

## J. Y. Interpretation No.304 ( August 14, 1992 ) \*

**ISSUE:** Do the proviso to Article 866 of the Civil Code and J. Y. Interpretation Yuan-tze No.1446, which maintain that superficies or other rights to use and collect benefits created after the registration of a mortgage should not affect the mortgagee's right, contradict the people's property rights guaranteed by the Constitution?

**RELEVANT LAWS:**

Article 15 of the Constitution ( 憲法第十五條 ) ; Article 866 of the Civil Code ( 民法第八百六十六條 ) ; J. Y. Interpretation Yuan-tze No. 1446 ( 司法院院字第一四四六號解釋 ) .

**KEYWORDS:**

mortgage registration ( 抵押權設定登記 ) , real property ( 不動產 ) , superficies ( 地上權 ) , rights to use and collect benefits ( 使用收益權 ) .\*\*

**HOLDING:** Article 866 of the Civil Code stipulates that, "After the creation of a mortgage, the owner of a real property may create superficies and other rights on the same real property provided that the mortgage shall not be affected

**解釋文：**民法第八百六十六條規定：「不動產所有人設定抵押權後，於同一不動產上得設定地上權及其他權利。但其抵押權不因此而受影響」，如其抵押權因設定地上權或其他權利而受影響者，本院院字第一四四六號解釋認

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\* Translated by John C. Chen.

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

thereby.” If the mortgage is affected because of the creation of superficies or other rights, according to J. Y. Interpretation Yuan-tze No. 1446, such superficies or rights shall not be effective against the mortgagee, and the Enforcement Court can directly enforce the execution of an auction for the mortgaged real property upon the mortgagee’s application. Because the mortgage is a right over things and will become public upon registration, the superficies or other rights to use and collect benefits on the mortgaged real property, which were obtained after the registration of the mortgage, shall not affect the mortgage registered prior to such superficies and rights. Such superficies or other rights to use and collect benefits may continue to exist if neither affects the mortgage. The rights of the one who obtains such superficies and other rights after the registration of the mortgage have been taken into consideration. Thus, the aforesaid Article 866 of the Civil Code and J. Y. Interpretation Yuan-tze No. 1446 do not contradict the Constitution.

為對於抵押權人不生效力，抵押權人聲請拍賣抵押物時，執行法院自可依法逕予執行，乃因抵押權為物權，經登記而生公示之效力，在登記後就抵押物取得地上權或其他使用收益之權利者，自不得使登記在先之抵押權受其影響，如該項地上權或其他使用收益之權利於抵押權無影響時，仍得繼續存在，已兼顧在後取得權利者之權益，首開法條及本院解釋與憲法並無牴觸。

**REASONING:** Article 866 of

**解釋理由書：**民法第八百六十

the Civil Code stipulates that “After the creation of a mortgage, the owner of a real property may create superficies and other rights on the same real property provided that the mortgage shall not be affected thereby.” If the mortgage is affected because of the creation of superficies or other rights, according to J. Y. Interpretation Yuan-tze No. 1446, such superficies or rights shall not be effective against the mortgagee, and the Enforcement Court can directly enforce the execution of an auction for the mortgaged real property upon the mortgagee’s application. Because the mortgage is a right over things and will become public upon registration, the superficies or other rights to use and collect benefits on the mortgaged real property, which were obtained after the registration of the mortgage, shall not affect the mortgage registered prior to such superficies and rights. If the mortgage is affected by the superficies or other rights to use and collect benefits which were created by the owner on the mortgaged real property after the creation of the mortgage, and where the mortgagee applies for the auction of the mortgaged real

六條規定：「不動產所有人設定抵押權後，於同一不動產上得設定地上權及其他權利。但其抵押權不因此而受影響」，如其抵押權因設定地上權或其他權利而受影響者，本院院字第一四四六號解釋認為對於抵押權人不生效力，抵押權人聲請拍賣抵押物時，執行法院自可依法逕予執行，乃因抵押權為物權，經登記而生公示之效力，在抵押權登記後就抵押物取得地上權或其他使用收益之權利者，自不得使登記在先之抵押權受其影響。故所有人於抵押權設定後，在抵押物上所設定之地上權或其他使用收益之權利於抵押權有影響者，在抵押權人聲請拍賣抵押物時，發生無人應買或出價不足清償抵押債權之情形，即須除去該項權利而為拍賣，並於拍定後解除被除去權利者之占有而點交於拍定人，乃為使抵押權人得依抵押權設定時之權利狀態而受清償所必要。反之，如該項地上權或其他使用收益之權利於抵押權無影響時，仍得繼續存在，已兼顧在後取得權利者之權益。民法第八百六十六條但書之規定及本院院字第一四四六號解釋，與憲法保障人民權利之意旨，並無牴觸。

property, and no person proposed a purchase, or where the proposed purchase price is insufficient for the repayment of the claim secured by such mortgage, the Enforcement Court shall then enforce an auction by removing said rights and, after the real property is auctioned, release the possession of the party whose rights had been removed to the buyer. This is necessary for the mortgagee to be repaid in the same status as when the mortgage was created. In contrast, such superficies or other rights to use and collect benefits will continuously exist where neither of these affects the mortgage. The rights of the one who obtains such superficies and other rights after the registration of the mortgage have been taken into consideration. Thus, the aforesaid provision in Article 866 of the Civil Code and J. Y. Interpretation Yuan-tze No. 1446 do not contradict the principle of the protection of the people's rights under the Constitution.