

**The transition of paradigm from the “encumbrance” to the “real right for security”  
- interpretation from the view of establishment of the seaman’s lien for wages**

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**Abstract:** In the theory of “encumbrance” of common law, the establishment of seaman’s lien for wages mainly derives from the fact of “service to the ship”, while its legal basis is the claim for wages secured by the lien in the norms of the civil law. Accordingly, it is well-advised that Article 30 of Property Law of People’s Republic of China is applied to the establishment of seaman’s lien for wages, on the basis of the nature of seaman’s work which is factual act. In the view of comparative study, the transition of legal paradigm which is from the “encumbrance” to the “real right for security” should be accomplished in our current rules.

**Key words:** encumbrance; real right for security; paradigm; seaman; maritime lien; factual act

## **1. Introduction**

Professor Thomas Samuel Kuhn, an American representative scholar of the school of historicism in the philosophy of science, claims that different paradigms are incommensurable. Such “incommensurability” is reflected in the standards as well as the concepts and operations. Like natural science, there are traditions and “paradigms” in legal concepts and institutions. So, Kuhn’s theory is in fact aimed to warn that the rejection reaction may occur in the transplantation between different paradigms. Under the common law system, maritime lien is a type of “encumbrance” imposed on specific sea-connected properties. However, in the academic circle in China, maritime lien is widely considered as statutory “real right for security”. From “encumbrance” to “real right for security”, it reflects the inherent difference between two different legal systems and a “paradigm shift” in legislation.

“Seaman’s lien for wages” is a sub-system under the structure of maritime lien system. The aforementioned paradigm shift is demonstrated especially clearly in this sub-system. It is widely believed by the British judges and scholars that the seaman’s lien for wages arises from jurisprudential explanation of service to the ship. However, in the laws of China, according to the feature of subordination of real right for security, the basis of its establishment lies in maritime claim (i.e., obligation). As provided in Article 22.1.1 of Maritime Code of the People's Republic of China (hereinafter referred to as “Maritime Code”), such maritime claim arises from labor laws, administrative rules and regulations or labor contracts. In this regard, Professor Sun Xinqiang pointed out that encumbrance is based on obligation (or “burden”) so that the seaman’s wage burden is closely attached to the property used as security. However, the purport of “real right for security” is to secure rights, emphasizing the rights of the seaman as maritime lien holder. In the author’s opinion, due to such paradigm shift, while the text of Maritime Code focuses on the content of right, it keeps subtle distance from the object of right (i.e., ship), overlooking the objective connection that the seaman established with the ship through labor. As a private right to guarantee the seaman’s labor income in Maritime Code, it is necessary to obtain a more definite explanation for the basis of the seaman’s lien for wages under the theoretical context of the paradigm shift from “encumbrance” to “real right for security”.

## **2. Enlightenment of British law and international legislation**

### **2.1 The theory of providing services to ships in the British law**

In the British law, maritime lien can be divided into absolute maritime lien and non-absolute maritime lien depending on whether it is independent of personal liability of the ship owner. It means whether maritime claim based on maritime lien requires the fault of the ship owner as the necessary factor. Let’s take claim for damage caused by ship collision (i.e., “damage done by a ship” in the British law) for example. The basis of maritime lien is the fault made by the ship owner or its employees. If such fault can not be proved, it will not be possible to claim maritime lien. However, the seaman’s lien for wages is a different case. As mentioned in the foregoing, the British judges and scholars believe that the seaman’s lien for wages arises from jurisprudential explanation of service to the ship and it has no direct relation to whether the ship owner incurs liability under the employment contracts. As early as in “The Edwin” case in 1864, the British judge Lushington said that in maritime court, it is a

traditional convention to take established labor as a maritime claim with relation to ships, though the source of this convention cannot be verified. Now, Merchant Shipping Act or other laws and conventions provide that the master and other members of the complement enjoy the right of being paid wages, guarantee and relief. Therefore, in my opinion, the existence of this right is independent of contract. The plaintiff can enjoy maritime property security through performance of labor.

