June, 1858, and the patent issued to S. T. Bacon, the defendant, instead of to John North, the inventor, on the 10th of August following, and this without any provious notice to him. How this happened in the Commissioner's office has not been explained. It was a very grave irregularity. The specification on file was in the name of North, the application in his name, and the patent fee paid by him. We have seen the defendant, to whom it was issued, had no right to it, legal or equitable. The officer must have been imposed upon by the use of the old machine of 1856, which we have seen was but an unsuccessful experiment, and abandoned. The plaintiffs, as assignees of North, have made out a clear right to the patent, and the decree of the Court below must be reversed and the cause remitted, with instructions to enter a decree for the plaintiffs, directing the defendant to surrender the patent to be cancelled.

De Krafft *vs.* Barney.

1. In order to give this Court jurisdiction under the 22d section of the Judiciary Act of 1789, the matter in dispute must be money, or some right, the value of which can be calculated in money.
2. A claim to the guardianship of the person and property of children, not on account of any pecuniary value attached to the office, but upon other considerations, is not within the jurisdiction of this Court.
3. *Barry* vs. *Mercein*, (5 How. 103,) re-stated and re-affirmed.

Appeal from the Circuit Court of the United States for the District of Columbia.

The appellant, De Krafft, by two petitions filed in the Orphans' Court of the District of Columbia, on the 2d of October, 1860, and the 7th of September, 1861, alleged that by reason of a decree of divorce rendered by the District Court of Jasper County, Iowa, on the 18th day of September, 1860, divorcing from the appellee his wife, Mary De Krafft Barney, since de-

ceased and allotting the custody and control of their infant children to the latter, the appellee was not entitled to the guardianship of the persons and estates of said infant children; and that even if so entitled the appellee was an unfit person to have the custody of the children and their estates, and ought to be removed; and the petition prayed the appointment of some suitable guardian to take charge of the children and their estates. The answers of the appellee to these petitions, filed on the 3d of November, 1860, and the 11th of September, 1861, denied the validity of the alleged divorce because the appellee was not a party to the proceedings wherein the decree was alleged to have been rendered, and because said decree was obtained by fraud. The answers further denied the alleged unfitness of the appellee to act as guardian, and pleaded to the jurisdiction of the Court to remove a guardian by nature. Here the pleadings ended. Evidence was taken at great length. The Iowa record showed on its face that the appellee was a non-resident of Iowa, was not served with process and did not appear, either in person or by attorney. Evidence was also produced showing that he was beyond the United States during the prosecution of the suit and had no notice that it was pending.

On the 25th of January, 1862, the Judge of the Orphans' Court delivered his opinion in which he held that by the 4th Article of the Constitution of the United States, Sec. I., and the Acts of Congress passed in pursuance thereof, the decree of the District Court of Jasper County was final and conclusive. The Court then rendered a decree appointing Dr. Harvey Lindsley guardian of the children, and requiring him to give bond with sureties, to be approved by the Court, in the sum of $30,000, which bond was accordingly given. The appellee appealed from this decree to the Circuit Court. The Circuit Court, at October Term, 1862, reversed the decree of the Orphans' Court, and directed said Court to cite the appellee "for the purpose of entering into bond with good and sufficient security for the performance of his trust as natural guardian of the estate of his infant children," &c. From this order De Krafft, in open Court prayed an appeal to this Court.

The case was submitted by counsel upon briefs, on a motion to dismiss for want of jurisdiction.

Mr. Davidge and *Mr. Ingle*, of the District of Columbia, in support of the motion.

In order to give this Court jurisdiction to re-examine a judgment, order or decree of a Circuit Court, (1st,) the matter in dispute must be money, or something whose value in money can be calculated and ascertained; (2dly,) the plaintiff in error, or appellant, must be deprived of such matter in dispute by the judgment, order or decree sought to be reversed; and (3dly,) the judgment, order or decree must be final.

As to the first requisite: It must be admitted that the right of revision exists only when questions of property are involved. Such is the only standard known to the law. By the Constitution of the United States, the appellate jurisdiction of this Court exists only when it is conferred by acts of Congress. The language of those acts is plain and unambiguous; the matter in dispute must be of the value of $1,000. The test of jurisdiction is a money or property test.

Applying this test to the present case; What is the value of the matter in dispute? What is the controversy? It is a controversy as to the right of a father to the custody, comfort and society of his children. The pretensions of the appellant, as set out in his petitions filed in the Orphans' Court, are that the appellee was deprived of this right by the decree of the Iowa Court, or, if not so deprived of it, ought to be by the Orphans' Court. In either case the matter in dispute is the right of the father.

