

**REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING**

**Creation of a Statutory  
Right of Redemption and  
Alternative Methods of  
Clearing Title  
to Real Property**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**HOUSE DOCUMENT NO. 22**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
1989**

MEMBERS OF THE COMMITTEE

W. Tayloe Murphy, Jr., Chairman  
John G. Dicks III, Vice-Chairman  
Thomas M. Jackson, Jr.  
Daniel W. Bird, Jr.  
Joseph B. Benedetti

STAFF

Legal and Research

Division of Legislative Services

Mary P. Devine, Staff Attorney  
Mary K. Geisen, Research Assistant  
Sherry M. Smith, Executive Secretary

Administrative and Clerical

Barbara H. Hanback, Office of the Clerk, House of Delegates

Report of the  
Joint Subcommittee Studying  
Creation of a Statutory Right of Redemption  
and Alternative Methods of Clearing Title to  
Real Property  
To  
The Governor and the General Assembly of Virginia  
Richmond, Virginia  
January 1, 1989

TO: Honorable Gerald L. Baliles, Governor of Virginia,  
and  
The General Assembly of Virginia

AUTHORITY FOR STUDY AND BACKGROUND

Delegate Jay W. DeBoer of Petersburg sponsored House Joint Resolution No. 185 during the 1988 Session of the General Assembly. See Appendix A. The resolution was adopted and called for creation of a five-member joint subcommittee to study (i) the need for creation of a statutory right of redemption and (ii) methods of clearing title to real property which are less expensive and time consuming than partition.

Also during the 1988 Session, Delegate Jean W. Cunningham of Richmond introduced House Bill No. 979. See Appendix B. The bill would provide authority for the court to allot, rather than partition, real property upon agreement of all joint owners or tenants in common. House Bill No. 979 was carried over by the House Committee for Courts of Justice because of concerns about the actual effects of the procedures outlined in the bill.

The bill and House Joint Resolution No. 185 were recommended and supported by Rural Virginia, Inc., and the Virginia Landownership Information Project (VLIP). VLIP is a cooperative effort of Virginia State University and Virginia Polytechnic Institute and State University. The primary purpose of the project is education of landowners, particularly limited resource landowners, regarding their rights and responsibilities in order to assist them in retaining ownership of their property. VLIP suggested that the joint subcommittee determine whether creation of a statutory right of redemption would afford landowners a better opportunity to avoid loss of their property by foreclosure. Additionally, VLIP suggested that partition is not a viable method for clearing title to property which has devolved by intestacy through several generations and is of limited value. The issues under study were dealt with separately by the joint subcommittee.

The membership of the joint subcommittee was appointed as follows: Delegates W. Tayloe Murphy, Jr., John G. Dicks III, and Thomas M. Jackson, Jr., were appointed by the Speaker from the House Committee for Courts of Justice; Senators Daniel W. Bird, Jr., and Joseph B. Benedetti were appointed by the Senate Committee on Privileges and Elections from the Senate Committee for Courts of Justice. The joint subcommittee held three meetings in Richmond. The joint subcommittee is grateful to Rick Cagan, Executive

Director of Rural Virginia, Inc., Dr. Grace V. Norbrey of Virginia State University, VLIP Coordinator, and Leon Geyer, Esquire, of Virginia Polytechnic Institute and State University and member of the VLIP Advisory Council, for the background information and assistance they provided.

#### EXECUTIVE SUMMARY

1. A statutory right of a landowner to redeem real property within a limited time following a foreclosure sale should not be adopted in the Commonwealth in the absence of convincing evidence that such a right could and would be used by landowners to retain their property;

2. A less expensive and more efficient alternative to partition should be provided to clear title to inherited, family-owned real property; and

3. Educational programs should be encouraged in both the public and private sectors in order to avoid further title problems.

