

J. Y. Interpretation No.119 (February 1, 1967) *

ISSUE: Where the owner first has his immovable property mortgaged, and then creates a *dien* thereon, shall the mortgagee or *dien-holder* have priority of claim to the proceeds from sale of said immovable property?

RELEVANT LAWS:

Article 866 of the Civil Code (民法第八百六十六條).

KEYWORDS:

mortgage (抵押權), *dien* (典權), mortgagee (抵押權人), *dien-holder* (典權人), default (屆期未受清償), discharge (清償), title transfer documents (權利移轉證書), erase the recordation (塗銷登記). **

HOLDING: When an owner mortgages his land first, then places a *dien*¹ on the land later, the mortgage interest is not affected by the subsequently

解釋文：所有人於其不動產上設定抵押權後，復就同一不動產上與第三人設定典權，抵押權自不因此而受影響。抵押權人屆期未受清償，實行抵押

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

¹ *Dien* is a unique form of transferring the immovable's title as security in traditional Chinese legal system and has been accepted as a part of civil law governing the rights over things, under which the *dien*-maker (owner) in consideration of a price usually at 50% of the actual value of the immovable, transfers title and possession of the object to the *dien-holder* and reserves for himself a naked right of redemption upon paying back the price so received with no interest within the period as agreed thereto by the parties, but under no circumstances, the period may exceed 30 years. For the detail, refer to Chinese Civil Code, Book of Rights over Things, Article 911-927.

recorded dien. Should the mortgagee be in default and an auction be held, however, due to the existence of the dien, no bidder of a price sufficient to discharge the mortgage can be found, the court may order that the dien be removed and a second sale be held. If, after satisfying the mortgage, any surplus remains from the proceeds from auction, the dien-holder shall have priority right for claim to the surplus over any subsequently recorded interests. The court conducting the auction, when issuing title transfer documents, shall notify the land administration office to erase the recordation of dien of the land.

REASONING: Article 866 of the Civil Code permitted an owner to mortgage his land first, then place a dien on the land later. But a proviso of the same Article also stated that the mortgage interest would not be affected. The latter created a dien on the land, but if it jeopardized the mortgage interest in any way, it should not have any force on the mortgagee at all. To reconcile the interests of the mortgagee and dien-holder, should a mortgagee be in default and an auction be

權拍賣抵押物時，因有典權之存在，無人應買，或出價不足清償抵押債權，執行法院得除去典權負擔，重行估價拍賣。拍賣之結果，清償抵押債權有餘時，典權人之典價，對於登記在後之權利人，享有優先受償權。執行法院於發給權利移轉證書時，依職權通知地政機關塗銷其典權之登記。

解釋理由書：所有人於其不動產上設定抵押權後，復就同一不動產上與第三人設定典權，因為民法第八百六十六條所認許。但抵押權不因此而受影響，亦為同條但書所明定。此項設定在後之典權，倘有影響於抵押權，對於抵押權人不生效力。為兼顧抵押權人及典權人之利益，抵押權人屆期未受清償，實行抵押權拍賣抵押物時，因有典權之後之權利人，享有優先受償權。執行法院於發給權利移轉證書時，依職權通知地政機關塗銷

held, however, due to the existence of the dien, no bidder of a price sufficient to discharge the mortgage can be found, the court may order that the dien be removed and a second sale be held. If, after satisfying the mortgage, any surplus remains from the proceeds from the auction, the dien-holder shall have priority right for claim to the surplus over any subsequently recorded interests. The court conducting the auction, when issuing title transfer documents, shall notify the land administration office to erase the recordation of dien of the land. We hereby elaborate on the J.Y. Interpretation Yuan-tse No.1446.

其典權之登記。本院院字第一四四六號解釋，應予補充釋明。