

J. Y. Interpretation No.671 (January 29, 2010) *

ISSUE: Is Article 107 of the Land Registration Regulation unconstitutional ?

RELEVANT LAWS:

Article 15 of the Constitution (憲法第十五條) ; Judicial Yuan Interpretation Nos. 141, 400, 562 (司法院釋字第一四一號、第四〇〇號、第五六二號解釋) ; Articles 819, 824-1, 825, 868 of the Civil Code (民法第八百十九條、第八百二十四條之一、第八百二十五條、第八百六十八條。) ; Article 107 of the Land Registration Regulation (Amended and promulgated on September 14th, 2001) (土地登記規則第一百零七條(九十年九月十四日修正發布)).

KEYWORDS:

Autonomy in private law (司法自治), joint ownership (tenancy in common (分別共有)), entitlement (應有部分), partition of jointly owned property (共有物分割), mortgage right (抵押權), the registration of partition of the jointly owned property (共有物分割登記), convey and record (轉載), restoration of co-ownership (回復共有關係).**

* Translated by Amy Huey-Ling Shee.

** Contents within frame, not part of the original text, are added for reference purposes only.

HOLDING: The purpose of Article 15 of the Constitution concerning the protection of people's property right is to ensure the free exercise of usage, benefit, and disposition under the status quo of the given property, and may not be infringed by the legal act of others. For joint ownership (tenancy in common), once the real property is partitioned after the creation of a mortgage, the mortgage right on the individual ownership is not affected (*see* Articles 825 and 868 of the Civil Code). For those who did not obtain consent from the mortgagee(s) prior to engaging in the partition, the subject matter of the mortgage right shall naturally be the entitlement of the respective parcels of property being conveyed and recorded. Thus the compulsory enforcement is levied against the title of the respective real property being partitioned, conveyed and recorded. After the bidding is completed, given that the winning bidder obtains the title to the mortgaged subject matter, the winning bidder restores the joint ownership of the specific real property with other co-owner(s), who also reinstate the respective entitlement prior to the

解釋文：憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，不得因他人之法律行為而受侵害。分別共有不動產之應有部分，於設定抵押權後，共有物經分割者，其抵押權不因此而受影響（民法第八百二十五條及第八百六十八條規定參照）。於分割前未先徵得抵押權人同意者，於分割後，自係以原設定抵押權而經分別轉載於各宗土地之應有部分，為抵押權之客體。是強制執行時，係以分割後各宗土地經轉載抵押權之應有部分為其執行標的物。於拍定後，因拍定人取得抵押權客體之應有部分，由拍定人與其他共有人，就該不動產全部回復共有關係，其他共有人回復分割前之應有部分，經轉載之應有部分抵押權因已實行而消滅，從而得以維護其他共有人及抵押權人之權益。準此，中華民國九十年九月十四日修正發布之土地登記規則第一百零七條之規定，符合民法規定之意旨，亦與憲法第十五條保障人民財產權之規定，尚無牴觸。

partition, and the mortgage right on the partition being conveyed and recorded is eliminated by its enforcement, so that the rights and interests of the co-owner(s) and the mortgagee can be maintained. As such, Article 107 of the Land Registration Regulation, as amended and promulgated on September 14th, 2001, is in compliance with the purpose of the Civil Code and does not contravene the stipulation to protect people's property right under Article 15 of the Constitution.

REASONING: The purpose of Article 15 of the Constitution concerning the protection of people's property right is to ensure the free exercise of usage, benefit, and disposition under the status quo of the given property, and may not be infringed by the legal act of others. The entitlement of a joint ownership is the proportion of the co-owners' ownership, by nature not different from fee simple absolute (*see* J. Y. Interpretation Nos.400 and 562). Article 819, Paragraph 1 of the Civil Code stipulates that each coowner may freely dispose of his/her entitlement. Disposal, as mentioned in that provision,

