standers in court. Lax practice may even have permitted the use of *tales de circumstantibus* when less than twelve jurors appeared pursuant to subpoena. [30]

The *Liber* shows that an oath was taken by the petty jurors impaneled to try the issue. (Challenge would have to be made before the jurors were sworn, if English practice were followed in this particular.) No form of oath was provided by the laws but it seems probable that the oath taken was substantially that in use in England, *viz.*:

> You shall well and truly try, and true deliverance make, between our Sovereign Lord the King and the prisoner at the bar, whom you shall have in charge; you shall true verdict give according to your evidence. So help you God.

Once the impaneled jurors were sworn, the *Liber* is barren of the details of trial and little can be gleaned from the colony laws. In several counties regulatory rules and orders of court have been found for trials in civil causes; none have been found for criminal prosecutions. It seems probable that the initial step of the trial consisted of the clerk's reading to the jurors the indictment and the prisoner's plea, perhaps along with an injunction respecting the jury's task. That the clerk of the indictments then "opened the indictment" by explaining what the crown was attempting to prove seems unlikely from the nature of the offenses charged. In any event the witnesses for the crown were called and sworn and gave their evidence on direct, subject, it is assumed, to cross-examination by defendant or his counsel. A few acts of the colony defined the measure of proof for specific offenses, such as "two Sufficient Witnesses", one witness and "pregnat Circumstances agreeable thereto," "one Sufficient or Lawfull witness not being the Party injured or damnified," etc.[31] Next, any witnesses for defendant were called (they could be subpoenaed by defendant); most likely, pursuant to the common law rule in cases not involving capital offenses, they testified under oath. In a few cases reference to the issuance of *subpoenas ad testificandum* reveal the identity of witnesses for the crown but there is no systematic notation of the names of witnesses in the *Liber*. To what extent crown witnesses were bound over by recognizance to appear to testify is not apparent.

Some guide to the philosophy of law enforcement appears in a 1692 comment of the Governor and Council upon an Act against Hogstealers that "for the better and more Easy discovery of Criminalls in that and all other matters of like Import Viz. in all cases of petty Larcenys and stealings of Provisions or other Goods; it were Convenient that the Onus Probandi lye upon the Party charged, and in whose Custody the same may be found; that in Case he or she cannot Sufficiently make appear and prove when and where and how they came by the same; It shall be a Sufficient Conviction of the Crime. . . ." To this the House returned that "as the Onus Probandi do lye upon the Party with whom found they are willing the Party Accused or Suspected should be put to prove where he had it." [32]

After the defense witnesses had been heard, perhaps counsel for the defense made a closing speech to the jury, followed by the clerk of the indictments for the crown. Such closing speeches, if made, were probably largely summations of evi-

30. The several acts of Parliament providing for *tales de circumstantibus* (35 Hen. VIII, c. 6; 4 and 5 P. & M., c. 7; and 14 Eliz. I, c. 9) were apparently regarded as in force in the province. See Kilty, *op. cit. supra*, 233–35; Alexander, *op. cit. supra*, 363–65, 376–77, 405–06.

31. 13 *MA* 487; 22 *id.* 477; 13 *id.* 479. See also conviction for adultery by "sufficient evidence or confession of either party." 38 *id.* 19. *Cf.* the criminal cause in Kent County Court where, there being no "substantial evidence" against the prisoner, he was found not guilty, the jurors not going from the bar. *KCP, Liber I*, 503.

32. 13 *MA* 285–86, 293–94, 379, 383.