The British scholar Professor D. R. Thomas holds that maritime lien is established based on service rather than employment contract. Accordingly, the ship becomes the property for security. By means of the unique remedies for actions in rem, the early maritime court consolidates the jurisdiction of cases concerning the seaman's wages. The more important issue is that it introduces the judicial theory of "certain maritime lien is independent of the personal liability of ship owner". In the case of "The Castlegate" in 1893, Judge Watson holds that the seaman's lien for wages is independent of any personal liability of ship owner, but is attached to the ship. The other judge Field in this case pointed out more clearly that the established service is the very essence of a lien for wages. In the case of "The Ever Success" in 1999, Judge Clarke carefully studied 14 classic precedents and the relevant academic works on this issue and concluded that even if the seaman obtains the job by deception or theft, or it is employed by a person who has legal possession of the ship but does not have the title, the seaman can still enjoy the right of security. Even if the seaman has no claim in personam against the owner of the ship, the ship as liability property can still guarantee the realization of the seaman's right for security.

In view of the above, the concept of the aforementioned "absolute maritime lien" is the product of the system of "encumbrance" in the common law system. It studies the legal relationship on the whole from both the perspective of the rights enjoyed by the seaman and the perspective of the obligations of the ship owner, the charterer and the operator. Therefore, the seaman's lien for wages in the British law is not bound by "privity of contract" and has countervailing power, so that it can be claimed against any subject who has control over the ship. Even if the seaman is employed by bareboat charterer while the ship owner does not have any obligation or liability under the employment contract, the seaman can still apply for detention of the ship to which he provides services and file the lawsuit by virtue of action in rem. Under the structure of the system of "encumbrance", by virtue of the system of "action

in rem”, the common law system successfully dilutes the identity of the subject of the security liability which should be cautiously dealt within the civil law system so that seaman’s rights can be secured.

The above mentioned theory in the common law system has considerable influence on the legislation of the countries under the civil law system. For example, in German Commercial Code (HGB), Article 754 provides that “statutory lien on the ship” arises based on “claim for wage”, but it does not point out that employment contract is the precondition of such claim. In addition, Article 755 provides that statutory lien on the ship can be claimed against any occupant of the ship, (i.e., dependency) so that the subject of the obligation is no longer restricted to the ship owner. That is, the security right of the seaman can be claimed against the ship owner as well as the legal occupants of the ship in accordance with the ship charter contract, ship operation agreement or other contracts. When the ship is used by the subject other than the ship owner for performance of debt, the essence is that the ship owner incurs the liability of the encumbrance for others.

## 2.2 Necessary factor of “serving on ship” in international convention

In Convention for the Unification of Certain Rules Relating to Maritime Mortgages and Liens (1926), Article 2 provides that payment claim arising out of maritime lien must be based on employment contracts, but it does not clearly indicate the other interested party of the employment contract. As a result, for the countries under the civil law system where maritime lien is considered as obligation, in case of bareboat charter, when the seaman claims maritime lien based on the contracts signed with bareboat charterer against the ship owner or based on the contracts signed with the ship owner against the bareboat charterer, there will be no legal basis. In view of this, International Convention for the Unification of Certain Rules Relating to maritime liens and Mortgages (1967) (hereinafter referred to as “1967 Convention”) and International Convention on Maritime Liens and Mortgages (1993) (hereinafter referred to as “1993 Convention”) make adjustment to this issue from two aspects. Firstly, Article 4 of “1967 Convention” adopts the broad sense of the owner, which is deemed to include bareboat or other charterer, manager or operator of the ship, while “1993 Convention” adopts the advice from the British delegation, limiting charterer to bareboat charterer only. Actually, in case the operation is conducted through voyage charter

or regular charter, the charterer does neither employ the seaman nor take charge of specific matters of the operation. It would be unfair to request the ship owner to incur the liability arising out of inappropriate behavior under the contract. Secondly, “employment contract” is no longer required as the necessary factor to claim wage secured by maritime lien. Instead, the necessary factor is “serving on ship” (“1967 Convention” and “1993 Convention”, Article 4.1). Therefore, as long as the seaman’s payment claim is arising based on “serving on ship”, such claim can be secured by maritime lien to adapt to the complicated situations of seaman employment in practice.

