of State Trials*, ed. T.B. Howell, vol. 14 (London: Longman, 1812), 1 ff.

<sup>126</sup> Shortly thereafter it was also unsuccessfully used by Viscount Canterbury, speaker of the Commons, seeking compensation for property lost in the fire which destroyed the Houses of Parliament. *Viscount Canterbury v. Attorney-General* (1843) 1 Phillips 306.

to report on the facts alleged. In the Baron's case, the crown opposed the use of this remedy at the very first stage,<sup>127</sup> arguing that no commission should issue, since he was in effect seeking damages, and there was no fund from which the claim could be paid. However, Lord Cottenham LC ruled that he had no authority to inquire on the merits at this stage, and so a commission issued.<sup>128</sup> With the crown always seeking to put obstacles in his path, it was not until June 1842 that a three-man commission, sitting with a special jury, sat to inquire into the truth of his allegations.

The crown was not represented at the proceedings and did not challenge the Baron's evidence. According to the crown's lawyers, the hearing before the commission was a purely *ex parte* proceeding necessary to establish a title to assert against the crown, which had to be done before he could compel the crown to defend its rights.<sup>129</sup> By now, the Baron and his supporters had gathered more and more expert and documentary evidence from France to sustain the claim. Evidence was given by Alfred de Bonard, a French advocate, on the law of Alsace, to establish Clement's legal rights to the fiefdom. The jury also heard evidence from the 82-year-old G.C.H. Rosentritt, who had known the family since 1787 and who had managed the mines until 1793. It also heard 81-year-old Matthew Hummel testify to having seen the cession at a public meeting in 1791, where a notary had set down in writing that the cession had been made.<sup>130</sup> When the jury was asked to consider whether the Baron's case had been made out, it confirmed that there had been a cession by the father to the son, and that there had been a balance of over £250,000 paid to the government after the commission had closed its work. The jury ended with a finding that the value of the Baron's property was £179,474 and that the accrued interest came to £161,208.<sup>131</sup>

<sup>127</sup> The law officers noted on 16 February 1839 that 'there is no ground whatever for this petition of right and that it ought not to be allowed to proceed further', TNA TS 11/532.

<sup>128</sup> *The Standard*, 2 May 1839, 15 July 1840; *In the matter of Baron de Bode* (1840) 2 Phillips 85.

<sup>129</sup> '[T]he Crown cannot be in a situation to defend itself until the Commissioners have found and recorded the Title of the Plaintiff'. Opinion of Robert Wray, 30 May 1842: TNA TS 11/530. The Treasury Solicitor did attend, however, to take notes of the proceedings.

<sup>130</sup> A transcript of the four days' evidence can be found in TNA TS 11/528. See also *The Morning Chronicle*, 16 June 1842, 17 June 1842, 20 June 1842.

<sup>131</sup> The total sum due (including additional interest for the period 1816–1819) was £364,266. The exact calculation is reproduced in 'Report from the Select Committee of the House of Lords appointed to inquire into the allegations of the Baron de Bode's Petition', Parliamentary Papers (House of Lords) 1852 (194), p. 112 (TNA TS 11/535). This sum is equivalent to £34,882,112 in 2012 values.

If the Baron thought he had finally hit the jackpot, the crown's lawyers had other ideas. According to H. Waddington, '[t]his Case is so entirely unlike those which are to be found in the Books that it is impossible to derive the slightest aid from precedents in dealing with it'. He advised a traverse of the entire inquisition, which would require another trial, the legal effect would have to be debated later. He also advised pleading the statute of limitations.<sup>132</sup> In the meantime, the crown's lawyers objected to the Baron's attempt to obtain a commission to take the evidence of the very elderly witnesses who were about to leave the country to return to eastern France.<sup>133</sup> It also undertook its own researches on the French law relating to Alsatian feudalism, the formalities required for a cession of property, and on the effect of the Treaty of Münster.<sup>134</sup>

The case was finally reheard in a trial at the bar of the Queen's Bench in June 1844. Once again, the crown opted not to offer evidence to counter the Baron's claims, but to dispute whether there was a remedy. According to the Solicitor-General, Sir Frederick Thesiger, this was a claim, in effect, that the Queen was his debtor for money had and received to his use; yet all the money had been paid into the Bank of England under statutory authority, and the monarch had no greater control of that money than over any part of the consolidated fund.<sup>135</sup> Summing up to the jury, Lord Denman told them that it was for them to determine what the French law was on the basis of the evidence given. He pointed out that the account of the law given by Clement's lawyers had not been contradicted for the crown had not offered any evidence on this, though he added that some might consider 'the improbability of such a law existing in all respects'. The question whether there was an undue confiscation under the treaty was also for the jury, which involved considering whether (as the lawyers claimed) the French state was bound by its Westphalian

<sup>132</sup> Opinion of 21 October 1842, TNA TS 11/530. Waddington was the Attorney General's Devil, who drew pleadings for the crown: *The Times*, 21 June 1844, 7c.

