already decided by the decision given in the case of *Norton* vs. *Satchwell*, 1 Menz., p. 77.

DE VILLIERS, C.J.:—Provisional sentence is sought against the defendant upon his indorsement of a promissory note of which he has never been the holder. According to *Heinneccius* (de Camb. c. 3, §§ 26–29), such an endorsement creates an obligation of suretyship, and was known in the Dutch law (as it still is in France) as *aval*. The holder had his summary remedy against the guarantor *jure cambiali*, but the practice of giving provisional sentence against such endorsers has never been followed in this Court. In the case of *Norton* vs. *Satchwell* (1 Menz., 77) it was expressly decided that whatever rights the holder might have in the principal case he could not sue such an endorser by provisional summons, and by that decision we are bound. In the present case it is not alleged in the summons that the maker has ever been excussed, and this is an additional reason why provisional sentence should be refused.

DWYER, J., concurred.

[Plaintiff's Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]

DE VRIES *vs.* ALEXANDER.

Ordinance of Charles V., of the year 1515.—*Ordinance of the year* 1658.—*Inability of lessee of country lands to sublet.*

By the law of this Colony a lessee of country lands (prædia rustica) *cannot sublet, or make over his lease, to a third party without the consent of the landlord.*

This was an action brought by B. A. de Vries of Cape Town against one Benjamin Alexander, for ejectment. The plaintiff B. A. de Vries, the proprietor of a farm called "Fraserdale," situate at Mowbray, leased it on the 12th of March, 1878, to F. W. D. Willmot for two years, Willmot to have the right of terminating the lease at the expiration of that period on giving three months' notice beforehand.

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Should such notice not be given, the lease was to be considered as renewed for a further period of one year. Willmot made the lease over to Benjamin Joseph Norden. The plaintiff protested in writing against this cession, but suffered Norden to remain in possession, and accepted the rent from him. Norden subsequently made the lease over to the defendant. Plaintiff objected verbally to this at the time, but accepted rent from defendant. Afterwards plaintiff sold the farm and called upon defendant to vacate it, though the period of the lease had not yet expired, on the ground that by the law of this Colony a lessee of country lands had no power to sublet without the written consent of the landlord, and that therefore defendant had no title to the farm as against plaintiff.

Upington, A.G. (with him *Solomon*), for defendant. The power of subletting clearly belongs to the tenant unless there is a stipulation to the contrary in the lease. If the landlord wished to deprive the lessee of his ordinary right he ought to have placed some stipulation to that effect in the lease. *Grotius* (Maasdorp's translation, Bk. 2, c. 44, sec. 9; Bk. 3, c. 19, sec. 10) supports this view of the law. The Placaats of 1575 and 1580 are not in force in this Colony.

Leonard, for plaintiff. The lessee has no right to sublet the land without the written consent of the landlord (*Van der Keessel*, § 674).

De Villiers, C.J.:—This case raises a question of considerable importance, and we therefore desired more argument than was possible when the case was first mentioned. The question is whether, in the absence of any special agreement, the lessee of a farm may cede his rights, or sublet the farm to another without the consent of the owner. It is a question upon which I have never entertained any doubt, but, as it has now been formally raised, it becomes necessary for me to discuss it fully and trace the history of the law upon the subject from the times of the Roman emperors to the present time. The *Code* (4, 65, 6) contains an authoritative statement of the law by the Emperor Alexander Severus in answer to one Victorinus in the following terms:—"In the absence of any special agreement no one is prohibited from letting to another a thing which he

