Logical Aspects of Some Burden of Proof Problems in Cases of Alleged Violations of the Right to Unionize According to Swedish Labour Law

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1 Introduction

The present study on the borderline between Philosophy of Law (or *Allgemeine Rechtslehre*) and Procedural Law, particularly the Law of Evidence, goes back to two contributions from the early 'seventies, viz. Bylund (1970) and Boman (1971) – see the list of references at the end of this paper.

From the standpoint of logico-philosophical conceptual analysis and definition theory we want to highlight a number of intricate problems dealt with in the two contributions just mentioned, both of which have significantly improved the legal doctrine in the areas of Evidence Law and Labour Law alike.

The plan of the paper is then as follows.

After a quick presentation (Section 2) of the background in Swedish Labour Law of cases of alleged violations of the right to unionize, we ask (Section 3) which are the material prerequisites – in the sense of necessary conditions – for a violation of the right to unionize to exist (in the sense with which Bylund and Boman are concerned). And we try to answer this question by proposing a certain explicative definition or "working hypothesis" (still in Section 3). As a characteristic prerequisite in that definition turns out to involve the notion of *main cause*, this fact leads us to study (Section 4) the logical properties of that notion and to summarize them in a so-called "square of opposition" (in the terminology of mediaeval scholasticism). We then consider (Section 5) the crucial concept of a 'distribution among the parties of the burden of proof for the prerequisites in the adopted explicative definition', and arrive at a characterization (still in Section 5) of three legally interesting ways of distributing the burden of proof for those prerequisites, ways which are discussed in Bylund (1970) and Boman (1971). Again (Section 6), we deal with the rule of distributing the burden of proof adopted by the Swedish Labour Court in the famous precedent *AD 1937 nr 57*, according to which the *facta probanda* (themes of proof) of the parties (employee vs. employer) seem to be *inconsistent* (*incompatible*) with each other as far as the prerequisite of causation is concerned; we propose (still in Section 6) an interpretation in terms of three-place relations of the notions of necessary and sufficient conditions which are crucially involved in that rule of distribution, as well as a new square of opposition governing those notions. On the basis of the results reached in Section 6 we are then able (Section 7) to discuss the closer import of the *AD 1937 nr 57* distribution rule by considering (still in Section 7) two interpretations of it, both of which yield the result that the rule is objectionable in some way or other. We then conclude (in the last Section) that the difficulties are due to the fact that, on both interpretations, the *AD* distribution rule is taken to involve "incompatible themes of proof for the parties" (in Bylund's terminology), and end up with recommending a deeper study of two alternative ways of formulating the desired distribution rule, which are both considered by Bylund (1970) and are such that the *facta probanda* of the parties will be "independent" in the sense of being compatible, or consistent with each other – as is usually and traditionally the case with respect to rules governing burden of proof situations.

Our present study may be said to be based on certain simple, though important methodological ideas, which we are anxious to emphasize. These methodological ideas are as follows:

(a) Concepts like those of "prerequisite", "legally relevant (operative) fact" (G. *Tatbestand*), and "condition for liability" ought to be *relativized to* an explicitly indicated definition in a way illustrated by our own D1 *infra*.

(b) In like manner, the concept of a "distribution among the parties of the burden of proof for an alleged violation of the right to unionize" ought to be *relativized to* an explicit definition with clearly distinguishable prerequisites, to which the distribution is applicable; see our Table in Section 5 below.

(c) The prerequisites in our explicative definition (working hypothesis) D1 *infra* can be varied with respect to logical strength in several directions, as it were, which gives rise to such phenomena as "ease of burden of proof" and "sharpening of burden of proof" for the parties concerned. This topic could be richly illustrated, but has to be left aside here.

I do not by any means want to suggest that e.g. Bylund or Boman be unaware of these methodological ideas – on the contrary, it appears clearly enough from their presentations that such is not the case. Nevertheless, I am seriously concerned about emphasizing the points (a)-(c) from the standpoint of Philosophy of Law, or that of *Allgemeine Rechtslehre.*

2 Empirical Background

As should be well known, the dissertation Bylund (1970) deals with a rule about the burden of proof in cases of alleged violations of the right to unionize, which rule gradually emerged in the course of the legal practice adopted by the Swedish Labour Court (= *AD*, Sw. *arbetsdomstolen*). In order to give the reader an idea about the complicated problems belonging to Labour Law and Law of Evidence which are actualized in such cases, I quote from the highly intriguing and perceptive review Boman (1971) on p. 349:

> The situation is this: An employee[1] demands that *AD* should oblige an employer to re-employ him or to pay damages. As a ground for his demand the employee alleges - inasmuch as is presently at issue - 1) that he has been discharged[2] from his employment by the employer; 2) that by the time of the discharge he was a member of a trade union and, maybe, that prior to the discharge he was engaged in union activities in some way or other; as well as 3) a causal relation between the items 1) and 2).
>
> In the sequel the item 2) will be referred to as the *union-factor* or, using Bylund's system of abbreviation, as *a*.
>
> The items 1) and 2) are usually non-contentious in the cases. Anyway, they are easily proved, and the employee may carry the burden of proof for them without great difficulty. The situation is altogether different as far as the item 3),

the causal relation, is concerned. For, in such cases as develop into litigation, the employer usually objects, 1) that he had an objectively valid reason for discharging[3] the employee, and 2) that the discharge was caused, not by the union-factor, but by this latter reason. In the dissertation Bylund refers to the *objectively valid reason* using the abbreviation *b.*

[1] Here and in the sequel we disregard the fact that the plaintiff is most frequently the trade union of the employee. For the sake of brevity, the plaintiff will always be called "the employee".

[2] Even other measures may be alleged, e.g. being cut off from work during a certain period of time.

[3] For instance, that the employee neglected to do his work properly.

[These three notes are footnotes to the Boman (1971) review of Bylund (1970).] In what follows I shall deviate from the Bylund scheme of abbreviation by referring to the union-factor as *F* and to objectively valid factors (reasons) as *G.* Furthermore, I refer to the employee as *AT* (Sw. *arbetstagaren*), to the employer as *AG* (Sw. *arbetsgivaren),* and to the latter's act of discharging ("firing") the former as *H.*

3 Which are the Material Prerequisites for a Violation of the Right to Unionize? A Preliminary Explicative Definition

Tentatively we propose the following explicative definition of what is known in predicate logic as a *quinternary*, or "five-place", relational notion of a violation of the right to unionize:

D1 By having performed the act H of discharging the employee AT because of the union-factor F, the employer AG violated AT's right to unionize, in spite of the fact that the objectively valid motivating factor G obtained (existed) alongside of F if and only if

(1) AG has performed the act H of discharging AT;
(2) F obtained (existed);
(3) F caused[1] H [F motivated AG to discharge AT];
(4) G obtained (existed) alongside of F;
(5) G was an objectively valid (legally acceptable) reason for AG to perform H;
(6) G caused[1] H [G motivated AG to discharge AT]; and

[1] In the prerequisites (3) and (6) we may naturally take the predicate "caused" to mean the same as "was *a* cause of". If understood in that fairly weak sense, (3) and (6) will turn out to be perfectly consistent with each other, which result appears to be reasonable enough. On this matter, see e.g. Hart & Honoré (1959), p. 47, 82, and Åqvist & Mullock (1989), p. 39.

(7) As compared to G, F was a (the) main cause of H [in the rough sense: "as a cause (reason, motive) of H, F carried sufficently more weight than G"].

As to this definition we observe that the prerequisites (1) – (3) in the *definiens* [right member] of D1 correspond nicely to the items (1) – (3) in the ground for the employee's demand according to the Boman (1971) quotation above. Furthermore, we observe that the employer's objection according to the same quotation implies (at the very least) the prerequisites (4) – (6) in the *definiens* of D1, but that, in addition, it may be taken to imply the denial of the prerequisite (3) to the effect that F caused H. The status of the concluding prerequisite (7) is perhaps not entirely clear; yet, as a necessary condition for the satisfaction of the *definiendum* [left member] of D1, the prerequisite (7) certainly looks plausible enough. If the employer AG wants to deny having violated AT's right to unionize in the sense of D1, he must deny that (7) was fulfilled and allege that, on the contrary, it was the objectively valid (legally acceptable) factor G which, as compared to the union-factor F, was a (the) main cause of the discharge H. Regardless of the more exact import of the notion of *main cause*, this appears to be obviously so.

