

Benjamin Harrison Smith,  
the West Virginia Constitution,  
and Land Titles  
By: Brooks F. McCabe, Jr.

*[Editor's Note: This is an article about one of the Firm's founders, Benjamin Harrison Smith. It was written by Brooks McCabe with much assistance from Bill Maxwell. This is the first in a series of articles to be posted about the Firm's history.]*

*Benjamin Harrison Smith died in 1887, at the age of 90. He left an important legacy through his pivotal role in the quieting of West Virginia's land titles. His work laid the foundation for much of the growth and development which occurred in the years following the Civil War. Smith, his son Isaac Noyes Smith and grandson Harrison Brooks Smith, are considered the founding members of this law firm.]*

The initial item of business in the afternoon session on Wednesday, January 8, 1862, during the First Constitutional Convention of West Virginia, was a motion by James H. Brown, Delegate from Kanawha, to seat Colonel Benjamin H. Smith, a resident of Kanawha County, as the delegate to the Convention from Logan County. A letter of credentials signed by 15 Logan County residents and an accompanying letter from Colonel Samuel A. Gilbert, Headquarters, 44<sup>th</sup> Ohio Regiment at Camp Piatt (current location of the Town of Belle), were presented to the Convention by the Delegate from Kanawha. The letter of credentials said that Logan County was unable to hold an election on October 24<sup>th</sup> last "on account of the hostilities of the county" and that "being citizens and voters of said county, desire to express our wishes for the new State and do hereby appoint Benjamin H. Smith, Esq., (with whom we are well acquainted as a man of character and legal ability and whom we know to be acquainted with the interests of the people of Logan) and request that he shall act as our delegate to said Constitutional Convention..."

Brown of Kanawha told the convention that the situation in Logan County was very uncomfortable for any responsible man with Union sympathies. "Those are the difficulties the

people of Logan labor under and the reason I image that drives them to the necessity of selecting a gentleman to represent them who lives out of the county.”

With that, the motion passed and Colonel Benjamin Harrison Smith was admitted to a seat in West Virginia’s First Constitutional Convention. Granville Davisson Hall, an official reporter for the *Wheeling Intelligencer*, commented that several other delegates were seated with minimum credentials, but they did not exercise the influence or play such an active role as Smith. Hall further pointed out that Smith arrived at the Convention late but appeared highly focused on matters relating to the quieting of West Virginia land titles.

The quieting of West Virginia’s land titles refers to settling issues related to providing clear and marketable title to land so purchasers can rely upon the deed as the true documentation of legal ownership. Providing clear title to lands in Western Virginia was an ongoing issue since the 18<sup>th</sup> century land grants to large land companies such as the Ohio Company, the Greenbrier Company, and the Loyal Company.

The history of quieting land titles in West Virginia adds a new dimension to the established historical narrative of out-of-state investors and the victimization of smaller local landowners. Who held title to the land was just as important to local businesses and farmers as it was to big industrialists. This history also shows the primary role played by Benjamin Harrison Smith and provides a new interpretation of the impact of the 1862 and 1872 West Virginia Constitutional Conventions as they relate to unappropriated, forfeited, and delinquent lands. The quieting of land titles became one of the foundations for local and regional economic development as West Virginia moved into the period of dramatic growth between the 1880s and the 1920s.

Smith was a central player in clarifying and reaffirming land owners rights in a time of westward expansion and poorly defined land ownership laws. He was involved in one of the

earliest of several major confrontations over the funding of public education through property taxes. Furthermore, he was one of the first delegates to formally address the fundamental difference between smaller local landowners and the large out of state land companies. Lastly, he, as a Whig turned Republican turned Democrat, was one of the first citizens in West Virginia to begin to lay the foundation for reconstruction after the Civil War and to provide a way through land ownership where reconstructed Confederates could join in the economic prosperity following the Civil War. These efforts principally affected the growth and development of Charleston, the surrounding county, and the State of West Virginia as a whole, in the coming decades.

