

upon the discretionary finding of the Presiding Justice as to whether the evidence will probably aid the trier of the facts. *Dowling v. Shattuck*, 91 N. H. 234, 236. See *Ricker v. Mathews*, 94 N. H. 313, 317.

The defendant excepted to proof that the defendant paid \$175 for the conveyance of the fifty acre lot which he acquired from, Seigny and Nixon, and moved to strike out testimony by a witness for the plaintiff that the going price "on cut over land" in Grafton County is two to four dollars an acre. The motion was denied subject to exception. No error is apparent in these rulings. The price paid had some bearing upon the question of which of the two lots in dispute the parties considered to be described by the deed. *Cf. Weed v. Woods*, 71 N. H. 581, 583. The question of the qualifications of the witness who testified to value was for the Trial Court. His concession that the presence of "mineral value" might change the price of land, if of any effect, could go merely to the weight of his testimony.

Since there was no error in the rulings of the Court, the order is

Judgment on the verdict.

All concurred.

Hillsborough, }
Apr. 3, 1951. } No. 3963.

ARILDA SAYKALY v. MANCHESTER.

Chretien & Craig for the plaintiff.

J. Francis Roche, city solicitor, for the defendant.

KENISON, J. The right of a plaintiff to a voluntary dismissal prior to a hearing on the merits is not open to question in this state. *Webster v. Bridgewater*, 63 N. H. 296; *Leonard v. Fahey*, 87 N. H. 170, 171; *Judge of Probate v. Abbot*, 13 N. H. 21. At the time that the plaintiff submitted his motion to dismiss the petition without prejudice, the case had been reopened and no final decree had been made. At this stage of the proceedings the plaintiff could not dismiss the petition without prejudice as a matter of right but it could be dismissed only in the legally reviewable discretion of the Trial Judge. *Ingalls v. Railroad*, 83 N. H. 397. Such a limitation on the right to take a voluntary dismissal after the case is opened is generally considered today to represent the better practice. Vanderbilt, *Minimum Standards of Judicial Administration*, 251-254 (1949).

There is nothing in the record or the briefs of counsel to indicate the reasons for which the Trial Court granted the plaintiff's motion. Whether the motion was granted on evidence submitted or on statements of counsel does not appear. "There was no request that the facts be found" (*Vidal v. Errol*, 86 N. H. 585, 586) and no record of either the evidence or statements of counsel have been trans-



ferred. Such procedure is not uncommon; no objection to it was made by the parties in the trial court "and it is now too late for either of them to object to it." *Kusky v. Laderbush*, 96 N. H. 286, 287. We cannot say on the record before us that there was any abuse of discretion by the Presiding Justice in granting the motion to dismiss without prejudice. *Vidal v. Errol, supra*.

Exception overruled.

All concurred.



Coos, }
Apr. 3, 1951. } No. 3974.

LAURIER LAMONTAGNE *v.* CANADIAN NATIONAL RAILWAY CO.