<sup>133</sup> TNA TS 11/529. See also *The Times*, 20 July 1842, col. 7a, 30 July 1842, col. 7e. The crown later asked for time to prepare its own case: 1 February 1843, col. 6e.

<sup>134</sup> TNA TS 11/534.

<sup>135</sup> Rough notes drawn up by the crown set out an argument that a petition of right could not lie for money or unliquidated damages, since that would allow any soldier or sailor to sue the Queen for his pay. But even if a petition of right lay, 'What form of action? assumpsit? indebitatus? or special assumpsit? or case? Money had & rec<sup>d</sup>? Supposes the money paid into Q's hands for use of Plt But here no specific payment for his use. The paym<sup>t</sup> for all claims indefinite in No. And amount. If one could being money had and receiv<sup>d</sup> so c<sup>d</sup> all. Then if claims amount to more than fund What is to be done that cannot be': TNA TS 11/534.

treaty obligations.<sup>136</sup> However, he noted that the main fact for the jury to consider was whether the cession – the fact of which had not been disputed by the crown – had been *bona fide* or not. Once again, a jury again found that there had been a valid cession of the land to the Baron from his father, at a time when the transmission of fiefs was still regulated by the old law of Alsace.<sup>137</sup> However, they were directed to find for the crown on the other two issues – that the issue had not arisen within the previous six years or in the reign of the present Queen. They also found (after prompting from the crown’s lawyers) that there was no evidence that the sum given by the French in 1818 had been expressly augmented to provide for the Baron’s claims.<sup>138</sup>

Once again the jury’s verdict did not settle the matter. Nothing was done by the crown on this for another five months, until Hill moved to have a verdict entered for the Baron on the substantive merits.<sup>139</sup> This prompted the law officers to make their own motion, calling on him to show the cause why judgment should not be entered for the crown.<sup>140</sup> The case was argued in the Queen’s Bench at the beginning of 1845, and judgment was handed down in December. Giving the judgment of the court, Lord Denman rejected the Baron’s claim on three grounds. First, while the jury had certainly established the fact that his property had been confiscated, the Baron had not shown that as a matter of law the confiscation was ‘undue’. It was not shown that the confiscation was caused by the rupture of relations between France and Britain; rather, it seemed to have followed from some violation of French law, as determined by a French tribunal. In Denman’s view, the court could not pronounce the French law against émigrés to be void. ‘Whatever we may know historically of the conduct of the Courts during the Revolution’, he ruled, ‘we certainly should not

<sup>136</sup> Denman’s own summing up indicated that his own view was that the French state was not internally bound by these obligations, and that there was no evidence to show that its confiscation had been improper. For the text see ‘Report from the Select Committee of the House of Lords appointed to inquire into the allegations of the Baron de Bode’s Petition’, Parliamentary Papers (House of Lords) 1852 (194), 113 ff. (Appendix I) (TNA TS 11/535).

<sup>137</sup> *The Times*, 25 June 1844, col. 7b.

<sup>138</sup> The crown’s lawyers appear to have accepted that the Baron had established his right, even if there was no remedy: see the note by Frederick Thesiger in TNA TS11/534.

<sup>139</sup> *The Times*, 6 November 1844, col. 6g.

<sup>140</sup> *The Times*, 28 January 1846, col. 6e. The grounds of the crown’s case were the statute of limitations; that no specific money had been paid over by the French for his claim (something found by the jury); that he was not within the meaning of the treaties; that a petition of right would not lie for unliquidated damages; and that he was barred by the statute under which the surplus had been paid to the treasury.

be justified in pronouncing their judgment wrong in any particular case without, at least, some direct proof.<sup>141</sup> This was perhaps an odd position to take, for as the Baron's lawyers pointed out in challenging this decision, the Treasury (and Privy Council) had accepted in many other cases where émigré property had been confiscated that it was 'undue'.