Hall, as the first official reporter, described Smith as “a lawyer of ability and experience, and perhaps more familiar with the subject of Virginia wild lands than any other member of the Convention.” William A. MacCorkle referred to Smith as one of the lawyers who “practically wrote the land law of Virginia so far as it applied to western Virginia.” W.S. Laidley said that Smith made the study of land laws a lifetime effort. His description of the environment within which Smith practiced law is telling. “In Virginia and especially in the western part, where there was much speculation in lands, the mode of acquiring title to land was probably more loose and uncertain than elsewhere and the land law of forfeiture of title for non-payment of tax, the law of possession under the statute of limitation, made the subject complicated.”

George Washington provides an interesting example illustrating Laidley’s comments. In 1769, Washington petitioned the Colonial government requesting 200,000 acres for himself and other officers and soldiers who had fought in the French and Indian War. Washington would spend much of the rest of his life defending encroachments on the titles to the 60,200 acres which he held in his name at the time of his death. Washington was acting as an individual speculator, but his motivation and concerns were similar to the much larger land companies. By

the mid-1700s, the Ohio Company had obtained grants for 500,000 acres in western Virginia. The Greenbrier Company and Loyal Company had in excess of 300,000 acres in what is now eastern West Virginia and southwestern Virginia.

After the Revolution, the Commonwealth of Virginia owned all unappropriated, forfeited or wastelands within its territorial limits. Wilma Dunaway in *The First Frontier* estimates that absentee land owners by the early 1800s owned up to 93% of West Virginia, a greater percentage than any other state in Appalachia. Much of this occurred after 1792 when the Virginia Assembly offered the unappropriated lands at two cents per acre. As an example, “In 1792 (Virginia) sold 2,590,059 acres to just fourteen speculators. In 1794, the state treasury disposed of 8,000,000 Appalachian acres.”

To obtain land from the Commonwealth, an applicant purchased a warrant from the register of the land office at a price of two cents per acre. With the warrant, the applicant was authorized to survey the land. The entry and location of the land was at the sole risk of the patentee, as the Commonwealth assumed no liability, even if it had previously granted the land to someone else. The risk was further compounded with poor surveys, many of which were later found to be overlapping, or with gaps between property lines and thus caused less than clearly defined boundaries. R. Brawley Tracy, a noted West Virginia title lawyer, described older lawyers explaining to him in the 1950s the problem with early land grant and patent surveys. This was partially an issue related to terrain. The surveyors did not always fully compensate for the mountainous terrain in defining the meets and bounds in the surveys. The officials in the land offices in eastern Virginia had a difficult time internalizing the severity of western Virginia’s mountainous terrain. The result was often lapses between titles of record.

The Virginia General Assembly had created this system to provide revenues from the appropriated lands in the form of taxes and to populate the vast areas in what is now West Virginia. The land warrant and patent system required settling on the land and improving it, as well as paying regular taxes. When problems arose, many larger delinquent owners chose relief by going to the General Assembly and seeking extensions or exceptions rather than working through their delinquencies with the land office. This created a disparity between larger landowners and smaller individual landowners. Because the Virginia Assembly was dominated by Tidewater and Piedmont landowners, these Virginia elite biased the unappropriated land sales and its administration to wealthy speculators and land companies at the expense of the small landholders in western Virginia.

Gradually, there was a significant increase in litigation when titles were challenged. Inconsistent results were common as flaws in the land title system, its administration, and inadequate surveys became more apparent. The cumbersome system began to collapse and quieting conflicting claims of ownership became a significant constraint in the development of the western lands. Even conscientious landowners were hesitant to spend money for land improvements and taxes when the very nature of their title could be challenged. It was within this environment that Smith worked as a land attorney. Quieting land titles became his pursuit and passion.

Virginia's western lands therefore, had unique title issues compared to the other Appalachian States. Sean Patrick Adams postulates in his *Old Dominion, Industrial Commonwealth*, that Virginia had many early advantages over its sister Commonwealth, Pennsylvania. However, due to its protectionist policies with slavery and its insecurity with western Virginia's potential, the Commonwealth of Virginia lost its competitive economic advantage. Eastern Virginia clung to their traditional power structure based upon two loci of

power: a legislature proportioned upon the state's free and slave population, and powerful local institutions staffed by traditional great landholders." This conservatism was fully intertwined with Virginia's antebellum property law.

