

J. Y. Interpretation No.139 (October 4, 1974) *

ISSUE: May an owner of immovable property create a mortgage on the property on which he has already created a right of dien to another person?

RELEVANT LAWS:

Civil Code, Part of Rights in Rem (民法物權編); Interpretation Yuan -tze No. 192 (司法院院字第一九二號解釋).

KEYWORDS:

right of *dien* (典權), mortgage (抵押權). **

HOLDING: The owner of an immovable property may, after the creation of a right of dien on his property, create a mortgage to another person on the same property to the extent that the dien is not affected. Our Interpretation Yuan-tze No. 192 is reaffirmed without the necessity of change.

REASONING: The right of *dien* is a right to use the immovable property of another person and to collect profits there-

解釋文：不動產所有人於同一不動產設定典權後，在不妨害典權之範圍內，仍得為他人設定抵押權，本院院字第一九二號解釋毋庸變更。

解釋理由書：按典權乃支付典價，占有他人之不動產，而為使用收益之權，與抵押權之係不移轉占有，為擔

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from by paying a price and taking possession of the property. It differs from, but does not preclude, the creation of mortgage, which is a right over a thing created to secure the performance of a debt without having to transfer the possession of the property. The owner of an immovable property does not lose his title to the property by creating a right of *dien* thereon. Therefore, the Civil Code, Part III, “Rights in Rem”, does not prohibit a property owner from creating a mortgage to another person on the same property insofar as the right of *dien* is not affected. Our Interpretation Yuan-tze No. 192 is reaffirmed without the necessity of change.

Justice Shih-Ron Chen filed dissenting opinion.

Justice Shi-Ding Chin filed dissenting opinion.

保債務之履行而設之擔保物權，其性質並非不能相容。不動產所有人於同一不動產設定典權後，其所有權尚未喪失，在不妨害典權之範圍內，再與他人設定抵押權，民法物權編既無禁止規定，自難認為不應准許。本院院字第一九二號解釋毋庸變更。

本號解釋陳大法官世榮、金大法官世鼎分別提出不同意見書。

Translator’s Note:

Dien is a traditional Chinese system whereby a creditor took possession of the real property of the debtor as a security for payment of the debt. The system was also commonly used for the purpose of acquiring the right to the use of residential or commercial buildings for an agreed term not to exceed thirty years by paying the owner a lump-sum price instead of annual or monthly rent. Upon or prior to the expiration of the term, the property may be redeemed by the *dien*-maker (debtor). While the right of *dien* is assignable by the *dien*-holder, the title to the property remains in the owner and is thus transferable to a third party so long as it does not affect the right of the *dien*-holder. See the Civil Code, Articles 911 through 927.