Second, even if his property had been unduly confiscated, he had not made out any legal or equitable claim to any surplus remaining after the claimants registered under the 1819 act had been paid. Like Coleridge, he held that the sum claimed had never been ascertained, and that the Treasury had in any event complete discretion over the surplus. There was nothing to show that the surplus had been received to his use by anyone. Clement's lawyers were once more nonplussed by this finding: 'A claim is, of course, not to be paid, until it has been shown to be legitimate, and the amount ascertained', they argued, 'but it can be no serious answer to a claimant to say . . . that before he can be heard to urge his claim . . . he must be able to show that the very claim which he urges, has been already proved and ascertained'.<sup>142</sup> Finally, even if the sum had been ascertained, it was not shown that Her Majesty had received the money. It did not follow from the fact that Coleridge had held that the Lords of the Treasury could not be reached by a mandamus since they were mere servants of the Crown that the money was in the hands of the sovereign: it had further to be shown 'that the Sovereign has or has had a personal benefit from that which is sought to be received'.<sup>143</sup> Responding to this, Clement's lawyers argued that the court was taking too technical a view of the matter: the real question was not whether an action for money had and received could lie against the Queen for this money, but 'whether it does not establish a case of a claim of *justice* against the Crown'.<sup>144</sup>

The press was outraged by the decision. 'We do not impugn the correctness of Lord DENMAN's judgment', *The Times* thundered, 'but we believe that in all the annals of all time there cannot be found an example where the forms of justice have been so grossly and palpably perverted'.<sup>145</sup> Clement determined to press on, obtaining a writ of error to challenge

<sup>141</sup> *Baron de Bode's Case* (1845) 8 QB 208, at 280.

<sup>142</sup> *Baron de Bode v. The Queen*, Case of the Plaintiff in Error [in the House of Lords], TNA TS 11/528, p. 31.

<sup>143</sup> *Baron de Bode's Case* (1845) 8 QB 208, at 285.

<sup>144</sup> *Baron de Bode v. The Queen*, Case of the Plaintiff in Error [in the House of Lords], TNA TS 11/528, p. 37.

<sup>145</sup> *The Times*, 13 December 1845, col. 4d.



the decision.<sup>146</sup> However, six weeks after obtaining the writ, he died of a heart attack – ‘Or from the cruelty of Government’, as one of the inquest jury puts it.<sup>147</sup> Sympathetic notices of his death were published in the press, with one journal predicting that his executors would imitate his ‘constancy and unflinching resolution’ in the pursuit of the justice which everyone who had investigated his case agreed to be on his side.<sup>148</sup> His son Clement now took on the case, first to the Exchequer Chamber and then to the Lords. Once again, the crown attempted to put obstacles in the path of the claim,<sup>149</sup> but in February 1847, the case was argued again in the Exchequer Chamber. The younger Clement was soon to find the courts no more receptive to his arguments than to those of his father. Delivering the judgment of the court for the crown, Parke B focused exclusively on the statute. He held that the court did not have to decide on the question of the crown’s obligations as a potential trustee of money paid by the French, for parliament had the right to dispose of the entire fund as it sought fit, and had in fact done so by the statutory arrangement put in place in 1819. His reading of the statute was that it did give the commissioners some discretion to hear claims registered late (which would have given them the jurisdiction to hear the Baron’s claim); but even if they had not, parliament had given the Treasury absolute discretion to deal with the surplus.<sup>150</sup>

The new Baron appealed to the House of Lords in 1851. In this forum, the crown sought to reopen a number of old issues, which it had not focused on hitherto in this phase of the proceedings, including the question of his nationality. However, the only question which was referred to seven judges to advise on was the remedial one of whether a claimant for funds under the convention had any other remedy than that set out by the 1819 statute. The judges’ answer was in essence the same as that given by the Exchequer Chamber<sup>151</sup>: the statute disposed of the whole fund, and the matter of the crown’s liability simply did not arise. The Baron’s claim had in effect been trumped by parliamentary sovereignty. Yet it was notable that, in argument, the Lord Chancellor, Lord Truro, formerly Thomas

<sup>146</sup> On three days before his death, he gave details of recent proceedings in a letter to *The Times*, 29 September 1846, col. 3e.

<sup>147</sup> *The Times*, 6 October 1846, col. 8d. <sup>148</sup> *Ipswich Journal*, 10 October 1846.

<sup>149</sup> *Baron de Bode v. The Queen* (1848) 13 QB 364.

<sup>150</sup> *Baron de Bode v. The Queen* (1848) 13 QB 364, at 381ff.

<sup>151</sup> Pollock CB’s wording at *Baron de Bode v. The Queen* (1851) 3 HLC 449, at 468–469 is identical to Parke B’s in *Baron de Bode v. The Queen* (1848) 13 QB 364, at 384–385.