has hired for the use and enjoyment thereof." That this rule was adapted as part of the general law of the Netherlands we have the concurrent testimony of all the institutional writers I have consulted (including *Grotius* in the passages quoted by *Mr. Upington*), and of several decisions of the Dutch Courts. But in very early times the municipalities of several towns by their local statutes, adopted the rule that the tenant of a house within the muncipality shall not be allowed to sublet without the consent of the landlord. The names of several such towns are given by *Van Leeuwen* in his *Censura Forensis* (1, 4, 22, § 9), but it is obvious that the local statutes of Dutch towns are not in force in this Colony. No general statute seems ever to have been passed by the Legislature upon the subject, and therefore, in regard to urban tenements, the rule of the Civil law must be held to obtain in this Colony. But whilst great latitude in the way of local legislation was allowed to the towns, the Legislature, whether it was the German Emperor or the Spanish King or the States of Holland, retained the legislation relating to country lands within their own control. As early as 1515 *Charles V.* issued an *Edict* to protect the owners of such lands against the illegal claims set up by their tenants to hold ever after the expiration of their leases, and even to sell their alleged right of holding over, without the consent of their owners. The terms of this Edict, as well as of the subsequent *Political Edict* issued by *Philip II.* in 1580, were so wide that many writers, following the opinion of *Neostad* (Dec. 31), came to the conclusion that the Legislature had prohibited lessees of country lands from subletting pending their leases without the consent of their landlords. *Grotius*, however, and *Van Leeuwen*, who wrote after the publication of the *Edicts*, refer to the rule of the Civil law as being in force in the Netherlands, and do not mention the *Edicts* as having altered the law, but in a footnote to *Van Leeuwen's Censura Forensis*, 1, 4, 22, § 9 (4th edit. by de Haas), I find a statement that the subletting of country lands had been forbidden by the *Edicts* of 1515 and 1580. It is clear that considerable diversity of opinion might reasonably have existed as to the true meaning of the passages bearing upon the subject in the *Edicts*, but there is no obscurity whatever in the language used by the framers of the *Placaats* of 1658 and 1696. The 9th

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Article of these *Placaats* appears to have been specially introduced to set at rest the doubts which had previously been entertained. "Sullen oock geen bruyckers ofte pachters, noch hangende ende geduyrende de *huyre*, noch oock naar de expiratie van dien, *zoodanige huyre*, ofte beterschappe van landen bij verkopinge, mangelinge, donatie, ofte andere contracten mogen oversetten directelijk of indirectelijk, sonder voorgaande schriftelijcke consent van den eigenaar," *i.e.*, "Lessees shall not be allowed, either during the existence of the lease or after the expiration thereof, either directly or indirectly to make over such lease or any so-called improvement of lands by sale, exchange, gift or other contract without the previous written consent of the owner." The term "*beterschap*," improvement, it will be observed from the Preamble to the *Placaat* of 1658, had been used by lessees as well as the term *nahuyre*, to express the alleged right under pretext of which they claimed the right of holding over, but this *nahuyre* was never recognised as being a *huyre*, lease, or as conferring the kind of alienable *jus retractus* claimed by many lessees. By the 9th Article the Legislature now made it clear that the rights to the lease shall not be alienated during its existence, and that, after its expiration, no claim by way of *beterschap* shall be capable of being alienated without the consent, in either case, of the owner. At all events, the language of the 9th Article is quite capable of this construction, and has been so construed by many eminent writers to whose opinions great weight is always attached in this Court. *Voet*, although he wrote his Commentaries after 1658, went so far as to hold that the previous *Edicts* of 1515 and 1580 had prohibited the subletting of lands without the consent of the owner (19, 2, 5). *Van Leeuwen*, on the other hand, who also wrote after 1658, assumes in his Commentaries (4, 21, § 4) and in the text of the *Censura Forensis* (1, 4, 22, § 9) that the Civil law was still in force in Holland. But all later writers of repute concur in the opinion that the 9th Article of the *Placaats* of 1658 and 1696 expressly forbade the cession of leases or subletting of country lands without the consent of the owner. Such was the clear opinion of the Jurists who edited the *Regtsgeleerde Observatien* in the latter portion of the 18th century (2, Obs. 80). Such also was the opinion of *Van der Keessel* (in the beginning of the