Forfeited and delinquent lands were the last subjects taken up by the West Virginia First Constitutional Convention. Gordon Battelle, Delegate from Ohio County, initially introduced the issue in the second Report of the Committee on Education on February 4, 1862. He proposed that all lands which were not on the tax books, or in which taxes were delinquent from the previous five years be "deemed and declared forfeited and forever irredeemable." These lands could then be sold by the state and the proceeds deposited in a permanent school fund. These proposals were seriously challenged by Smith of Logan County and Brown of Kanawha County. Furthermore, Smith used this opportunity to rewrite the constitutional provisions on forfeited, delinquent and unappropriated lands as they related to quieting titles.

Whether to have public schools was not the real issue of debate. The question centered around how the school system should be funded. Battelle's proposal divided the delegates into two camps. The progressive, or public school group, was championed by Battelle. The conservative, or internal improvement group, was led by Peter G. VanWinkle of Wood and Brown of Kanawha. They "wished to build slowly and to defer establishment of a school system until the bonded indebtedness of the new state could be determined." Smith was aligned with the latter and his focus was two-fold: how the funding would be attached to forfeited and unappropriated lands and how to assure clear title to those lands.

This divisive matter was referred to a special committee of which Thomas W. Harrison of Harrison County was chairman. Harrison was a good choice as chairman since the issue of "wild lands" was a major bone of contention between the northern panhandle delegates and the

delegation from the southern counties where the majority of such lands were located. Delegate Harrison represented the middle ground both philosophically and geographically. A lawyer, and future judge, he was in a position to bring the matter to conclusion.

It was no surprise to Col. Smith, that on Feb. 12, 1862, he was appointed, along with James H. Brown, to the special committee of seven to study the subject of all forfeited, waste and unappropriated lands. Hall wrote, "The member who appeared to be most zealous and most influential in shaping the action of the Convention in this matter was Col. Benjamin H. Smith.

Two days later, on the 55<sup>th</sup> day of the Convention, the Special Committee on Forfeited, Waste and Unappropriated Lands submitted its report to the Convention. Upon proper motions of VanWinkle, member of the Special Committee, the report was taken up for consideration, section by section, and was approved. The report in essence became Article IX, Forfeited and Unappropriated Lands, in the Constitution of West Virginia as approved in 1863. Smith was seated at the Convention on January 15, and within one month he had accomplished his major goal.

The provisions in the constitution relating to forfeited and unappropriated lands were based on the pragmatism of a title lawyer who had been practicing in Kanawha County since 1822. As summarized by William B. Maxwell, III, a real estate lawyer with more than 40 years of experience, the new Constitution had the following key provisions:

- (1) Lands forfeited or sold to the state for taxes were to be sold in proceedings in the circuit courts of the counties where they lay.
- (2) Generous provision was made for exoneration from forfeitures that had occurred if the acreage did not exceed 1,000 acres and for forgiveness of taxes not in excess of \$20.

- (3) As to lands so forfeited or sold to the state, the former owner was given five years within which to redeem them.
- (4) Entry by warrant was eliminated and waste and unappropriated lands were to be sold under supervision of the courts.
- (5) Former owners of such lands were given the right to petition the courts for amounts previously received by the state in excess of taxes, interest and costs.

In effect, this allowed many small landowners to recover previously forfeited property. Out of state land companies were effectively excluded as they typically held more than 1,000 acres, and their claims exceeded \$20. Requiring the sales to be in the county where the property resided and under the supervision of Circuit Courts further benefited resident landowners.

