

CONSTITUTIONAL LAW

Construction with reference to

common law.

16 Am Jur 2d

§ 114. Construction with reference to common law.

An important canon of construction is that constitutions must be construed with reference to common law,⁸⁵ since, in most respects, the federal and state constitutions did not repudiate, but cherished, the established common law.⁸⁶ This fact has been taken into consideration by the courts in construing certain clauses in a state constitution, such as the provision securing the right to a jury trial.⁸⁷ Also, provisions in regard to crimes have been interpreted with reference to the common-law rule that one charged with a crime may be convicted of a lesser offense necessarily included in the crime charged.⁸⁸ In such cases, the courts of the state always regard the language in its common-law sense.⁸⁹ #

The common law also permitted destruction or abatement of nuisances by summary proceedings, and it was never supposed that a constitutional provision was intended to interfere with this established principle.⁹⁰ And although there is no common law of the United States in the sense of a national customary law, as distinguished from the common law of England adopted by the several states,⁹¹ in interpreting the Federal Constitution recourse may still be had to the aid of the common law of England.⁹²

It has been said that without reference to this common law the language of the Federal Constitution could not be understood.⁹³ This is due to the fact that this instrument and the plan of government of the United States were founded on the common law as established in England at the time of the Revolution.⁹⁴ Therefore, it is a general rule that phrases in the Bill of Rights taken from the common law must be construed in reference to the latter.⁹⁵ Specifically, the United States Supreme Court has taken the common law into consideration in construing the Fourth Amendment;⁹⁶ the Fifth Amendment provisions relating to the right to presentment or indictment by a grand jury⁹⁷ and the privilege against self-incrimination;⁹⁸ and the Sixth Amendment provision relating to the right to counsel.⁹⁹ Other areas of the Federal Constitution which have been considered by the Supreme Court in the light of the common law include the provisions on citizenship;¹ due process; and the President's pardoning power under Article II § 2.³ #