### **3. Relevant provisions in Maritime Code and review of China’s judicial practice**

#### **3.1 Interpretation of relevant provisions in Maritime Code**

According to Article 22.1.1, the seaman’s claim for labor secured by maritime lien can be divided into two situations: (1) in accordance with the provisions of labor laws and regulations, no matter whether there is labor contract between the seaman and the owner, as long as the wage and remuneration should be paid in accordance with the labor laws and regulations, this claim should be secured by maritime lien. (2) If there is labor contractual relationship between the seaman and the owner, the claim for wage and remuneration should be based on the labor contract. Therefore, it can be inferred that when the labor contract between both parties is null, the claim can still be based on the labor laws and regulations. The author holds that such wording in the Maritime Code is based on that the current labor laws, regulations and labor contracts can cover all specific manifestations of seaman’s labor in reality. However, as Professor Zheng Shangyuan said, fundamentally, China’s economic life still stays in the historical stage where traditional employment deed and labor contracts complement each other. It is not possible for labor laws and regulations to govern all kinds of employment relationship existing in the society. So, the civil law plays an irreplaceable role in adjusting the traditional employment relationship. As a result, nowadays, as the seaman employment modes become more multiple and flexible, it is still an issue whether China’s labor laws and regulations can cover all kinds of legal relations with the nature of labor and employment between the seaman and the owner. In addition, if China’s labor laws and regulations are not applicable in the situation where the seaman is sent abroad, such wording will undoubtedly increase the difficulty for maritime court to examine cases involving foreign elements. For example, in the business where the seaman is sent abroad, there are

plenty of cases where the seaman does not sign contract with the owner. In such cases, whether the seaman can claim wage and remuneration against the owner based on maritime lien will be questionable.

### 3.2 Judicial decisions in China

As it may be noted from the above, the text of Article 22.1.1 of Maritime Code seems rigid and closed, that is, it does not provide flexibility for the complicated actual situation and overlooks the objective connection between seaman's labor and the ship. As a result, the judicial decisions are not consistent and are difficult to predict. Accordingly, it is difficult to realize similar treatment of similar cases. For example, in the case of "dispute over the labor contract of the seaman on Vessel Huamao No. 6", Vessel Huamao No. 6 is operated by Dalian Ruixing Company through bareboat charter. Dalian Ruixing Company and Dalian Yuanyang Labor Company signed a contract, according to which, the labor on the vessel should be employed by Dalian Yuanyang Labor Company while the wage should be paid by Dalian Ruixing Company to the labor. However, the contract and its attachment employing the seaman are not signed by the bareboat charterer Dalian Ruixing Company for confirmation. The legal dispute thereof arose because Dalian Ruixing Company did not pay wage to the seaman. The court responsible for this case decides that as Dalian Ruixing Company actually accepted services provided by the seaman, the contract should be deemed as confirmed by Dalian Ruixing Company. Based on the fact that the seaman actually provided service on the vessel, the seaman should enjoy maritime lien on Vessel Huamao No. 6. To the contrary, in China's judicial practice, there is another adjudication concept that the court determines there exists factual contract between the seaman and the employer. As such, despite the absence of the labor contract, the seaman's right can be protected in a roundabout way in the dispute over seaman's labor.