Gordon Battelle, the Chairman of the Education Committee – and noted Methodist preacher and educator – failed in his effort to claim the wild lands of southern West Virginia as the primary source of funding for the general school fund. Although some funding came from forfeited and delinquent lands, most came from other sources. In Hall's words, the general effect of the provisions

provided avenues through which about all these forfeited lands could be given back to the persons who had carried them thirty years without any payment of taxes, except where the tracts were larger than 1,000 acres and the taxes more than \$20. It was even provided that where any forfeitures did occur and the lands were sold, all excess of the sale over the taxes, damages and costs should go back to the former owner. Thus it appears was lost to the schools nearly all of the munificent endowment Mr. Battelle had expected to secure from this source.

Smith had effectively shifted Battelle's focus from funding public education with proceeds from forfeited and delinquent lands to that of providing a constitutional basis for clear title for those same lands.

Hall commented that forfeited delinquent lands was a subject that most members of the Convention did not understand. It was the lawyers who took the lead. One of the members, Granville Parker of Cabell County, who was not on the Special Committee but was a lawyer, did understand the subtleties of the issue. He took exception to allowing only smaller landowners to reclaim their delinquent and forfeited property. He commented that larger tracts of land were generally owned by non-resident owners, while the smaller properties were owned by individuals who were, for the most part, supporters of the southern cause. He felt non-resident owners should not be discriminated against, especially in favor of those who fought for, or supported the South in the Rebellion.

Granville Parker published several articles articulating his discomfort with the actions of West Virginia's First Constitutional Convention in reference to land titles. As a manager of absentee landowner interests, Parker was knowledgeable about property law. His basic premise was the early patentees, and their heirs or assignees, kept their taxes paid, but suffered from junior patents and squatters. He argued that the constitutional provision favored rebel squatters against loyal men living in and out of the State. The squatters' lands generally came within the exemption (i.e., less than 1,000 acres and less than \$20 owed in delinquent taxes). In most cases their lands become delinquent in 1861 and 1862, since, as Parker claimed, they refused to pay anything to the Wheeling "bogus" government, while loyal men had paid their property taxes.

Smith's actions at the First Constitutional Convention illustrated his skill as a member of the convention. He deftly shifted the goal of using forfeited and delinquent lands as a funding

source for education to that of quieting their titles. He accomplished his task in a manner that supported smaller landowners against the able opposition of Granville Parker, an articulate supporter of large land companies as well as Battelle.

Although Smith was a lawyer with a significant practice in real estate, his participation in the 1862 Constitution Convention was not an isolated event. He ventured into the realm of elected local politics throughout his career, not unlike the West Virginia entrepreneurs who would drive the economic expansion of the 1880s through the 1920s. Smith was one of the earliest West Virginia businessmen to actively participate in the political process as a direct means to improve the business environment. Later industrialists took a more brazened approach toward crafting legislation benefiting their personal business interests.

In 1833, as a young man of 36, Smith ran against Colonel Philip R. Thompson for the Virginia State Senate. He was urged to run by friends, business associates and clients interested in improving the land laws in western Virginia. He won the election and ran successfully twice more for the two-year senate term. In the third term, he was late announcing and ran from Logan, the same county he represented in the 1862 Constitutional Convention. Smith did not complete his third term since he felt his work on the property laws was completed in the first year of that term.

Smith entered politics partially because of a law passed in 1831 dealing with western Virginia's title laws which caused considerable discussion and concern. This law allowed titles previously forfeited on account of an owner's failure to enter his property with the Commissioner of Reserve, to vest in other claimants in possession who had paid their taxes and who claimed title under grants mediately or immediately from the Commonwealth. In 1835, during Smith's second term, "a new forfeiture law was enacted with respect to such lands as had

not been entered with the Commissioner of Revenue, such titles also to vest in claimants from the Commonwealth in possession who had paid taxes.” In 1837 Smith’s most important piece of legislation passed, which called for the appointment of commissioners of delinquent and forfeited lands west of the Alleghenies. Commissioners were directed to report to the court what delinquent lands had been sold to the State and what was forfeited. Those parcels not in possession of adverse claimants were offered for public sale under supervision of the court. The court could direct the commissioners to authorize surveys where necessary. This legislation moved tax sales under the authority of the court, where presumably they would pay closer attention to procedures under their direct control, rather than as previously with the Commissioner of Revenue. Between 1837 and 1846, there was strong evidence that the 1837 act was “effective in transferring western lands from non-resident speculators to resident developers.” The all but complete control of western Virginia by absentee landowners had begun to shift and Smith was centrally involved.