What is the value of that right? It is plain it cannot be computed in money—it is not the subject of pecuniary estimation. It is in no sense a money or property right; and hence it is not within the grant of appellate jurisdiction to this Court.

The subject is not new in this Court. In *Barry* vs. *Mercien*, (5 How., 103), the controversy was between the father and mother of an infant daughter, each claiming her custody. To

the judgment of the Circuit Court of New York, denying the writ of *habeas corpus* prayed for by the father against his wife, who had possession of the child, he sued out a writ of error. A motion was made to dismiss for the want of jurisdiction; and this Court held that it had appellate jurisdiction only when rights of property were concerned, and that the matter in dispute was utterly incapable of being reduced to a money standard; and hence dismissed the cause. And to the same effect are *Grant* vs. *McKee*, (1 Pet. 248); *Ritchie* vs. *Mauro*, (2 Pet. 243) *Scott* vs. *Lunt*, (6 Pet. 349); *Ross* vs. *Prentiss*, (8 How. 772), *United States, ex rel., Crawford* vs. *Addison*, (22 How. 174, 181); and numerous other cases.

But secondly: Even if the character of the subject matter in dispute in this cause were not conclusive against the jurisdiction of this Court, how is the appellant aggrieved or otherwise affected by the order of the Circuit Court? Of what right or claim, touching the matter in dispute, is he deprived? The order of the Circuit Court appealed from confides the custody of the children to the father, and gives him also the management of their property, on his giving adequate security. What is *taken from* the appellant by such order? He never had any claim, or pretence of claim, either to the children or to the management of their property. By the law of the District of Columbia, if there be no natural guardian, the selection of the guardian rests wholly in the discretion of the Orphans' Court. One man has no more right or title to the office than another. Nobody has any such right or title. It is again asked of what right or claim has the appellant been deprived by the order of the Circuit Court? As regards the persons and property of the children, does not the appellant, since the order, stand precisely as he did before? In the second petition he disclaims any desire to be appointed guardian.—He has not, therefore, even disappointment, much less the invasion of any legal right, to complain of. He may *prefer* that the father should not have the custody of the children and their property, and that the guardian appointed by the Orphans' Court should; but such preference furnishes no ground of jurisdiction.

If this appeal, therefore, be regarded as taken by De Krafft in his individual character, it is plain he has sustained no injury, as even the costs are directed by the Circuit Court to be paid out of the estate of the children; and the petitions are filed by him in his individual character, and the appeal so prayed. He nowhere appears as *prochein ami*. But assuming that he acted as such, and that the suit is, in legal contemplation, the suit of the children: the argument is the same. What injury, it is asked, has been sustained by them? They must have some guardian for their persons and property; and that guardian is legally entitled to his commissions. What have they lost by the establishment of the legal right of their father? What legal right or claim is there to which they were entitled unde Lindsley and are not now equally entitled to? It seems absurd to say that, as regards the children, there is anything more involved than the *choice* between two persons, for some guardian they must have; and assuming that they prefer Lindsley to their father, (which is not the fact,) such preference will no give jurisdiction to this Court.

Thirdly: The order is not a final order. It does not put an end to the whole controversy. Whilst it affirms the father's right to the custody of the persons of the children, it directs the Orphans' Court to cite him to give security for the management of the property. A portion of the controversy is therefore left undisposed of. If he fails to give security, a special guardian is to be appointed to take charge of the property. The suit in the Orphans' Court continues: that Court alone can *dismiss* the petitions. The suit goes on there, subject to the direction of the Circuit Court; but relief may be still granted under the petitions. They are, at all events, to be disposed of by the Orphans' Court. It is true that the judgment of the Orphans' Court has been reversed; but a reversal of judgment does not dispose of the matter in dispute. *Mayberry* vs. *Thompson*, (5 How. 121.)

Very similar to the present case was that of *Van Ness* vs. *Van Ness*, (6 How., 62.) There letters of administration on the estate of John P. Van Ness were claimed by a party alleging herself to be his widow. The next of kin denied that she was such, and

under the Act of Assembly of Maryland, (1798, c. 101,) the Orphans' Court directed an issue to be sent for trial to the Circuit Court. At the trial, numerous exceptions were taken. The finding of the jury was ordered by the Circuit Court to be certified to the Orphans' Court, and from this order the writ of error was sued out. Under the above act the finding and order were *conclusive;* and the Orphans' Court could not do otherwise than render judgment in conformity with them. This Court held that the order of the Circuit Court was not a final order, and dismissed the writ of error.

Mr. Coxe and *Mr. Blount,* of the District of Columbia, in opposition to the motion.

