court to plead guilty—an example is the two university students I mentioned—they must still go through the preliminary inquiry process before reaching the high court. Why could the government not say that in instances like that the preliminary inquiry could be waived? Why could an accused not go directly before the trial division of the Supreme Court? That sort of reform might be considered. That is the sort of reform Canadians who read the Prime Minister's book thought they would see. It seems that we are to have jam tomorrow but not jam today.

One of the cornerstones in the common law system of criminal law is the traditional principle that the accused is presumed innocent until his guilt is proved beyond a reasonable doubt. However, there have been in the past exceptional cases in which the legislature has thrown upon the accused the *onus probandi* of a part of the issue. Strong objections have been raised to legislation of this type so much so that members of the judiciary have made such comments as "it is a pernicious method of proof to introduce into the common law." Another judge said that legislation of this type is opposed to every principle of what is right and just and to the entire spirit of British law. The most outstanding example of this type of legislation is section 295(1) of the existing Criminal Code which reads:

> Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Under the existing legislation, in theory anyone could be charged for having a flashlight or screwdriver in his glove compartment, objects which I am sure many of us have in our cars. That is because the offence is complete when the Crown establishes possession by the accused of a screw driver, flashlight and so on. There has been much general concern over the years about this type of legislation. In June, 1967, Mr. Justice Hall said in a Supreme Court of Canada decision in Tupper *v.* The Queen:

> Whether Parliament intended it or not, s. 295 (1), as it reads, permits of no other interpretation. It puts the possessor of many necessary tools of trade, automobile accessories and tools and hundreds of similar instruments used and carried daily for routine purposes which might be capable of being used for house-breaking in the position that merely from being in possession under the most innocent circumstances, he can be brought into court and put to the proof that he has a lawful excuse for having a screwdriver, a flashlight or some other such household tool or instrument in his car, boat, tool kit or on his person at any given time or place which includes his home. It can be argued and readily accepted that this may not happen frequently, but it can and may happen if Parliament really intended what the section says when, without any qualification as to time or circumstance, it put the burden of proof on the person in whose possession any such item may be found.

[Mr. Woolliams.]

How does this section of the Criminal Code affect, say, a young man who in his youth did a little breaking and entering for which he was convicted and who is picked up by a policeman a couple of years later when a robbery occurs in his district? If a policeman finds in the glove compartment of the young man's car a flashlight or screwdriver he can charge him with possession of burglars' tools and the onus is on the boy to prove his innocence. He needs a good lawyer. And many of our young men caught in a similar trap cannot afford one. It thus becomes incumbent on us to take a very careful look at this type of legislation and assure ourselves that any departure from significant principles of the common law are clearly justified.

In this regard the committee will have to balance carefully the competing forces that will be created by proposed section 224A, popularly called the breathalyzer section. During this inquiry committee members should also satisfy themselves as to the reasons for removing the words prima facie which precede the words "evidence" in a number of places.

When talking about the breathalyzer test the minister said, "But you don't have to take it." If my interpretation of the section and that of other lawyers is correct, it means that if the policeman who stops you is reasonably sure you have been drinking and asks you to take the test and you refuse to do so, you are then guilty of an offence. Let me say at once that as a Canadian I agree with the minister that murder on our highways must be ended. He quoted some interesting figures. They show what happens when the use of alcohol is abused. But legislation seeking to cure the evil of the drinking driver must not be a worse evil than the one it seeks to cure.

• (4:40 p.m.)

Next I wish to direct my attention to the problem of an accused's right to obtain counsel. The present Criminal Code in section 709(1) states in part:

> —the defendant is entitled to make his full answer and defence.

Any hopes that this would provide adequate protection for an accused were abruptly shattered in 1966 in Regina *v.* O'Connor when the Ontario court of appeal held that where the accused was refused permission to obtain