解釋理由書：憲法第十五條關於人民財產權應予保障之規定，旨在確保個人依財產之存續狀態行使其自由使用、收益及處分之權能，不得因他人之法律行為而受侵害。共有物之應有部分乃共有人對共有物所有權之比例，性質上與所有權本無不同（本院釋字第400號、第五六二號解釋參照）。民法第八百十九條第一項規定，各分別共有人得自由處分其應有部分。該條項所謂處分，包括讓與應有部分，或以應有部分為客體設定抵押權（本院釋字第一四一號解釋參照），旨在保障應有部分之財產權。又抵押權亦屬憲法財產權保障之範圍，惟因分別共有人就其應有

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includes the assignment of entitlement or creating mortgage right on the entitlement (*see* J. Y. Interpretation No. 141), that aims to protect the property right of the entitlement. Furthermore, mortgage right also falls within the scope of property right protection under the Constitution. However, since each coowner may individually create mortgage rights on his/her entitlement without the consent of other co-owners, as long as the result of such mortgage creation does not harm other co-owners' interests, it is in compliance with the principle of autonomy in private law and the meaning and purpose of Article 15 of the Constitution in protecting people's property right.

For entitlement in a joint ownership (tenancy in common), once the real property is partitioned after the creation of a mortgage, the mortgage right on the individual ownership is not affected (*see* Articles 825 and 868 of the Civil Code). Article 107 of the Land Registration Regulation, as amended and promulgated on September 14th, 2001, stipulates: "For real property of joint ownership

部分設定抵押權得單獨為之，不須其他分別共有人之同意；故就應有部分設定及實行抵押權之結果，無害於其他共有人之利益者，符合私法自治原則及憲法第十五條保障人民財產權規定之意旨。

分別共有不動產之應有部分，於設定抵押權後，共有物經分割者，其抵押權不因此而受影響（民法第八百二十五條及第八百六十八條規定參照）。九十年九月十四日修正發布之土地登記規則第一百零七條規定：「分別共有土地，部分共有人就應有部分設定抵押權者，於辦理共有物分割登記時，該抵押權按原應有部分轉載於分割後各宗土地之上。但經先徵得抵押權人同意

(tenancy in common) having some of the joint owners creating mortgages on their respective entitlements, the recordation of the partition of the joint property should duly record that each mortgage is fixed upon each respective parcel of land as conveyed in proportion with its original entitlement. However, in the event the mortgagee has provided prior consent, the mortgage right shall only be conveyed and recorded on the [specific] parcel of land acquired by the mortgagor.” (*hereinafter* the disputed provision) In other words, to take the specific parcel of land acquired by the mortgagor after the partition as the subject matter of the mortgage is limited to the situation where the mortgagee has provided prior consent before the partition. In the situation that prior consent from the mortgagee was not obtained before the partition, although the method of conveyance and recordation of the mortgage right provided by the disputed provision can prevent the mortgagee(s) on the entitlement(s) from being disadvantaged due to the partition, the disputed provision, however, conveys and records the mortgage right on each

者，該抵押權僅轉載於原設定人分割後取得之土地上。」（下稱系爭規定）亦即限於分割前已先徵得抵押權人同意之情形，始以原設定人分割後取得之土地為抵押權之客體。對於分割前未先徵得抵押權人同意之情形，系爭規定抵押權之轉載方式，固可避免應有部分之抵押權人因分割而受不利益，但系爭規定將該抵押權轉載於分割後各宗土地之上，致使其他分別共有人取得之土地，亦有抵押權負擔，且抵押權人得以轉載於該土地經抵押之應有部分拍賣取償。然抵押權之客體既為原共有物之應有部分，故於分割前未先徵得抵押權人同意者，於分割後，自係以原設定抵押權而經分別轉載於各宗土地之應有部分，為抵押權之客體。是強制執行時，係以轉載於分割後各宗土地經抵押之應有部分，為其執行標的物。於拍定後，因拍定人取得抵押權客體之應有部分，由拍定人與其他共有人，就該不動產全部回復共有關係，其他共有人回復分割前之應有部分，經轉載之應有部分抵押權因已實行而消滅，從而得以維護其他共有人及抵押權人之權益。準此，系爭規定符合民法規定之意旨，亦與憲法第十五條保障人民財產權之規定，尚無抵觸。