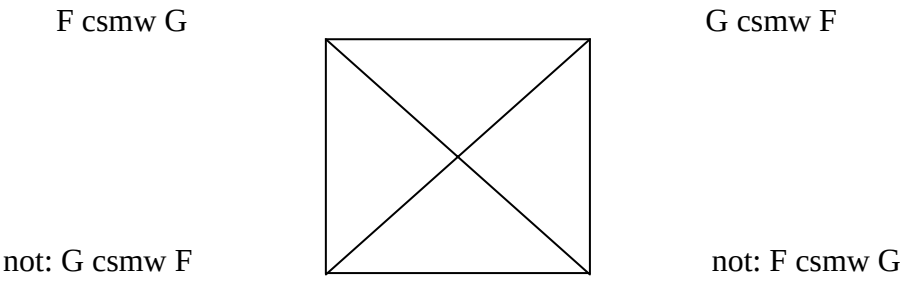
4 Logical Properties of the Notion of Main Cause: a So-Called Square of Opposition

On p. 24 of Bylund (1970) the author points out, quite importantly, that "one cannot say of two factors that they both have been a (the) main cause of a certain effect". In the jargon of logic we can make precisely the same point by saying that the relation "As compared to Y, X is a (the) main cause of Z" is *asymmetric* (with respect to X and Y).

Again, in the footnote 8 on p. 351 of Boman (1971), reviewing Bylund (1970), Boman points out that the fact that a certain factor *b* was not the main cause of a discharge says nothing by itself about the question whether the union-factor *a* was the main cause or not, since the main cause of the discharge could have been *c* (some third factor). According to this equally important point it might well be the case that, of two allegedly motivating factors of a discharge, *none* of them was a (the) *main* cause of it (if you like: "in comparison with each other").[2] Let us now summarize these two observations in the following so-

2 In personal correspondence from 1990, Bylund pointed out that there is a certain obscurity in cases where one concludes that, of two allegedly motivating factors, say F and G, of a discharge, *none* of them was a (the) main cause of the discharge, viz. in the following way: the conclusion may result from (i) a comparison just between F and G, which are found to be "equally efficient" as causes of the discharge; but it may also result from (ii) a comparison between F and some *third* factor *c* together with one between G and *c*, where *c* is found to be the main cause of the discharge in the sense of being "more efficient" than both F and G as causes of the discharge. In the present paper we restrict ourselves to 'normal' cases of type (i) above, where just F and G are at issue, because they are the only ones alleged by the parties concerned. The function of our favored locutions "as compared to", "in comparison with" is precisely to express this restriction to 'normal' cases of type (i).

called square of opposition (according to the post-Aristotelian tradition). Here we use the notation "F csmw G" ["G csmw F"] to denote the relation: "F[G] is a (the) main cause of H as compared to G[F]" (or, if you prefer, the relation: "F[G] carries sufficiently more weight than G [F] as a cause of H").



In the philosophical *Kindergarten* of the old Swedish *Gymnasium* we then used to learn the following:

(i) The states of affairs [propositions] in the two upper (NW, NE) corners of the square are *contraries* (*contrarily* opposed) in the sense that *at most one* of them can be realized [true].

(ii) The states of affairs [propositions] in the two lower (SW, SE) corners of the square are *subcontraries* (*subcontrarily* related) in the sense that *at least one* of them must be realized [true].

(iii) The states of affairs [propositions] in the diagonally opposed corners of the square (NW, SE and NE, SW) are *contradictories* (*contradictorily* opposed) in the sense that *exactly* one of them has to be realized [true].

(iv) The states of affairs [propositions] in the two lower (SW, SE) corners of the square are *subordinate to* those in the two upper (NW, NE) corners in the sense that the latter are *logically stronger than* the former insofar as F csmw G (in the NW corner) implies, but is not implied by, not: G csmw F (in the SW corner), and analogously for the states of affairs in the NE and SE corners.

We now readily verify that, when we make the notion of main cause precise by means of the relation csmw and observe along with Bylund that this notion has the property of denoting an *asymmetric* relation, this property then yields the result that the points (i), (ii) and (iv) in our commentary to the above square of opposition are satisfied – as to (iv), however, just the condition that the states of affairs in the two upper corners *logically imply* the matching subordinated states of affairs. As to the further condition that the former are *not logically implied by* the latter, we appeal instead to the observation made by Boman

supra. Finally, asthe satisfaction of point (iii) is immediate, the proof that our square of opposition has all the right properties (i) – (iv) is thereby complete.

