

Strafford, }
Feb. 7, 1939. } No. 3048.

ELLEN McALPINE v. FRED R. GILPATRICK & a.

Ovilla J. Gregoire, by brief, for the plaintiff.

Keefe & Varney, by brief, for the defendants.

Per Curiam. If the mother is not an unfit custodian, she is entitled to the custody, by force of the statute (P. L., c. 290, s. 4). *Leclerc v. Leclerc*, 85 N. H. 121, 125; *Brown v. Jewell*, 86 N. H. 190; *Sheehy v. Sheehy*, 88 N. H. 223, 228. The court has found the mother's fitness, but the defendants' brief alleges an offer of evidence tending to show her unfitness. It is not shown by the record, and it is not clear, whether this evidence was excluded. Assuming its exclusion, the exclusion was proper if it was offered only to show that the child's welfare would be better subserved by the defendants' custody over her. But in view of its relevancy on the issue of the mother's fitness, a finding, upon application for a new trial, of accident, mistake and misfortune in not also offering it for that purpose, would require the grant of the application. *Barclay v. Club*, 89 N. H. 87 and cases cited.

The rights of the child's father are not involved. If, as the defendants' brief states, the child is illegitimate, he has none.

As the case stands, the order is

Exceptions overruled.