present century), the latest, and at the same time one of the most accurate of the commentators, whose works are treated as authorities in this Court. In *Thesis*, 674, he says:— "Although by the general law, as adopted either wholly or with modifications by particular statutes, it is permitted to a lessee to sublet land leased to him, yet by the law of Holland of 16th September, 1658, renewed in 1696, an exception has been made in respect of country lands (*in prædiis rusticis*) which cannot be sublet without the consent in writing of the owner." We are not concerned with the question whether the law thus laid down is reasonable or not, but I am quite satisfied that *Van der Keessel* has given the correct, and, in his time, generally received interpretation of the *Placaats*.

It only remains for me to consider whether the 9th Article of the *Placaat* is in force in this Colony. In *Herbert* vs. *Anderson* (2 Menzies, 166) it was incidentally held that the *Edicts* of 1515 and 1580 are not in force in this Colony, and therefore, it is now argued, the subsequent *Placaats* are not in force. The answer to this objection is obvious. The Court could only have intended to confine their decision to those portions of the Edicts which are of a fiscal or of a purely local nature. So far as they had been incorporated in the general law of Holland, and were not inapplicable here, they were equally incorporated in the law of this Colony. Take, for instance, the *Edict* of 1580. Some of its provisions relating to marriage and to intestate succession formed part of the law of Holland, and now form part of the law of this Colony. "It may well be," to use the words of LORD CAIRNS in *Thurburn* vs. *Steward* (L. R. 3 Ap. P. C. 570), "that the fate which has attended one division of the *Placaat* may be altogether different from that which has attended or should attend another division of the *Placaat*." And even if the *Edicts* were not in force here, it by no means follows that the subsequent *Placaats*—so far as they do not deal with purely local or fiscal matters—are inoperative here. The 9th Article of the *Placaat* of 1658, in requiring the consent of the owner to the cession of leases or subletting of lands, must be regarded as enacting a general law. The defendant, in the present case, cannot, therefore, be allowed to set up any sub-lease or cession made by the lessee as an answer to the plaintiff's claim,

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and the judgment of the Court must be for the plaintiff, with costs.

DWYER and STOCKENSTRÖM, JJ., concurred.

Judgment for plaintiff with costs, but the right was reserved to the defendant of entering upon the land for the purpose of removing his crops.

[Plaintiff's Attorneys, C. & J. BUISSINNÉ.
Defendant's Attorney, C. H. VAN ZYL.]

BOOYSEN *vs.* THE TRUSTEES OF THE COLONIAL ORPHAN CHAMBER, AND OTHERS.

Community of Property.—Mutual Will.—Fidei commissum.—Rights of fidei commissary legatees.

B. and his wife (married in community of property) made under the reservatory clause of their joint will a codicil by which they left certain farms to their children and step-children jointly, who were however to have no claim to them before the death of the survivor. The wife died first. Before her death B. had not received transfer of the farms, though he had occupied them. Subsequently B. became the registered owner of both farms, and mortgaged them to the Orphan Chamber. Provisional sentence was afterwards granted against B., and the farms were sold in execution. B. subsequently died. Held, *in an action brought by the legatees to restrain the transfer of the farms to the purchasers, that, since they had never vested in the testatrix, the plaintiffs, as fidei commissary legatees, had acquired no such real rights as to enable them to follow the farms into the hands of* bonâ fide *alienees without notice of the* fidei commissum, *and that therefore judgment must be for defendants.*

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Booysen & Another *vs.* Colonial Orphan Chamber & Trust Co., & Others.

This was an action brought by Bootje, Jan, Pieter and Willem Adriaan Booysen, legatees under a codicil to the mutual will of their late father and mother, against the Colonial Orphan Chamber and Trust Co., the Master of the Supreme Court, Ludwig Henry Goldschmidt, and Carel Aaron van der Merwe to prevent the transfer of the farms