5 Three Legally Interesting Ways of Distributing the Burden of Proof for the Prerequisites in the Definition D1

Let us assume - provisionally at least -that our explicative definition, or"working hypothesis", D1 captures one reasonable sense of the concept of a violation of the right to unionize according to valid Swedish Labour Law. We may now ask in how many different ways one could distribute the burden of proof for the seven prerequisites (1) – (7) among the parties AT and AG. From a purely mathematical standpoint the answer is obvious: in altogether 128 (= 2^7) different ways. However, the overwhelming majority of these ways are more or less bizarre, and, as a matter of fact, only three of them seem to deserve serious consideration as being legally interesting or realistic. The characterization of the three distributions I have in mind are to be found in the table *infra*:

	AT	AG	
	burden of proof with respect to	burden of proof with respect to	matching *facta probanda* (themes of proof)
Distribution I of prerequisites in D1:	(1), (2), (3); (7)	((4), (5), (6)	(4), (5), (6)
Distribution II of prerequisites in D1:	(1), (2), (3)	(4), (5), (6); (7)	(4), (5), (6); neg (7)
Distribution III of prerequisites in D1:	(1), (2)	(4), (5), (6); (3), (7)	(4), (5), (6); neg (3), neg (7)

In the spirit of Bylund (1970) and Boman (1971) we may suggest the following labels here: for Distribution I: "The whole burden of proof for the causal prerequisites on the employee AT"; for Distribution II: "The burden of proof for the prerequisite of main cause on the employer AG – i.e. a so-called *reversed* burden of proof with respect to that prerequisite"; and for Distribution III: "The whole burden of proof for the causal prerequisites on the employer AG".

Note also that in the above table we allow for a certain familiar discrepancy between the locutions "burden of proof" and "theme of proof" (in the sense of 'what is to be proved' = *factum probandum*). Thus, according to the distributions II and III, the employer AG carries the *burden of proof* for, or better: with respect to, the prerequisite (7), whereas his matching *factum probandum*, or

theme of proof, is not (7) itself, but the *negation* ('contradictory opposite') *of* (7), which we denote by "neg(7)" in the table and by "not: F csmw G" in our square of opposition above. This discrepancy agrees well with current jural terminology and normally causes no trouble; but in a logical reconstruction we obviously have to point it out explicitly.

6 The Rule of Distributing the Burden of Proof Adopted by the Swedish Labour Court in the Precedent *AD 1937 nr 57*: An Interpretation in Terms of Three-Place Relations and a New Square of Opposition

In his review Boman (1971, p.349) the reviewer observes that Bylund – after a thorough study of the decisions of the Swedish Labour Court (= *AD*), including the well known precedent *AD 1937 nr 57* – arrives at the conclusion that *AD* appears to distribute the burden of proof with respect to causal connections in the following way. The employee has to *make* it *probable* that the union-factor F (my notation) was a necessary condition for the discharge. If he succeeds in doing this, the employer has to *prove* that the objectively valid reason (factor) G was a sufficient condition for the discharge. Somewhat later in his review (p. 350) Boman observes – like Bylund – that these *facta probanda* of the employee and the employer are *inconsistent* with each other in the sense that they cannot both be true. And further on in the review (p. 354) he emphasizes the *contrary* character of the involved propositions, or themes of proof.

The thesis that the propositions "F is a necessary condition for H" and "G is a sufficient condition for H" are inconsistent in the sense indicated by Boman, or contrarily opposed in the same sense, is based on a perfectly sound and correct observation. However, this observation has to be made more precise (be analyzed more fully) in order for its soundness (correctness) to appear clearly to everybody with all necessary explicitness. An analysis of the desirable sort was given, I claim, in my contribution Åqvist (1989), where a basic suggestion is to the effect that we must construe the causal relations *is a necessary condition for* and *is a sufficient condition for* as "three-place", or *ternary*, relations of a certain type in order to be able to show that the required inconsistency indeed obtains. My suggestion came down to this: think of the respective *facta probanda* of the employee and the employer as elliptical for the following propositions:

> F was a necessary condition for H in the *presence* of G
> (abbreviated as: F nec H pres G)