Almost 50 years after Smith’s 1837 legislation in the important case of McClure v. Maitland, the Supreme Court of Appeals of West Virginia said: “Nearly or quite one half of all the lands in Randolph, Hampshire, Lewis, Doddridge, Ritchie, Wood and in all the counties of this State lying south of and between those counties and the Virginia and Kentucky state lines were sold and many of the titles in that sector are held under titles derived from sales under these proceedings.” Smith’s legislative accomplishments were a significant component of his life’s work in quieting land titles in West Virginia.

Smith’s first constitutional convention was in 1850, when he was elected to serve as a delegate to the Virginia Constitutional Convention. Elizabeth Cometti, in *The Thirty-Fifth State*, referred to the western Virginia delegation as having its “finest hour” with “rare leadership

in such men as ... Benjamin Smith and George W. Summers of Kanawha.” The Convention was seen as a victory for western Virginia in that the House of Delegates was reapportioned based upon the white population, and judges and other local and state officials were to be elected, as was the Governor, all of which gave the western counties a stronger voice in Richmond. From Smith’s perspective, now the judges hearing his land cases would be from the county where the land was located and to some degree accountable to the people through periodic elections.

Property law is based upon constitutional provisions that are implemented by legislative statutes and their judicial interpretation in case law as well as common practice. Smith was uniquely involved in all aspects of creating this system where by clear title could be assured. His legal practice was of considerable note. George Atkinson, a lawyer, wrote in 1876 that between 1831 and 1874, Harrison Smith “was actively employed in every land case of importance in the Circuit Court..., most of them being of great complexity, and involving lands of great value.” “In all of the vast number of land cases in which the Colonel has been engaged as an attorney, about nine-tenths of them have been decided in favor of his clients. This of itself, would establish his reputation as a land lawyer.”

An example of one of Smith’s land cases can be found in the extended effort to access the coal and timber resources found along the Coal River. Smith was involved in the 1870s with the Coal River Railroad Company of West Virginia. In the early 1880s, he was a trustee on behalf of Peytona Cannel Coal Company for the Navigation Company of Coal River. These development efforts met with marginal results and illustrated the difficulty and risk of developing the mineral and timber resources in West Virginia without clear title to larger land tracts and without the proper transportation infrastructure in place. In fact, the Coal River area was not fully opened to coal and timber development until Governor William MacCorkle

succeeded in raising the capital to complete the Coal River and Western Railroad between 1903 and 1905. MacCorkle credited one of his partners, Major Joseph Chilton, as a principal reason for this success because of Chilton's exceptional knowledge of local land surveys. Chilton was also a premiere title lawyer of his day.

One interesting land case in which Smith was involved may have helped form his view on how, or how not, to fund public education. Western Virginia's first permanent district free schools were in Kanawha County and established by local election in 1847. Several major property owners and other conservatives challenged the district free school system and under an authorizing act of the 1853 Virginia General Assembly, the new system was again put to a local vote. The vote, for a second time, resulted in favor of the district free schools. Questioning the legality of using property taxes to fund public education, salt manufacturers William Dickinson and Joel Shrewsbury refused to pay some of their 1853 property taxes. The Sheriff instituted a tax sale for collection on their property. Smith was counsel for the plaintiff as they sued for trespass damages. The Kanawha County Sheriff won. Dickinson and Shrewsbury then used their legislative contacts, presumably Smith, to have the Virginia General Assembly reduce the necessary amount of property taxes by instituting a special tax in support of free public schools in Loudon, Fairfax and Kanawha Counties. This was a tax on provident parents and guardians of not less than fifty cents nor more than a dollar per term of three months for each "scholar." Through this and other measures, the school system was "effectively restrained from making liberal expenditures" in the years predating the Civil War. The issue of funding education was addressed in the 1862 West Virginia Constitutional Convention, and again Smith and others exercised a cautious hand in the funding of public education through the taxing of real estate. It would not be until

the Constitutional Amendments of the 1930s that property taxes would be the dominant funding sources of public education for the State of West Virginia.