The author holds that the above two concepts in China's judicial practice are problematic in two aspects. Firstly, no matter whether it is based on the fact of serving on the ship or based on the factual contract, the court is trying to protect the rights of the seaman by making use of its discretion based on the actual situation of the case. From the perspective of positive law, such decisions lack legal basis in the current laws. Secondly, from the theoretical perspective, China's judicial practice is still restricted to the concept that the seaman's lien for wage arises

in the normal changing process from voluntary encumbrance (contractual relation) to statutory property right (maritime lien), but overlooks the possibility of the abnormal pattern from statutory encumbrance to statutory property right. In other words, it overlooks the change of real right in the process that the seaman breaks the restriction of the contractual relativity and directly obtains the right against the ship through its labor. However, the latter is under the background of the legislation paradigm of “encumbrance” in the common law system. It takes “providing services on the ship” as the basis of the seaman’s right which is realized by means of actions in rem.

According to the basic theory of legal dogmatics which is important for exploring the regulations of the current law, this article studies the specific regulations in combination with literal expression and practical applications. The author intends to provide more appropriate support from the positive law for the arising of seaman’s lien for wage from the perspective of interpretative theory. On the one hand, there is the need to get the same decision on similar cases in the judicial practice so as to achieve consistency and predictability of the law. On the other hand, it is hoped that such explanation can realize the paradigm shift from “encumbrance” to “real right for security” in the interaction between legislation and jurisdiction.

#### **4. Defining the Nature of Seaman’s Work**

Based on the actual circumstance of a seaman’s maritime work, with the existence or absence of formal employment relationship as the dividing point, the author will discuss separately the nature of a seaman’s maritime work based on two different circumstances of with “employment relationship” and without “employment relationship”.

##### **(1) Circumstance of Existence of Employment Relationship**

When there is an express contractual relationship between a seaman and a ship-owner, the nature of a seaman’s work shall be the “performance” of obligations subject to the binding force of a contract. There are disputes among civil law scholars as to the nature of performance under the law of obligations. There are three main theoretical viewpoints: first, the “theory of juridical act” holds that performance shall carry the intent of realizing certain outcome. If the intent to perform is absent, the outcome of the extinction of obligations will

not be realized; second, the “theory of non-juridical act” holds that performance and act of payment are two independent concepts. Because the act of payment fits the real intention of obligations, the contents of obligations can be realized and the obligations are naturally extinguished due to their satisfaction, and therefore, the expression of the intent to perform and to accept performance is not required; third, the “theory of eclecticism” holds that if the act of payment is a juridical act, then performance is a juridical act. If the act of payment is a factual act, then performance is also a factual act. In recent years, the viewpoints of scholars have become increasingly similar to each other. Nowadays, the “theory of non-juridical act” has become a common theory.<sup>[11]833</sup>

Professor Wagatsuma Sakae, a Japanese civil law scholar, holds that “the obligations are extinguished by performance for the fact that the purpose of the obligations is realized, rather than for the effect of the payer realizing certain outcome. The intent of the payer is merely an element combining the payment and the obligations”.<sup>[12]</sup> Professor Yubao Fujio holds that realization of the effect of performing the obligations is not based on the notification of the performance intent of the payer, but on the fact that the purpose of the obligations has been realized. Even without the payer’s notification of his/her intent to perform, it can still be determined from the objective facts the reasons of the payment and furthermore, whether the effect of performance is realized. Therefore, it’s more reasonable to interpret “performance” under the law of obligations as a factual act.<sup>[11]833-834</sup> The author holds that, from a theoretical perspective, a distinction shall be made between two different concepts of performance of obligations and act of payment made for the purpose of performing the obligations. Among the acts of payment, there are factual acts, quasi-juridical act and juridical acts due to its many forms of manifestations. But such manifestations are only the means of payment, rather than the payment itself.<sup>[13]</sup> The only criteria for performance are whether the obligations are satisfied, regardless of whether the payer has the intent to perform. Therefore, the purpose of a seaman’s performance of a contract is to provide relevant services to the ship with his/her work, so that the ship-owner’s goal of engaging a seaman may be achieved. Therefore, the criteria for determining whether performance of the obligations is effected depend on whether a seaman has comprehensively and personally fulfilled his/her obligations according to applicable contracts, rather than whether the seaman, when performing the obligations of payment and the ship-owner, when accepting such performance, has the intent to extinguish the obligations. Alternatively, it’s the “objective facts” as alleged by Yubao Fujio, rather than

the subjective intent that is manifested through the parties' acts, that should be the criteria for determining "performance". As a result, if there is a express contractual relationship between a seaman and a ship-owner, the nature of a seaman's work is better defined as factual acts, by virtue of which the obligations of mutual assent is established.