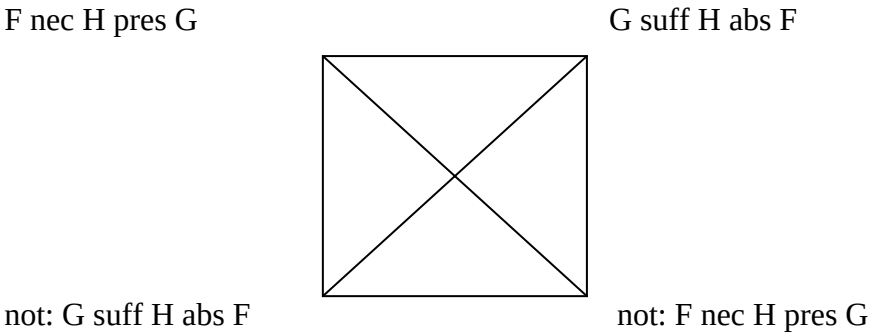
and

> G was a sufficient condition for H in the *absence* of F
> (abbreviated as: G suff H abs F).

The first proposition here [F nec H pres G] can be read, and understood, as follows: "the employer *would not* have discharged the employee because of the

objectively valid factor, *unless* the union-factor had obtained". And the second proposition [G suff H abs F] is to be read thus: "the employer *would* have discharged the employee because of the objectively valid factor, *even if* the union-factor had *not* obtained".

Given a certain modification of the Åqvist (1989) theory for these two concepts (essentially to the effect that the first one is construed more as a traditional *conditio sine qua non*-notion than was done in my paper), we may easily verify the correctness of the following new square of opposition:



To "verify the correctness" of this new square of opposition means that we prove the analogues of the points (i) – (iv) in the commentary to our first square of opposition in Section 4 *supra*. I leave the details to the reader.

7 Interpretations of and Objections to the *AD 1937 nr 57* Distribution Rule: Should the *facta probanda* of the Parties Really Be *Inconsistent* with Each Other?

How are we then to understand the distribution rule adopted by *AD* and defended (in principle) by Bylund against the background of my account in Åqvist (1989) of the concepts of necessary and sufficient conditions and against that of my working hypothesis (explicative definition) D1?

Let us consider two interpretations both of which have the following feature in common:

The *factum probandum* of AT, i.e. the employee's theme of proof, is interpreted to mean F nec H pres G, and the *factum probandum* of AG, i.e. the employer's theme of proof, to mean G suff H abs F.

(i) Now, on the *first* interpretation, we take the employee's theme of proof to be the prerequisite (3) in D1 and the employer's theme of proof to be the prerequisite (6) in D1. So this implies that the term "caused" is ambiguous in the *definiens* of D1, it means one thing when appearing in the prerequisite (3), and another thing when appearing in the prerequisite (6).

> (ii) On the other hand, according to the *second* interpretation, we still take the employee's theme of proof to be the prerequisite (3), but take the employer's theme of proof to be the contradictory opposite neg(7) of the prerequisite (7) in D1.

We now deal in turn with these two interpretations.

Ad (i). The first interpretation is easily seen to yield an unacceptable result. For, by our observations above, it means that the two prerequisites (3) and (6) contradict each other (are inconsistent) in D1, whence the relation defined by D1 becomes "empty", i.e. cannot possibly obtain between *any* AT, AG, H, F or G *whatsoever*. But this result clearly conflicts with the intuitive consistency of the *definiendum* as well as the *definiens* in D1.

Ad (ii). On the second interpretation, the employer's theme of proof ("AG *would* have discharged AT because of G, *even if* F had *not* obtained") purports to refute the employee's allegation that the prerequisite (7) in D1 was fulfilled. His, i.e. AG's, argument would then be this:

G suff H abs F implies G csmw F	(reasonable assumption)
G csmw F implies not: F csmw G	(by point (iv) under our first square of opposition)

where the proposition not: F csmw G (= neg(7)) means that F does not carry sufficiently more weight than G as a cause of H [that F is not a (the) main cause of H as compared to G].

The second interpretation is not as obviously unacceptable as the first one. Nonetheless, even when interpreted in accordance with it, the *AD 1937 nr 57* distribution rule exhibits several strange features, of which we draw attention to the following.