The appellee contends, that to give this Court jurisdiction the matter in dispute must be money, or something which admits of a pecuniary valuation.

The subject of controversy is then stated to be "the right of a father to the custody, comfort, and society of his children."

It is somewhat singular that in the order of the Circuit Court not a word is said of the guardianship of the persons of the children, or of their custody, comfort, or society.

Appellee is to be cited to give bond for the performance of his trust as natural guardian of the estate of the children, and upon his neglect or refusal then to appoint a fit and proper person to take care of and manage the estate and property of the infants.

It may be questioned whether the phraseology employed by the Orphans' Court is not more technically accurate than that used by the Circuit Court. The former, pursuing the precise language of the Maryland statute, appoints a guardian of the infant children, the word as clearly indicated by the whole scope of the statute, and especially by the proximate context including the guardianship of the person as well as property. The superior Court, while limiting the responsibility of the father's bond entirely to the estate of his children, and in case of his refusal to give the bond required the substitution of another guardian, equally limited in authority and responsibility, wholly

omits to provide for the maintenance, education, and especially that which it is now insisted constitutes the entire subject of controversy, "the custody, comfort, and society of the children." It may be surmised that the paramount consideration in the mind of the party or counsel who drafted the order, hastily and inconsiderately adopted by the Court, was not rather the estate of these minors than their physical, moral, intellectual or religious well-being.

Indeed, it may well be doubted whether the phrase *natural guardian of an estate* is not utterly unknown in the law. In the complicated system of the Enlish common law there were a variety of guardians—by nature, by nurture, in socage, chivalry, &c. The father was guardian by nature, but that guardianship extended only over the person, and did not continue until the infant attained his majority The abrogation of some of the feudal rights and prerogatives necessarily annulled some of these species of guardianship and by the Statute of 12 Car. II., c. 24, authorizing a father by will or deed to appoint a guardian, such guardian might be continued until the infant attained the age of twenty-one. Vide, Co. Litt. 106, a. s. 123; Hag, n., ad idem, 67, 68; 2 Fonbl. 240, 244.

If these views be correct, it necessarily results that the matter in controversy in this case is not, as the learned counsel contends, the simple "right of a father to the custody, comfort, and society of his children."

Even were this the real aspect and character of the case, it by no means follows that this Court is incompetent to exercise an appellate jurisdiction.

The language of the Act of April 2, 1816, which limits the right of appeal from the Circuit Court of this district to cases in which the matter in dispute is of the value of $1,000, has received a judicial construction in this Court. 8 Peters, 44, *Lee* vs. *Lee.* It was the case of a petition for freedom. On p. 48, the Court says: "The matter in dispute is the freedom of the petitioner. The judgment of the Court below is against their claims to freedom. The matter in dispute is, therefore, to the plaintiffs in error the value of their freedom, and that is not susceptible of

pecuniary valuation" The Court entertained no doubt of its jurisdiction.

If in this case on the part of the appellee the matter in controversy was the right of the father to the "custody, comfort, and society of his children," as is contended, it is at least equally apparent that on the other side the case involves, so far as a guardian can control, mismanage, or impair the estate of his wards, the misapplication and misappropriation of the income resulting from it, their maintenance and support, their domestic, family, and religious education and training, either by precept or example, considerations of infinitely weightier importance than any of a purely pecuniary character. If the value of freedom to one held as a slave, although not susceptible of valuation in money, constitutes a value which, as the Court says, in *Lee* vs. *Lee*, leaves no doubt as to the appellate jurisdiction of this Court, surely the physical well-being, the proper maintenance, moral, intellectual, and religious training of four infant children, two males and two females, most imperatively invoke the exercise of all the authority of this Court in their behalf and for their protection.

It is also attempted to be shown, that the appellant has no legal or equitable interest in the matter in controversy; that he has none of a personal kind, inasmuch as he declined the position of guardian; none in a representative character, as "he nowhere appears as *prochein ami*." In a pecuniary point of view, he has no interest, and he has presented none. But he is the only near male relative to the late Mary De Krafft, and on the mother's side of the children of the deceased. Moreover, it appears, both from the language of his petitions to the Orphans' Court as well as from the opinion of that Court, that he appeared as "*prochein ami*." It is manifest that not De Krafft, in his individual character, asserting any individual interest, is the appellant in this cause, but the four orphan children, as with an allowable departure from the precise meaning of the word orphan, they sometimes appear to be designated on this record, through his instrumentality, as their "*prochein ami* and relative," are the parties to this suit.