Wilde, who had first raised Clement's case in the Commons in 1832, and who only handed it over to Hill in 1834 because he was so busy with the mammoth case of *Atwood v. Small*, observed that it was 'admitted law, that if the subject of a country is spoliated by a foreign Government, he is entitled to obtain redress from the foreign Government through the means of his own Government. But if, from weakness, timidity, or any other cause on the part of his own Government, no redress is obtained from the foreigner, then he has a claim against his own country'.<sup>152</sup> It remained evident to many that the Baron had a substantial claim in justice, which was being hampered by technicalities in domestic law.

### 3. *Return to parliament*

The fact that the family retained significant public support became manifest in the following year when Lord Lyndhurst secured the appointment of a select committee in the House of Lords to investigate the claims. Lyndhurst had been present in the Lords when the decision was made against the Baron, and while he agreed with the view of the law taken there, he felt the injustice of the case to be so strong that he undertook to bring the case before the chamber.<sup>153</sup> In the course of a speech relating the prior history of the claim, the ex-Chancellor indicated his incredulity at the crown's argument that any money remaining was in the hands of the Lords Commissioners of the Treasury and not the crown; he added that even if the money had been spent for public purposes, the public had reaped the benefit of it and should restore it. He wanted a committee to be set up to confirm the facts he had related with a view to asking the government for redress. The select committee – whose members included Lord Brougham (who had represented the Baron in his first case before the Privy Council) and Lord Truro – in effect provided another opportunity for the Baron to state his claim in detail, reprinting a great deal of the evidence which had been amassed over the years, and which had been rehearsed before two juries. Once again, his opponents did not participate. Unsurprisingly, the committee's report was a ringing endorsement of the claim: the cession, it reported, was *bona fide* and in every respect legal and valid. His property was unduly confiscated; he had presented his claim in time, and even after the other registered claims had been paid, a surplus sufficient to pay him had remained. The commissioners had

<sup>152</sup> *Baron de Bode v. The Queen* (1851) 3 HLC 449, at 465.

<sup>153</sup> *Parl. Debs.*, 3rd ser. 122: 478 (11 June 1852).

erred in requiring him to show that his property had been confiscated under the laws sequestering British property, and in closing the inquiry before the Baron could bring all his proofs. The committee reported that this was a case of great hardship and injustice.

The Lords' report attracted much public attention, for it seemed to settle that the Baron had a legitimate claim and that parliament had a duty to respond.<sup>154</sup> In August 1853, Lyndhurst raised the case again in the Lords, after having unsuccessfully raised the case with the prime minister. However, the government continued to resist, Lord Cranworth setting out the objections to the claim, including that 'to all intents and purposes [the Baron] was practically a foreigner' and that the cession (notwithstanding the jury's finding) was 'invalid and fraudulent'.<sup>155</sup> In any event, even admitting that tribunals might err, he did not think disappointed claimants could ask parliament decades later to vote money to make good the error – particularly in a case where the sum to be voted would amount to £1.5 million. The Lords' debate of 1853 in effect revisited the parliamentary squabbles of 1835, as Lords Monteaule and Cranworth (formerly Spring Rice and Rolfe) were pitted against Truro (formerly Wilde) who now berated the Lord Chancellor for the unfounded allegations he had made nearly twenty years previously in the Commons, which prevented the reappointment of Hill's select committee.<sup>156</sup> Once again, the motion was lost, but the Baron's supporters had once more appealed to the court of public opinion. As *The Standard* reported, 'The case is a foul opprobrium upon the British character – a flagrant violation of the promise of Magna Charter'.<sup>157</sup>

Ten months later it was the turn of the Commons to reject another motion, brought this time by Montagu Chambers, who regarded the question as one of 'national honours'.<sup>158</sup> Once again, the government resisted, with the Attorney-General (Cockburn) setting out the oldest of grounds: that Clement had not been British within the terms of the 1786 treaty, nor had his property been confiscated as the property of an

<sup>154</sup> *The Times*, 7 August 1852, col. 4c. The newspaper pointed out that 'as if to crown the poor Baron's misfortunes, the Parliament in which his claims were at last recognised has become extinct before redress could be made'.

<sup>155</sup> *Parl. Debs.*, 3rd ser., 129: 1063 (1 August 1853). At 1072, he said, 'he doubted very much the competency of any jury, in 1844, to decide whether a transaction which had a great appearance of fraud in 1791 was fraudulent or not'.

