The Legal News.

Vol. VII. MAY 31, 1884. No. 22.

HODGE v. *THE QUEEN*..

In reporting the case of *Hodge* v. *The Queen* (7 L. N. 18), the *Criminal Law Magazine*, for May, adds a note by Dr. Francis Wharton, a well-known author. It will be observed that Mr. Wharton takes substantially the same view of the question of imprisonment as was set forth in the article of "R." which appeared in this journal (7 L. N. 49). The following is the note in question:—

The position taken in the opinion of the Privy Council, as above reported, that the power to impose imprisonment, when given in a legislative enactment, implies, in countries subject to the English common law, a power to impose compulsory hard labor is one of great importance. Not only does it involve interesting questions of constitutional and statutory construction in its largest sense, but it applies to all cases of powers to inflict punishment, whether such powers are contained in provincial or state constitutions, or in statutes regulating the action of the Courts in the distribution of penal justice, or in the charters of municipal corporations. I cannot bring myself to think that the decision of the Privy Council, as above given, is right; and I have the less reluctance in expressing this opinion from the fact that the question, as stated by the Court, "was not raised on the rule *nisi* for the *certiorari*," and is not to be "found amongst the reasons against the appeal in the appellate court in Ontario."

1. Unless the power claimed to be exercised is either included from the nature of things, in that imparted, or has been held by settled judicial precedent to be so included, it would be excluded by force of the familiar rule that statutes imposing restrictions or penalties are not to be construed to authorize any restriction or penalty beyond those specifically designated.

2. The careful specification of modes of punishment in the section before us tends to show that each particular term was used in a strictly technical sense. That particular specifications work a contraction of the sense of the specifications within the technical limits, has been often determined. A statute, for instance, making it penal maliciously to injure "horses," might, if the term stood by itself, include the malicious injury of geldings. If, however, the statute should enumerate the objects of protection as "horses, mares and colts," this very specification would be regarded as an exclusion of all objects which, on a more general interpretation of the word, might be regarded as included under the term "horse." It is by the application of this principle that the common law offence of malicious mischief has assumed proportions in most jurisdictions in the United States so much greater than those to which it has been restricted in England. In England, a series of statutes have been adopted imposing severe penalties on the malicious destruction of particular articles of property, *e. g.*, machinery of certain specified classes. It has been, consequently, not illogically held by the English Courts that this specification is more or less an exclusion; and that parliament, by the enactment of these statutes, is to be understood as saying, "No other kind of malicious mischief is to be punished than those specified." It is hard to see why the enumeration, in the statute before us, of three kinds of punishment, "fine," "penalty" and "imprisonment," should not have a similar operation. Each of these terms has its particular technical meaning. A "fine" is a compulsory payment of money. A "penalty" indicates not only this, but the compulsory return of articles stolen. The very enumeration of "fine" and "penalty," as distinguished from "imprisonment," shows that "imprisonment" is not to be so construed as to include either "fine" or "penalty"; and if it does not include either "fine" or "penalty," it is hard to see how it can include any other penal discipline than that which the term "imprisonment" specifically imports. It is on this principle that the judicial application of the limitations in