## (2) Circumstance of Absence of Contractual Relationship

If the existence of contractual relationship embodies the autonomy of the private law, in the circumstance of having no contractual relationship, the effect of a seaman's lien for wages must be confirmed through legally regulatory measures. On one side, there is no contractual relationship between a seaman and a ship-owner (which means there are no legal obligations); on the other side, the ship-owner actually uses the seaman to do relevant work and carry out operations (i.e. acts of management). Therefore, the author holds that, in the case above, a relationship of "quasi-contract" is established between the two parties ("the factual contract" as acknowledged in China's judicial practice also embodies this idea), which, under the positive law framework, shall be interpreted as management of affairs without mandate. From the perspective of constitutive elements, such relationship covers the elements of "actually commits acts of management", "manage affairs for a third party", "without legal obligations" and the "intent to manage" for the constitution of management of affairs without mandate.<sup>[14]</sup> From the perspective of legal effect, in accordance with Article 93 of the *General Principles of the Civil Law of the People's Republic of China* ("General Principles of Civil Law") and applicable judicial interpretations, given that the seaman has actually provided "management and services", the ship-owner shall pay remuneration ("necessary expenses" as referred to in Article 93 of the General Principles of Civil Law) as required by the actual circumstances. As to the nature of management of affairs without mandate, civil law scholars generally recognize it as factual act. Though a party must have the intent to manage affairs for a third party, such intent does not equal the intent to effect, and is merely a human being's mental process, i.e. the intent to acts.<sup>[11]97</sup> As a result, in the event that there is no contractual relationship between a seaman and a ship-owner, a seaman's work can also be defined as factual act, by virtue of which the legal obligations are established.

## (3) Summary

Taking the two circumstances above into consideration, the author holds that whether there is a contractual relationship between a seaman and a ship-owner, the nature of a seaman's work

is better defined as factual act, by virtue of which obligations of mutual assent or legal obligations may be established depending on different scenarios. In this sense, Article 22.1.1 of the **Maritime Law** limits the basis of the obligations for wages secured by a seaman's lien for wages to "labor laws, regulations or employment contracts", the scope of which is indeed not adequate. Given the actual modes of employing seamen and the application of law in China, the norms of the law of obligations within the regime of the civil law are still the theoretical basis and effective addition to labor laws and regulations.

## 5. Regulation of Seaman's Lien for Wages by Article 30 of the Property Law

### (1) Theory of Extensive Interpretation of Article 30 of the Property Law

Factual act belongs to the theoretical category which "does not depend on the wills of an actor and for which the legal norms directly links the legal consequences to the acts".<sup>[15]</sup> Before the promulgation of the *Property Law of the People's Republic of China* ("Property Law") in 2007, "factual act" is only a theoretical concept in China's textbooks, while Article 30 of the Property Law changed this. Article 30 provides that "when a property right is created or extinguished by factual acts such as lawful construction or demolition of premises, the effect is achieved when the factual acts are done"; therefore, factual act has become a term and rule in the positive law. However, this rule is only an enumeration rather than a definition of the factual acts, which, judging from the normative intention, seems only limited to the "practical process of construction or demolition, and the factual consequences of corresponding physical changes" of the real property, and which thus results in the acquisition and loss of the property right of the real property. Chinese scholar Dr. Chang Pengao refers to such acts which are particularly objective and is extremely similar to the concept of factual acts as "typical factual acts".<sup>[16]</sup>

