

The defendant acquired no title under the collector's deed. The tax of 1858 was assessed to Luther Aiken upon the whole of lot 10, of which the demanded premises are a part. Luther Aiken was neither the owner nor the original proprietor of the premises, nor was he in the possession or occupation of them when the tax was assessed. The land was neither taxed in the name of the owner, the original proprietor, nor without any name, and the tax was not assessed in conformity to the statute. "Unimproved lands of non-residents shall be taxed in the name of the owner if known, otherwise in the name of the original proprietor if known, otherwise without any name * * *." Rev. St., c. 40, s. 10. An assessment of a tax upon land of a non-resident owner in the name of one who is neither the owner nor the original proprietor, nor in the possession or occupation of the premises, is illegal; and a sale and conveyance of the land for non-payment of the tax conveys no title to the purchaser. The case of *Alword v. Collin*, 20 Pick. 418, cited by the defendant, is not an authority, because the statute under which the tax in that case was assessed did not require non-resident owners of unimproved lands to be named in the assessment. *Desmond v. Babbitt*, 117 Mass. 233; *Jaquith v. Putney*, 48 N. H. 138; *Paul v. Linscott*, 56 N. H. 347; *Thompson v. Gerrish*, 57 N. H. 85; *Ainsworth v. Dean*, 21 N. H. 400.

Exceptions overruled.

STANLEY and SMITH, JJ., did not sit: the others concurred.

SHAW v. ABBOTT.

Claiming and exercising the right to open and close is not necessarily an assumption of the burden of proof.

PETITION, to redeem land from a mortgage for \$300, dated December 7, 1871. The plaintiff holds a mortgage on the premises dated May 30, 1872, for \$500; and the defendant, besides his mortgage of December 7, 1871, holds another mortgage on the premises, dated January 25, 1873. All the mortgages were made by the plaintiff's father. The defendant denies the right of the plaintiff to redeem the mortgage of December 7, 1871, without also redeeming the mortgage of January 25, 1873, and sets out in his answer a writing purporting to be signed by the plaintiff, agreeing, in consideration of a loan of \$300 to his father, secured by the mortgage of January 25, 1873, to postpone his mortgage of May 30, 1872, and allow the mortgage of January 25, 1873, to take precedence. The action being committed to a referee, to find, among

other things, whether the plaintiff made the agreement to substitute mortgages, as set up in the defendant's answer, both parties claimed the right to open and close. The referee, against the defendant's objection, allowed the plaintiff to open and close. The plaintiff offered the report of a former referee and the pleadings in this cause, and rested. The defendant offered no evidence, and claimed that the referee must find that the plaintiff executed the agreement set out in the defendant's answer, in the absence of any evidence to the contrary. The referee so held, and the plaintiff excepted.

Norris & Rand, for the plaintiff.

Albin, for the defendant.

CLARK, J. The burden of proof was upon the defendant to show the due execution of the agreement set up in the answer. 1 Greenl. Evid., ss. 74-81. The case was not within the rule of court relating to the signature of instruments declared on. *Benedict v. Swain*, 43 N. H. 33. It was not a cause in equity heard on bill and answer, where the allegations of the answer must be taken to be true. *Rogers v. Mitchell*, 41 N. H. 154. Nor was the burden of proof changed by the fact that the plaintiff claimed and was allowed the right to open and close. Although the right to open and close may be determined by the burden of proof (*Judge of Probate v. Stone*, 44 N. H. 593), and has sometimes been allowed on condition of assuming it (*Schoff v. Laithe*, 58 N. H. 503), the exercise of the right to open and close is not necessarily an assumption of the burden of proof. The holding of the referee, that he must find that the plaintiff executed the agreement set forth in the defendant's answer, in the absence of any evidence to the contrary, was erroneous.

Report recommended.

STANLEY, J., did not sit: the others concurred.

SHAW v. SHAW.

In an action on a promissory note against the maker, defended by subsequent attaching creditors, the note, when its execution is proved or admitted, is *prima facie* evidence of the maker's indebtedness.

ASSUMPSIT, on notes made by the defendant, and payable to the plaintiff or order. The defendant was defaulted, and the action was defended by subsequent attaching creditors on the ground that the notes were fraudulent. The plaintiff having produced his