Another land case in which Smith was directly involved also included Dickinson and Shrewsbury. In 1857, Dickinson filed a suit to dissolve his fifty-year partnership with Joel Shrewsbury. Smith was representing Dickinson in what MacCorkle called “the famous old salt case of Dickinson and Shrewsbury. This was the Jarndyce versus Jarndyce of the Kanawha Bar.” MacCorkle’s reference was to Charles Dickens’s novel *Bleak House* and its satire of the old English Court of Chancery. Dickens’ novel, published in 1852-3, focused on a long-running legal battle over the estates of Jarndyce and Jarndyce where the only winners were apparently lawyers with the fees they collected. In the end, the suit exhausted the assets of the estate and brought ruin to many of the principal characters. Although the Dickinson and Shrewsbury case did not bring ruin to the litigants, it became very contentious and was not settled until 1882 with Isaac Noyes Smith, the son of Smith, as principal counsel to the Dickinson family (William Dickinson had died). Counsel for the defendant was William A. Quarrier, whose mother was the daughter of Joel Shrewsbury (who also had died by this time) and who was the brother-in-law and Civil War compatriot of Col. Smith’s son, Isaac Noyes Smith. I.N. Smith had married William Quarrier’s youngest sister. The suit ironically enough was about clear title and who owned how much of the significant assets held in the Dickinson Shrewsbury partnership. It is an excellent example of the high stakes and complexity involved in rendering clear title to West Virginia real and personal property. It also illustrates the interrelationship between contract law and property law.

Smith was not just a legislator and active attorney dealing with land title issues. He was also an astute buyer of delinquent lands in West Virginia. In approximately 1845, Smith and Samuel A. Miller, a young land attorney, went to Roane County to a delinquent land sale and purchased at 2 cents per acre several large tracts of land. The Roane County town of Walton was

named for Miller's mother and the town of Roxalana for Smith's wife. This is the very type of purchase that Smith's earlier legislative initiatives had addressed.

Another important aspect of Smith's career was his appointment in the federal judiciary. He was appointed by President Taylor as the US District Attorney for the western district of Virginia in 1849 serving until President Pierce's election when the Whigs lost control of the White House. More importantly, between 1862 and 1867, Smith again served as the US District Attorney upon appointment by President Lincoln. Smith offered a balanced approach to local war issues and later to reconstruction and the mending of the economic and political strife following the Civil War. Smith was one of the first to advocate leniency toward those who had supported Virginia. In the Kanawha Valley, this was of importance due to the large number of southern sympathizers. On a personal level, his son was one of the more prominent members of the Kanawha Riflemen which became Company H of the 22<sup>nd</sup> Virginia Infantry.

With the passage of the "Voters Test Oath" and other laws, former Confederates could not challenge the seizing of their property during the war for nonpayment of taxes or abandonment. They were unable to petition the court for redress as former Confederates were given no such rights. Although Smith as US District Attorney for West Virginia would uphold federal law, state law was another matter.

In 1866, Smith ran for governor of West Virginia on the Democratic ticket against the incumbent Arthur I. Bowman. Smith was recruited largely "because of his valiant services" in attempting to bring everyone back together and to treat returning Confederate soldiers with dignity. Smith lost the election, but the Democrats would seize control of the statehouse in 1870 and proceed to rewrite the 1862 constitution to, among other things, assure the property rights of all West Virginians, including those with southern sympathies.

Although Smith was not a delegate to the 1872 Constitutional Convention, his law partner, Edward B. Knight, was, and did an able job in representing Smith's interests. Smith was, however, very prominent along with Judge James H. Ferguson in promoting the need for that convention. He and Judge Ferguson led a large meeting in Charleston advancing the cause. Ferguson, like Smith, was a noted land attorney practicing in many of the southern counties and was keenly aware of the changing sentiment towards reconstruction and the need for clear land titles. Not everyone wanted a second constitutional convention. Smith's nemesis from the First Convention, Granville Parker, published a series of articles in the (northern) *Panhandle News* objecting to the need for the convention. As a Republican, he did not want the Constitution rewritten by the newly elected Democrats, thus assuring the disenfranchised Confederate soldiers would be brought back into the fold, property rights and all.