<sup>156</sup> *Parl. Debs.*, 3rd ser., 129: 1075 (1 August 1853). Rolfe (as Cranworth then was) had been responding to Wilde (as Truro then was).

<sup>157</sup> *The Standard*, 2 August 1853. <sup>158</sup> *Parl. Debs.*, 3rd ser., 134: 400 (20 June 1854).

Englishman, but because he had violated the laws of France.<sup>159</sup> Once again, the motion was lost. However, when George Denman brought the matter back to parliament in 1861, asking for an inquiry (rather than a vote of money), the Baron's supporters won the vote. A select committee was appointed, hearing legal argument in July 1861. By now, the government was well prepared to argue the case, having amassed a great deal of evidence with respect to the Baron's French claims, and also much detail on the cases which had gone to the Privy Council. Vernon Harcourt, for the crown, put together an argument which challenged the conclusions come to by the Lords committee. The question of Clement's nationality came to the fore once again: for the purposes of international law – which was what they were dealing with here – the Baron was (Harcourt argued) to be regarded as the same nationality as his father. The English rule – 'a remnant of feudal barbarism' – was irrelevant in that context.<sup>160</sup> He also argued that the commissioners had followed the policy of awarding compensation only to those whose land had been seized because they were English, an assertion which required him to argue that some of the reports of cases in the Privy Council had misrepresented what had been decided. Harcourt also argued that the very notion of a cession had been concocted by the Baron around 1821; and that the French courts had never recognised his right to the unsold properties of his father.<sup>161</sup> By the early 1860s, the government was clearly keen to set the heavy guns out to destroy the Baron's arguments. Indeed, in 1862, the Treasury commissioned an opinion from two Parisian advocates on the French law relating to the claims, which claimed not only that the cession had not complied with the necessary formalities, but that the very grant by the Archbishop had been void in the first place.<sup>162</sup> But if the government was now seeking to put together a case on the law of France, and the feudal rules pertaining in Alsace, to challenge the version presented by Clement for the first time, they were never called on to make the argument. Like its predecessor of 1834, the work of this select committee was interrupted by

<sup>159</sup> These grounds were supported by Sir Frederick Thesiger, who had argued the case for the crown in the trial at the bar of the Queen's Bench: *Parl. Debs.*, 3rd ser., 134: 408 (20 June 1854). Thesiger stressed the precedent of *Drummond's Case* as barring Clement's claim.

<sup>160</sup> PP 1861 (502) XI 513, at p. 73. <sup>161</sup> PP 1861 (502) XI 513, at p. 80.

<sup>162</sup> *La Trésorerie Anglaise contre M. Le Baron de Bode* (Paris, 1862), pp. 10–18 (in TNA TS 11/535). The argument was that later treaties had vested the feudal rights of the Archbishop in the French crown. Indeed, the French lawyers wrote that 'cet acte de 1788 constituait encore l'entreprise la plus audacieuse de la part d'un prélat étranger, contre l'autorité et la souveraineté du roi de France' (29).

the end of the parliamentary session; and when George Denman was asked in 1862 whether he would move for a reappointment of the committee, he declined to proceed, since the younger Clement had been away in Russia for some time and had not yet signalled his desire for the inquiry to continue.<sup>163</sup> In effect, he had given up the fight. Despite the strong and continued public support for his case, and the endless arguments which had been deployed to establish validity of his claim, the younger Clement realised that he would never persuade the government to reopen a case involving so much money, the result of which would surely lead to a flood of other claims being revived. Politics triumphed. The Baron's family would never get their inheritance.<sup>164</sup>

The demise of the Baron's claim did not immediately end interest in the fate of the commission's funds. The younger Clement's researches in Paris in 1861 had caught the attention of local politicians, who began to ask about what had happened to the money paid over in 1815 and 1818. In 1868, the French press again raised questions about this money, claiming that any surplus should be repaid to France. Now that the Baron's claim had died, they wondered whether this money should now be returned.<sup>165</sup> Within three years, the question of these funds was raised again in England by the Irish colleges, who called for a select committee to look at their claims, on the precedent set by the Baron's case. The government was forced to publish returns to show there was almost no money left,<sup>166</sup> but still had to resist continued pressure from the Irish interest into the mid-1870s to appoint a select committee.<sup>167</sup>

#### IV. Conclusion

For nearly half a century, the Baron de Bode and his son strove to force the British authorities, who had received a capital sum of £5.6m<sup>168</sup> to settle French claims, to pay compensation for the losses his family suffered by the confiscation of their properties. There was no doubt that the family had

<sup>163</sup> *Parl. Debs.*, 3rd ser. 166: 1127 (2 May 1862).