From the perspective of normative object, the author holds that the primary function of Article 30 of the Property Law is to achieve positivism of the concept of "factual acts", and to clarify the legal effect of a particular factual act on the creation or extinction of the property right. The reasons are that first, from a systemic perspective, Article 30 falls within Chapter 2 "Creation, Modification, Transfer and Change in Property Right Extinction" of Part 1 General Provisions of the Property Law ("Property Right Change") and is a general rule of Property Right Change. Regardless of the object being personal property or real

property, a particular factual act may trigger the effect of Property Right Change; second, from a methodological perspective, the construction of a legal concept does not mean that “the designer has full knowledge of all the significant features of the object, but for purposefulness reasons (normative intention), the designer” intentionally makes a trade-off. “When the scope of legal interpretation is determined, the interpreter of law shall substantiate or determine the contents and intention of the law from the viewpoint of the system and the purpose”.<sup>[17]</sup> Since the context of Article 30 fails to specify what are the property right and subject matter included in the normative reach of the “factual acts”, and such wording of “and so on” is expressly used in the text, necessary room is reserved for future interpretation and application. In publications compiled by judicial authority on interpretations of the Property Law clauses, it is written that, in addition to construction and demolition of premises as expressly referred to in relevant clauses, relevant factual acts also include the making of furniture or sewing of apparel. It can be inferred that the judicial authority also takes a broad interpretational position on the scope of the factual acts. In consideration of the two points above, the author proposes that certain degree of “teleologische extensive” interpretation may be applied to the application of Article 30, which means that Article 30 of the Property Law may be applicable to factual acts which satisfy the elements as required by law and have the legal effect of “creation and extinction” of certain property right.

## (2) Application of Article 30 of the Property Law to Seaman’s Lien for Wages

Compared to juridical acts, factual acts only trigger changes in real-time de-facto status, and provide a standard strong point for the law to determine the normative effect of the factual acts. Subject to this pre-condition, only behavioral intent, rather than the intent to effect, is required for the establishment of a factual act; moreover, the intent to effect is not meant to be regulated by the law. “The demarcation point between a juridical act and a factual act is the different elements linking to the legal effect, namely, expression of intention for the former one and factual effect as the strong point for the latter one, which are provided by the law.”<sup>[19]</sup> Therefore, the juridical act can become the main media for “autonomy of the private law”, while the factual act must count on express confirmation of its factual effect by the legal text. As to the normative process of maritime lien created by a seaman’s work, the author holds that the fundamental paradigm structure can be summarized as follows: a seaman’s maritime work (factual act) → completion of a ship’s operation (factual effect) →

legal intervention (Article 22 of the Maritime Law and Article 30 of the Property Law) → formation of maritime lien (legal effect). From the theoretical perspective of the obligations under the civil law legal system — dualistic structures of the rights in rem, the changing process of the property rights can also be interpreted as follows: factual act → obligations of mutual assent/statutory obligations → statutory property right.

It's not hard to tell that, the process of creating a maritime lien by the factual act of a seaman's work is substantially the creation of specific factual effect by a seaman's work, and the legalization of the legal effect as the outcome. Chinese scholar Dr. Zhang Songlun holds that in the context of common law "encumbrance" system, the factual act, upon being acknowledged by law of the status or results of process, results in a legal effect that an individual does not wish to create. The factual act itself does not create encumbrance, the encumbrance it create is public law encumbrance in substance.<sup>[20]</sup> In China's theory of Property Law, the real right for security, based on its causes of formation, may be classified into statutory real right for security and agreed real right for security.<sup>[21]</sup> The creation of maritime lien by the factual act of a seaman's work actually fits into the key characteristics, namely legality, of such right as "statutory non-transferable possessory" real right for security in Chinese law. The author holds that such fitting is not a coincidence; to the contrary, it corroborates the theoretical reasonableness and justification of a seaman creating maritime lien by his/her factual acts. For that matter, a seaman's lien over wages is a product of statutory regulation. The determination of whether the causes of the statutory property rights are the obligations of mutual assent or statutory obligations has no actual meanings, except for the function of expanding the normative space to cover actual circumstances. After all, the normative intention of statutory property rights lies at regulation without autonomy, and fundamentally aims at the safeguard of obligations.<sup>[22]</sup> As to whether the obligations secured by the property rights originate from autonomous contractual performance or regulated performance of obligations is not what it seeks to answer, nor does it have any fundamental difference at the effectual level.