(a) On this interpretation (as well as on the first one), the *factum probandum* of the employer amounts to G suff H abs F, and that of the employee to F nec H pres G. So by our last square of opposition these *facta probanda* are inconsistent or contrarily opposed to each other. This means that the following quotation from Boman (1971, p. 350) turns out to be immediately relevant and applicable:

> However, such a distribution of the burden of proof, to the effect that each party is to prove one of two contrarily opposed propositions, must as a rule appear to be pointless. For, if the plaintiff alleges *a* as the ground of his demand, while *b* is alleged by the defendant in his objection, it does not matter whether the defendant fulfills his burden of proof or not. Either the plaintiff manages to prove *a*, and thereby he has refuted *b*, since *a* implies *not-b*, or else the plaintiff fails to fulfill his burden of proof, in which case his demand should be dismissed (upon the merits) already on that ground.

Take *a* in the quotation as the prerequisite (3) in D1, meaning that F nec H pres G, i.e. the *factum probandum* of the employee according to the *AD* distribution

rule, and take *b* as the *factum probandum* of the employer, i.e. G suff H abs F. Boman's conclusion that such a distribution of the burden of proof becomes pointless then appears to be inevitable in the present application. (We must mention, however, that Boman (1971) thoroughly discusses the laudable attempt by Bylund (1970) to make sense of the rule by relativizing it to different parts of the evidence and by working *inter alia* with a division of the rebutting evidence into direct and indirect one; yet, this highly interesting topic falls outside the scope of my present account.)

(b) A variant of the strange feature just discussed could be elaborated as follows. If the employer's theme of proof (according to the *AD* distribution rule and the present interpretation) amounts to the proposition that G suff H abs F, we may reasonably assume that its negation, or contradictory opposite, is a *prerequisite* (necessary condition) that has to be satisfied in order for a violation of the right to unionize to obtain in the sense of D1. Then, if in our last square of opposition we follow the diagonal from the upper right corner in NE to the lower left one in SW, we find that such a prerequisite would amount to

not: G suff H abs F

On the other hand we know that, if so, this prerequisite is *implied by* (3) in D1 under the present interpretation, since (3) then means that F nec H pres G, and the upper NW corner implies the lower SW one by an analogue of point (iv) in Section 4 *supra* [the *subordination* case]. That prerequisite then becomes redundant in the *definiens* of D1 and can be deleted without further ado.

(c) A moment ago we mentioned that AG's theme of proof G suff H abs F ("the employer *would* have discharged the employee because of the objectively valid factor, *even if* the union-factor had *not* obtained") could be taken to imply the proposition G csmw F and, more in general, that the concept of sufficient condition at issue may be thought of as a version of that notion of main cause which figures in the prerequisite (7) of D1 and in our first square of opposition. However, as a variant of the concept of main cause, the present concept of sufficient condition seems to me to be *unduly strong*: as compared to F, G might well be a (the) main cause of H without it being true that G suff H abs F (in other words, G csmw F does not imply the proposition G suff H abs F).

Again, AT's theme of proof F nec H pres G ("the employer *would not* have discharged the employee because of the objectively valid factor, *if* the union-factor had *not* obtained") seems to me likewise to be *unduly strong* as an interpretation of the prerequisite (3) in D1: we could give a weaker import to (3) while at the same time doing justice to the intended "extra force" of the present notion of necessary condition through the prerequisite (7) and the notion of main cause used there. However, the task of showing precisely how to do this satisfactorily in detail again falls outside the scope of this paper.

8 Conclusion

In the last section we have discussed – against the background of our working hypothesis/ explicative definition D1 – two interpretations of the *AD* rule of distributing the burden of proof "with incompatible themes of proof for the parties". According to the first interpretation the list (1) – (7) of prerequisites in the *definiens* of D1 becomes inconsistent (self-contradictory), according to the second one some prerequisite on the list turns out to be redundant (logically implied by the remaining members on the list). Obviously, neither of these properties is desirable – we require from a formally satisfactory and "neat" definition that the list of prerequisites in its *definiens* be both consistent (non-contradictory) and irredundant (free from superfluous items). So some third and better interpretation needs to be found. From this logico-definition-technical point of view I would then recommend a deeper study of the two alternatives considered by Bylund (1970) on pp.160 – 164. These alternatives are in turn labeled "A distribution of the burden of proof for the prerequisite of main cause" and "A legal presumption"; both alternatives are said to have the virtue of making the *facta probanda* of the parties "independent" in the sense of being consistent, or compatible, with each other. The interesting argument in Boman (1971, p.355 f.) on proof by 'presumptive' and 'circumstantial' evidence seems to agree well with this recommendation of mine.

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