<sup>164</sup> Some other members of the family did continued to ply a living on the prospect of the fortune coming their way: Clement's illegitimate half-brother, Augustus Wilkins, continued to give creditors post-obit bonds, secured on the £15,000 he expected to receive under his father's will. See *Willis v. Clegg*, *The Times*, 8 June 1875 col. 11a, and the case of James Schneider in *Reynolds Newspaper*, 9 March 1884.

<sup>165</sup> *Glasgow Herald*, 25 July 1868. <sup>166</sup> PP 1871 [C. 376] LXXXI. 483.

<sup>167</sup> See PP 1872 (239) XLVI.713, *Parl. Debs.* 3rd ser, 223: 1916 (30 April 1875).

<sup>168</sup> Or £422,248,818 in 2012 values.

lost its assets, and that the French government had refused to consider his claims relating to the properties which had been sold off, on the grounds that the British should pay. The Baron was wrong to claim that his specific claim had been provided for in calculating that sum,<sup>169</sup> but he was correct to claim that his case was well known to those negotiating the sums to be paid over in 1818. Nor was he wrong to assert that numerous other Britons, whose property had been confiscated as émigré property, had been given compensation. Certainly, over four decades, the family obtained the support of a large number of eminent lawyers, as well as politicians and aristocrats, who felt that he had a just claim on this fund. Moreover, two English juries had agreed.

The Baron sought to assert his claim by invoking the authority of law, yet he found that the law which he hoped would secure his fortune was far more indeterminate than he hoped. The law relating to his nationality, which seemed so unambiguous in *Calvin's Case*, appeared far more unsettled when debated by government lawyers. The rules of feudal and Alsatian law on which his property rights were based were also hotly contested, as was the question whether English tribunals, settling claims arising from an international treaty, should determine his rights according to France's international law obligations, or her domestic law. Finally, when it came to holding the government to account, the Baron found that the rule of law did not reach the highest authority in the state at all. Even the issue of which questions had to be answered to settle his claim was not a stable or settled one, but shifted over time and according to venue.

The one constant feature in the Baron's long dispute was his persistent failure, and the dogged determination of various governments that he should not receive the enormous sum he was claiming. Far less constancy is to be found in the law which was argued or held to apply. In the first stage of his claim before the commissioners the crucial decision was one of fact regarding the ownership of the estates, which was determined by a body of lay commissioners, an administrative body which did not hear legal argument. It was only later, at the second 'political' stage, that more sophisticated legal arguments were made about his nationality, the nature of his rights to the property and the powers of the French state over the estates in question. The most intricate legal questions pertaining to the nature of his claim were set out before a political body, the select

<sup>169</sup> The sum was described by Castlereagh as a 'compromise' between the parties regarding French liabilities, which 'might not go to the full extent of the claims': *Parl. Deb.*, 1st ser. 39: 531 (19 February 1819).

committee of 1834, where the goal was to procure parliament to vote a sum to compensate the Baron. After all the legal arguments, it was politics which defeated the Baron in this venue. The third stage in his battle was that before the courts, where Clement appeared to have established his legal claim to the conviction of two juries. Yet his vision was not challenged in court by the crown, even though behind the scenes crown lawyers were gathering as much evidence as they could to challenge his version. Instead, the crown allowed the Baron to establish his right, and rather challenged whether he had a remedy. Their simple argument was that all the money had been appropriated by parliament under a statute, and that none of it came into the hands of the crown. Parliamentary sovereignty triumphed, for it gave the Treasury – not the Queen – compete discretion over the funds. But such a judgment could hardly persuade public opinion that all was well. If parliament had appropriated money which should in justice have been destined to the Baron, why could it not – as it had in the Spanish claims – simply vote him compensation? From the government’s point of view, the obvious answer lay in the size of the claim (and the other claims, such as the Catholic ones, which might follow). However, from a constitutional point of view, the notion that the crown might be regarded as a trustee of sums received from former enemies to pay to her subjects, but whose trust had been displaced by act of parliament, was not a very comfortable one. By 1876, crown lawyers had developed a more secure argument as to why people in the Baron’s position could not use a petition of right to recover foreign compensation: such exchanges between sovereigns were to be seen as acts of state, simply beyond the power of any court.<sup>170</sup>

<sup>170</sup> *Rustomjee v. R.* (1876) 2 QBD 69.