No 81.

Or, where it means to give that import to these words, " finally determine," it continually attends them with the addition of many others explaining its intention.

Cay, in abridging the statute in question, leaves out the word "finally," as a mere expletive; understanding that "finally determine" means nothing more than to bring the cause to an issue, so far as depends upon the justices.

The act of the eleventh of Henry VI. cap. 6. ordaining, That no suit, before former Justices, shall be discontinued by a new commission, gives a power to the new Justices to determine pleas, which were before the former ones, and 'the same pleas and processes, and all that depend upon them, to hear and finally determine.' If "finally determine" signified that the determination should be final; then by this statute of Henry VI. the determination of the Justices would have been final in all questions coming before them, which is not true.

In the act 19th, *anno* 20th Geo. II. entituled, 'An act for the adjusting and 'more easy recovery of the wages of certain seamen,' the Justices have a power finally to determine the disputes therein provided for; notwithstanding which, many sentences of Justices on such disputes have, since that statute, come under the review of the Court of Session.

The statute in question gives no appeal from the sentences of the Justices to the quarter sessions; but when a statute, relating to a crime, intends to give the final determination to the Justices of Peace, it constantly takes care to give an appeal to the quarter-sessions, for the greater safety of the subject.

" The Lords ordained the bill to be passed."

Reporter. *Murkle.* Act. *Lockhart.* Alt. *Boswel & J. Dalrymple.*
J. D. *Fol. Dic. v.* 3. *p.* 344. *Fac. Col. No* 108. *p.* 159.

No 82.

A process of damages for a verbal injury, is competent before the Court of Session in the first instance.

1755. *March* 4. Samuel Auchenleck *against* James Gordon.

Samuel Auchenleck brought a process against James Gordon, for having uttered several defamatory and injurious expressions against him; and particularly setting forth, That Gordon asked the pursuer's son, 'Whether he came 'with a staff to murder him?' adding, 'that the pursuer and his family ought 'to have their faces marked when they offered to murder on the highway; 'that they were a parcel of thieves, robbers, murderers, and coiners of false 'money, and deserved to be banished.' And the libel concluded for damages and expenses of process.

The defender *objected*, That this action being for slander and defamation, could not be brought in the first instance before the Court of Session, as the Commissaries were the only judges competent for questions of that kind.

The Lord Ordinary sustained process, and found the action competent; and, before answer, allowed a proof to both parties.

No 82.

The defender applied by petition to the Lords, and *pleaded*, That before the Reformation, Commissaries only could judge in matters of scandal, and the civil courts were not even entitled to judge in these matters by review; for appeals from the bishops courts were only competent to the Pope, or judges delegated by him.

After the Reformation, by statute 1560, ratified Parl. 1581, cap. 115. all questions depending before the Commissaries, when their jurisdiction was abrogated, were allowed to be tried by the judges-ordinary; but soon after, it was thought necessary, notwithstanding the abolition of Episcopacy, to continue the office of Commissaries. These Commissaries were named by the Crown, and vested with the same jurisdiction that the ancient Commissaries had.

By the statute 1609, cap. 6. bishops were restored to their full powers, and their Commissaries were declared entitled 'to judge in all causes spiritual and 'ecclesiastical wherein the Commissaries then in office were in use to decide.' And by the same statute, the Court of Session is only empowered to judge in matters consistorial, as a court of review, when the Commissaries of Edinburgh should not do their duty, and to advocate from inferior commissaries for iniquity. And that matters of scandal are consistorial, appears from the instructions to the Commissaries *anno* 1666, § 1. where such questions are expressly enumerated amongst other consistorial cases. And Sir George Mackenzie, Crim. B. 2. Tit. 20. says expressly, 'That the bishop's officials are the only judges to 'verbal injuries, because these verbal injuries are considered as scandals.'

The reason why matters of scandal came to be appropriated to the jurisdiction of the Commissaries appears to be, that in the early ages of our law, the criminal judges only interposed in violent breaches of the peace, leaving crimes and injuries of less importance altogether unpunished. In rude and uncultivated ages, honour was a thing little understood, and verbal injuries made but slight impressions; but, as injuries of this kind were contrary to the doctrines of Christianity, they naturally fell under the observation of the clergy, who at first, probably, only admonished those who were guilty in that way, but by degrees came to inflict ecclesiastical censures; and at last, when they were allowed to hold courts, they added to that punishment a fine or mulct, which being sometimes applied to the party injured, came to receive the name of damages, though it is evident that the fine could only be imposed as a punishment of the crime, and to satisfy the resentment of the party injured, and not to restore him to any patrimonial interest, as none could be lost by the injury. And therefore, from the nature of the crime, as well as from the laws and practice whereby the jurisdiction of the Commissaries is established, questions of this sort can only be tried, in the first instance, before the Commissaries, and not before the Court of Session.

Observed on the Bench, That whatever was the ancient practice, yet for some years past, verbal injuries have been tried both before the Court of Justiciary and Court of Session, and even by Justices of Peace.

No 82. "The Lords refused the petition, and adhered to the Lord Ordinary's interlocutor, finding that the action was competent before the Court of Session."

For the Petitioner, *Johnston*.

B. *Fol. Dic. v.* 3. *p.* 345. *Fac. Col. No* 147. *p.* 219.

1756. *January* 8.

Lord Prestongrange *against* Justices of the Peace of Haddington.

No 83.
It was declared, by a turnpike act, that any abuse of the powers conferred by that statute, should be cognizable only by the Justices of Peace. Found, that an exemption from payment of toll, granted by the trustees to an individual, was an abuse of their powers, and that a complaint against the trustees, for granting such exemption, was cognizable only by the Justices.

By the Turnpike Act for the shire of Haddington, 23d Geo. II. the trustees are empowered 'to compound and agree by the year, or otherways, with persons using the turnpike road, for any sums of money, to be paid quarterly.' In an after clause, the Justices of Peace of the county are empowered to appoint fit persons to enquire about the application of the tolls and duties, received in pursuance of this act; 'and in case the persons so appointed find 'any misapplication of the money collected, *or any other abuse of the powers* 'or *authorities hereby given*, they shall certify the same to the Justices of 'Peace, at their next General Quarter Sessions, who are hereby authorised and 'required to hear, examine, and finally determine the same, without further 'or other appeal.'

The trustees made a transaction with a neighbouring heritor, allowing those who purchased his coal and salt the use of the turnpike road, without paying any toll; but obliging him to pay L. 3 Sterling yearly, whenever he should have a going coal in a different part of his ground, particularly condescended on. This agreement, which was in reality an exemption, not a composition, was complained of as an abuse. As such, it was by the Justices of Peace declared void; and it was ordered that the toll should be levied, without regard to the agreement.

This sentence being suspended by the heritor, a hearing in presence was appointed, as in a new case. In the debate many points were started, of which the most material follow, with the reasonings of the Judges upon them at advising. One preliminary point was urged in behalf of the Justices of Peace, that, by the statute, their judgments are final, and cannot be brought under the review of any Court; and, therefore, that the suspension was incompetent. But this, by an obvious distinction, received a satisfactory answer. The Justices of Peace, with respect to all matters trusted by this statute to their cognizance, are final. But if they exceed their bounds, and find that to be an abuse, which, in reality, is no abuse, they so far assume a jurisdiction which they have not, and their proceedings must be null, as *ultra vires*. If, then, it be contended, that the transaction made with the suspender is no abuse, the Court of Session is bound to take cognizance, in order to determine the preliminary point, with respect to the jurisdiction of the Jus-