Changes implemented in the Virginia 1850-1851 Constitutional Convention, the 1862 West Virginia Constitution Convention, and the revisions in the 1872 Constitutional Convention provided the basis for much of the real estate law in West Virginia. With some refinements in 1882, Article XIII in the 1873 Constitution remained substantially in place until the 1932 amendments eliminated the commissioner of school lands (net proceeds of public land sales were deposited in a school fund), and the 1992 amendments updated the Article and repealed those sections which had become superfluous.

John A. Hutchinson, a successful member of the Parkersburg Bar, chief attorney for the Baltimore and Ohio Railroad Company, and Smith's contemporary said the following in his important 1887 reference book, *Land Titles in Virginia and West Virginia*:

Within fifteen years prior to the late war, Virginia shortened the period of the statute of limitations, relating to the action of ejectment; simplified that action, and abolished some of the ancient forms of real actions.

With the creation of the State of West Virginia, a constitutional prohibition against entering land warrants upon waste or unappropriated lands was adopted.

The first constitution, Article IX, provided for the sale of forfeited lands, of all waste and unappropriated lands; for exoneration of lands delinquent; releasing forfeitures in certain cases and redemption of lands.

By the second constitution, Article XIII, provision is made for the forfeiture and sale of lands delinquent for non-payment of taxes, or non-entry upon land books... These provisions, and the construction given them by the highest court in West Virginia, justify the opinion, that if the landowner in West Virginia will discharge his duty to the state he will have no risk to encounter; and that titles in this state can be obtained which are as perfect and secure as any titles to real estate can be found in any other state in the Union.

In essence, West Virginia's property law, through constitutional revision, legislative enactment and case law, significantly reformed a dysfunctional system into one which provided individuals and corporations the security of clear title. Mr. Hutchinson's comments related directly to the life work of Smith, for Smith was involved in rewriting the 1850-51 Virginia Constitution articles dealing with land titles in western Virginia as well as the similar expanded Article in West Virginia's first Constitution of 1863.

West Virginia historians have never specifically focused on the multi-faceted dimensions of the 1862 and 1872 constitutions conventions in reference to the articles on forfeited and unappropriated lands. John A. Williams, in *West Virginia, A Bicentennial History*, references the 1872 Constitutional Convention's efforts to address land title provisions. He points out that Article XIII was written by a "select committee of land lawyers" and that these provisions, "escaped debate entirely." In those comments, Williams was correct. However, Granville Parker's newspaper articles illustrate that the residents of the Northern Panhandle were well aware of the objectives of the newly elected Democrats in changing certain provisions in the Constitution. Knight, as a land lawyer, was a principal author, building upon the 1863 constitution, of this most important article with its complex and significant ramifications.

Much of the debate in the Second Constitution Convention centered around bringing the state back into balance following the aftermath of the Civil War. The property rights issue focused upon the disenfranchised returning confederate soldiers, not around the nuance of title law.

Williams continues his discussion of the land title provisions by quoting *New York Times* articles published over several months in 1872 and in 1876. They reference the 1872 Constitution as “the Lawyer’s Constitution” and “a contrivance gotten up to make litigation the principal business in West Virginia – to the great impoverishment of suitors and the enrichment of the swarms of one-horse political lawyers that now feed upon the body politic.” Williams acknowledges that “there is no evidence that this was the intended result.” Otis K. Rice, in referencing the same *New York Times* quote comments “there appears to have been no basis for the charge.” These inflammatory comments and those of Parker speak to the emotion and concern exhibited at the time in regard to land, who owned it, and what was done with it. The *New York Times* articles accentuate the emotions of the times, not the reality in the courtroom or the basis of land law articulated in Article XIII of West Virginia’s 1872 Constitution.