In accordance with the objective situation and common ideas of maritime work and take into consideration the normative function of Article 30 of the Property Law in a derivative manner, the primitive motive for the early common law to grant rights to a seaman against a ship is for no other reason other than that a seaman's work constitutes a necessary component

of maritime transportation business, and although a labor contract or an employment contract offers an opportunity for a seaman to join the maritime transportation business, it only adjusts the relationship of obligations between a seaman and a ship-owner as a result of providing the work, and has nothing to do with the added value created by a seaman's work to the ship's operation and by virtue of which the acquisition of maritime lien, which, as Dr. Chang Pengao refers to, is the "structure of accompanying hidden rights and co-efforts"<sup>[22]</sup>. With the intervention of a labor contract, maritime work becomes a reality; however, a seaman's lien for wages is the property right formed in accordance with the norms of Maritime Law and in fact, is not based on the survival of the contractual relationship. The author holds that in the legal relationship structure of a seaman's lien for wages, it is this accompanying right of "obligations of mutual assent → statutory property rights" and the appearance of co-efforts result in the fact that the Maritime Law, including Article 24 of the "Maritime Law" in the Taiwan region, specifies that the creation of a seaman's lien for wages is based on the existence of the payable obligations under the employment contract; and the supplemental application of Article 30 of the Property Law is intended to strip off the appearance of the labor contract serves to render clearer the fact that a seaman acquires the statutory property rights by his/her factual acts, so that the changing process of this property right is interpreted more smoothly and reasonably at the positive law level.

From a comparative law perspective, though the maritime lien as the "real right for security" in the Chinese law is starkly different from the "maritime lien" as the "encumbrance" in the common law in terms of legislative paradigm, system design and operation system. But the two concepts, as a legal system, are basically the same in terms of normative functions. The author holds that this functional commensurability is the root causes of why "encumbrance" and "real right for security", two completely different legal concepts, can realize paradigm shift in different legal traditions and contexts and furthermore, rational dialogue and drawing lessons from each other. In a sense, the author holds that supplemental application of Article 30 of the Property Law to determine the legal effect of the creation of a seaman's lien for wages is still a "detour interpretation" in legal dogmatics. The Maritime Law is the special law of the Civil Law. Supplemental application of Article 30 of the Property Law is intended to further clarify the basis for creating the seaman's lien for wages from the perspective of interpretative theory, therefore, softening and expanding the slightly rigid and narrow norms of Article 22 of the Maritime Law, and providing, from a theoretical perspective, the positive

law basis for the “factual contract” or “the fact of proving services” which has already arisen in the judicial precedents. From the perspective of legislation theory, the author maintains that when the Maritime Law is amended in the future, by learning from the provisions of the British law and international conventions, the “in accordance with labor laws and regulations or the employment contract” may be superseded by “service to the ship” or “holding an office aboard the ship” as the express basis for a seaman claiming wages and welfare benefits which are also secured by maritime lien.

## 6. Conclusion

As claimed by Japanese comparative law scholar Masao OKI, “various legal orders, arising from and developing in their own histories, invented various kinds of legal technologies, which may portray starkly different outlooks”.<sup>[23]</sup> As to the theory of methodology, interpretation of the system of a seaman’s lien for wages, as a civil property right, shall be based on, but not limited to, the texts of the Maritime Law, by virtue of which can it be comprehensively examined in a more extensive normative system. As to the norms of generating the rights in rem, the author holds that supplementary application of Article 30 of the Property Law shall be adopted to clarify the legal effect, not only to seek, from a technical perspective, a linking and connecting “point” between the maritime lien as a right in rem under the special law and norms of right in rem under the general law; what’s more important is that from the standpoint of “functionalism” under the comparative law, to offer a possibility and opportunity for rational dialogue between the two legal systems in this regard.

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