As regards them, the matter in controversy is the management and control over their property, the value of which is not less than 60,000 dollars—the providing them a proper maintenance, an education suitable to their circumstances and situation in life. The case as presented in the Orphans' Court, and now appearing on this record, involves the question whether this appellee, the father, is not alleged and proved to be from all his antecedents utterly unfit to assume such high responsibilities. The decree of the Orphans' Court has adjudged him to be wholly disqualified, and it appears from the opinions appended to the appellee's brief on this motion, that the order of reversal by the Circuit Court proceeded on the ground that the Orphans' Court had no jurisdiction in the case.

This, it is alleged, is not a final judgment. It is manifest that it is not an interlocutory judgment, order or decree. It is equally obvious that it is a most singular one on the facts presented on the record. A petition is presented by these minor children through their next friend, averring the unfitness of their father to perform the office of guardian, and asking the Court to appoint some suitable individual to that office. The Orphans' Court, after a laborious investigation, adjudge the allegations against the father to be substantiated by the testimony, and proceed in conformity with the prayer of the petition to appoint a gentleman of the most unexceptionable character to the position of guardian. The Circuit Court reverse this order, on the ground that the Orphans' Court under the laws of Maryland, now in force in this District, had no jurisdiction to entertain such an application, or to grant the prayer as desired.

One accustomed to the ancient and well established course of proceeding in analogous cases, would have supposed that the Orphans' Court being thus adjudged to have assumed a jurisdiction not conferred upon it by law, would simply have been directed to dismiss the petition. It would certainly have been a fair inference that if the petitioner was improperly before that Court, if he had no case on which that Court could rightfully act, if the petition asked that which the Court could not legally grant the only proper course would be to dismiss it.

Unfortunately for the case of the appellee, the most careful examination of the record discloses not the shadow of evidence showing that he ever did apply "to be permitted to give bond for the performance of his trusts as natural guardian of the estates of his infant children," or any other bond for any purpose whatever; nor does the final decree, or any other order or decree to be found in this record, convey the slightest idea that any such application had been made or rejected.

The order of the Court, as given in the record, is wholly silent as to both these points. Unless, however, this appellee did present his case in some form or other, and the decision of the Orphans' Court had, as the one version of the decree of the Circuit Court assumes, it is plain that no such directions as are contained in them, as to what the Orphans' Court should do, can be maintained as right. It may be incidentally noticed here that the power which the statute confers upon the Orphans' Court to require a bond from the father as natural guardian of his children, can only be exercised "on the application of any friend of the infant." See Act of 1798, c. 101, S. C. 12 sec. 3. No such application has been made by any one; the Court cannot, *ex mero motu*, cite the father to give such bond; the order of the Court is therefore warranted by no law.

It is argued in the brief that this decree or order is not final, because further proceedings are directed.

In a large proportion of the cases brought before this Court by writ of error or appeal, there are further proceedings in execution of the judgment of this Court. The order in this cause, however, effectually puts this appellant and the case out of Court. He can have, and the cause he represents can have, no longer a standing in Court. It is impossible to conceive of a decision against him more decidedly a final one.

It is unnecessary to show any actual abuse of his authority as natural guardian by Barney.

2 Story Eq. Jur., § 341, note 4. Guardianship, by nature is of the heir apparent (at common law). It belongs to the father or mother. It extends no farther than the custody of the infant's

person. Guardianship by nurture lasts only till fourteen, and extends only over the person.

Mr. Chief Justice TANEY. This case cannot be distinguished from the case of *Barry* vs. *Mercein,* (5 How., 103). The controversy in that case was between a husband and his divorced wife, respecting the guardianship of a child of the marriage who was still an infant.

They were living apart, and each of them claimed the right to the guardianship. And after full argument, the Court held that in order to give this Court jurisdiction under the 22d section of the Judiciary Act of 1789, the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money. And as the matter in controversy between the parties was not money, nor a right which could be measured by money, but was a contest between the father and mother of the infant upon other considerations, the appeal was dismissed for want of jurisdiction.

In the case before the Court, it is admitted that De Krafft, the appellant, has no pecuniary interest in the controversy. He appears as *prochein ami* for the children of Barney, whose wife is dead, and from whom the children inherited a large property. De Krafft alleges that Barney, from his character and habits, is unfit to be trusted with the guardianship of the persons or property of his children, and prays that some other persons suitable and trustworthy may be appointed by the Orphans' Court. The guardianship of the persons and property of the children is, therefore, the only matter in dispute, not on account of any pecuniary value attached to the office, but upon other considerations. The case is the same in principle with that of *Barry* vs. *Mercein,* above referred to, and the appeal to this Court, for the same reason, must be dismissed for want of jurisdiction.