The ability to quiet titles was central to the development of West Virginia. The role played by Col. Smith was primary, but the aftermath continues to be debated. James Morton Callahan wrote in 1923, “The antiquated clauses of the constitution (1872) which relate to the forfeiture of land may be regarded as a monument to a mistake of the dead but living past.” “Originating with a purpose to quiet titles and reduce litigation, they are still a prolific source of expensive litigation.” Williams wrote in 1976, “it is true that the constitution entailed further confusion in land and tax policies and facilitated, under the supervision of “distinguished land attorneys”, the eventual transfer of titles from small owners to mining and lumber corporations in

later years.” In 1993, Otis K. Rice wrote “clauses relating to lands later gave rise to numerous expensive lawsuits and contributed to the transfer of titles to mining and lumber companies.” Most recently, C. Stuart McGehee, when commenting on the 1872 Constitution said, “most significantly for the future of the Mountain State, [the Constitution] expressly reinstated the property rights of alien nonresidents, most of who lived in Virginia.” The above comments misinterpret the complex subject of property law as written in the 1872 constitution.

As William B. Maxwell reaffirmed 120 years later: “In the intervening years, Article XIII, in place since 1872, through statutes passed implementing it and cases construing it, had accomplished its purpose. This was not only to do justice to various interested parties but to quiet the titles of the western lands.” “For this Col. Smith must be given the lion’s share of the credit. Not only did he jump start the west’s settlement with the 1837 statute, but he left a legacy of law that long outlasted him and which facilitated the commercial development of the state in the years following the Civil War.” Article XIII was a real attempt to limit litigation, not encourage it.

Smith understood that clear title was the basis for all commerce. He knew the importance of establishing rightful ownership. For western Virginia to prosper, inadequate, overlapping surveys needed to be resolved, as did conflicting land grants and squatters claiming land by adverse possession. W.S. Laidley described Smith as was “one of the greatest land litigants ever produced in Kanawha.” George W. Atkinson, a noted attorney and future governor of West Virginia, wrote in 1890 that Col. Smith “was one of the greatest lawyers Virginia ever produced.” Without Smith’s initiatives, both constitutional and otherwise, the massive investments in the 1880s through the 1920s would have been slowed and opportunities missed.

Smith spent much of his life dealing with the intricacies of title law in lands west of the Alleghenies. In West Virginia, much of the historical focus on quieting titles on forfeited and delinquent lands relates to absentee landowners and exploitation, particularly from 1880 to 1920. Barbara Rasmussen, in her landmark book, *Absentee Landowning and Exploitation in West Virginia, 1760-1820*, discusses the issue in great detail without significant reference to the quieting of title. The abuses of absentee landowners was in fact one of the issues Smith tried to address by putting in place a structure to allow local owners to obtain clear title. The point for this discussion, however, is not the ills of absentee landowner exploitation; rather, to explain how the legal infrastructure was put in place, which allowed land to be owned and developed without fear of a clouded title by some land patentee in Virginia, Maryland or New York.

Alan Greenspan, in *The Age of Turbulence* considered “state-enforced property rights as the key growth-enhancing institution”. He furthered commented that “property rights require not only a statute but an administrative and judicial system that enforces the law”. Greenspan was focusing on global growth in the 21<sup>st</sup> Century. However, his observations are just as valid for the 19<sup>th</sup> Century in the developing of western Virginia. Clear title is the basis for all property rights.

Smith dedicated his career dealing with what George Washington, an early absentee land owner in what was to become West Virginia, considered one of his biggest concerns: vesting clear title to lands properly acquired and managed. In so doing, Smith accomplished what Washington was never able to do by providing a solid legal foundation for the development of lands in West Virginia. However, the way he accomplished the task would not have been entirely to the liking of Washington, as Smith leaned more toward local landowners as opposed to out of state land speculators.

Perhaps no other single person in the state's history has been so influential as Smith in the quieting of land titles and thereby laying the foundation for the development of the natural resources of West Virginia. The state's future economy would be largely predicated on the basis of property law as defined, interpreted, litigated and implemented by Smith, his contemporaries, and the major West Virginia law firms, which followed.