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parcel of the land after partitions, causing the parcels of land acquired by other co-owners also encumbered with the mortgage, and the mortgagee may foreclose the entitlement portion conveyed on each parcel to satisfy the debt payment. Since the mortgaged subject matter was the entitlement of the original joint ownership, for those who did not obtain consent from the mortgagee(s) prior to engaging in the partition, the subject matter of the mortgage right shall naturally be the entitlement of the respective parcels of property being conveyed and recorded. Thus the compulsory enforcement is levied against the title of the respective real property being partitioned, conveyed and recorded. After the bidding is completed, given that the winning bidder obtains the title to the mortgaged subject matter, the winning bidder restores the joint ownership of the specific real property with other co-owner(s), who also reinstate the respective entitlement prior to the partition, and the mortgage right on the partition being conveyed and recorded is eliminated by its enforcement, so that the rights and interests of the co-owner(s) and the mort-

gagee can be maintained. As such, the disputed provision is in compliance with the purpose of the Civil Code and does not contravene the stipulation to protect people's property right under Article 15 of the Constitution.

Justice Tsay-Chuan Hsieh filed concurring opinion, in which Justice PiHu Hsu, Justice Chi-Ming Chih and Justice Ching-You Tsay joined.

Justice Mao-Zong Huang filed concurring opinion.

EDITOR'S NOTE:

Summary of Facts: The petitioner and A, not a party to this case, co-own a parcel of land, which the petitioner owns two-thirds and A owns one-third. In December 2005, the land was partitioned with a judgment of the Taiwan Taoyuan District Court. As a result, the petitioner and A both obtained individual parcels. However, before the partition judgment, A had created three mortgages on his/her original one-third entitlement of the land with three different companies. The Land Office conveyed and recorded the

本號解釋謝大法官在全、徐大法官璧湖、池大法官啟明及蔡大法官清遊共同提出協同意見書；黃大法官茂榮提出協同意見書。

編者註：

事實摘要：聲請人與 A 共有土地一宗，聲請人持分三分之二，A 持分三分之一。嗣該宗土地於 94 年 12 月間經臺灣桃園地方法院裁判分割，聲請人與 A 均因該分割而取得各自單獨所有之土地。惟 A 在裁判分割前，已就其原所有之分割前土地三分之一應有部分，設定三筆本金最高限額抵押權與三家不同公司。地政機關於裁判分割後，依系爭規定，將該三筆抵押權按 A 之原應有部分比例，轉載至聲請人所分得之單獨所有土地上。

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three mortgages, in accordance with the disputed provision, on the petitioner's individual parcel of land based on the proportion of A's entitlement after the court judgment.

Dissatisfied with the conveyance and recordation, the petitioner brought the case to request the court to nullify the recordation concerning the three mortgages. The Taiwan Taoyuan District Court found against the petitioner, but the Taiwan High Court reversed on appeal. Since two of the three companies did not appeal, the judgment on that part was confirmed and finalized.

Yet the other company, B, appealed to the Supreme Court, which vacated and remanded the judgment. On remand, the Taiwan high Court denied the petitioner's suit in accordance with the Supreme Court judgment (see Civil Judgment of the Taiwan High Court, Shang Keng (1) Tzu No.73 (2008)). The petitioner again appealed but was once again rejected by the Supreme Court (see Tai Shang Tzu No. 135 (2009)). The judgment was then

聲請人不服轉載之結果，遂向法院訴請塗銷該三筆抵押權之登記。臺灣桃園地方法院判決聲請人敗訴，案經上訴至臺灣高等法院，該院一度判決聲請人勝訴，且三家公司中之二家公司並未上訴，該部份因而確定。

惟前揭臺灣高等法院判決中關於 B 公司部分，經該公司提起上訴，最高法院將該部分判決廢棄發回。臺灣高等法院 97 年度上更（一）字第 73 號民事判決，依最高法院發回意旨，駁回聲請人之訴；聲請人上訴後，復經最高法院 98 年度台上字第 135 號民事裁定駁回上訴，全案遂告確定（該判決與該裁定合稱確定終局裁判）。聲請人遂以確定終局裁判所適用之土地登記規則第 107 條（90.9.14）及民法第 825 條規定有違

confirmed and finalized. The petitioner questioned the constitutionality of Article 107 of the Land Registration Regulation and petitioned for interpretation.

憲疑義，向本院聲請解釋。