#### CONSIDERATIONS AND FINDINGS

##### 1. Statutory Right of Redemption

All fifty states recognize the common law equitable right of redemption whereby a mortgagor/owner may avoid foreclosure by payment of the debt after default but prior to the sale of the property. In the early to mid-1800's, statutory redemption gained acceptance as a protection for farmers. The statutory right provides a mortgagor/owner with an alternative to strict foreclosure; he may buy back his property by payment of the debt plus costs within a certain limited time following foreclosure. Twenty-five states have created a statutory right of redemption.<sup>1</sup>

The joint subcommittee reviewed the statutes in these other states at great length. The statutes generally provide for redemption by the owner-mortgagor/debtor and by creditors whose claims are subordinate to the debt for which the property was sold, and by the heirs or transferees of either. However, several states provide that redemption is not available where the estate is a leasehold with an unexpired term of less than two years.<sup>2</sup> In some states,<sup>3</sup> the owner's right of redemption is given priority over a creditor's right. That is, creditors may exercise their right of redemption only after expiration of all or part of the owner's redemption period. Four states<sup>4</sup> specifically provide for subsequent redemptions, within the applicable redemption period, by subsequent creditors, provided the owner has not exercised his right of redemption.

Illinois allows a joint owner to redeem his interest upon payment to the purchaser of his proportion of the entire amount necessary to redeem. The other states which deal directly with this issue allow redemption of a portion only if the property was sold in severable portions.<sup>5</sup>

The time for exercising the right of redemption varies from thirty days (Arizona - non-agricultural property) to three years (Montana). Most of the states have chosen a one-year redemption period, although several use six

months. Missouri has a one-year redemption period, but the redeptor must give notice of intent to redeem within ten days of the sale and post security for the purchase price with the court within twenty days of the sale.

Some states provide for extensions of the redemption period.<sup>6</sup> In Washington, the redemption period is extended if the purchaser fails to give the redeptor appropriate notice of the expiration of the time for redemption. Several states have different redemption periods based upon the character, use or size of the property.<sup>7</sup>

The redeptor is required to pay to the purchaser or person conducting the sale any amounts which the purchaser paid at sale and during the redemption period and the costs or expenses of the sale. Amounts paid during the redemption period usually include taxes, assessments, insurance premiums, and other amounts necessary to protect the purchaser's interest in the property, including any liens with a higher priority than that of the purchaser. In addition, several states require the redeptor to satisfy any prior lien held by the purchaser.<sup>8</sup> In New Mexico, procedures are provided for a former owner whose property was sold on foreclosure to petition the court in which foreclosure was ordered to issue a certificate of redemption and determine the redemption price.

Most states require interest to be paid on all or part of the redemption price. The interest rates vary from 1% per month<sup>9</sup> to the composite prime rate.<sup>10</sup> Most states appear to be in the 8-10% range or to use the state's judgment or legal rate of interest. In lieu of interest, Georgia requires payment of a 10% "premium" on the purchase price. A few states specifically provide that redemption price is to be reduced by rents and profits paid<sup>11</sup> or by the value of the purchaser's use and enjoyment of the property.<sup>12</sup>

Theoretically, the statutory right gives the owner time to earn the money needed to avoid strict foreclosure. This is particularly evident with respect to agricultural property. A bad harvest adversely affects the farmer's ability to make payments on the mortgage debt. An additional year or so following foreclosure in which to redeem allows for an additional harvest to provide the needed funds. This, in turn, gives the owner leverage when negotiating with the mortgagee to avoid foreclosure upon default. It was also suggested that the existence of the owner's statutory right induces the mortgagee to "bid-up" the price of the property and discourages attempts to obtain a deficiency judgment against the owner following foreclosure.

However, the joint subcommittee found little empirical data regarding the effects of a statutory right on the ability of property owners to avoid strict foreclosure. According to Dr. Geyer, little economic analysis has been done. The data which is available suggests that the statutory right is rarely exercised by the owner mortgagor.<sup>13</sup>

Representatives of the Virginia League of Savings, the Virginia Mortgage Bankers Association, the Virginia Bankers Association and the Commissioner of Financial Institutions, State Corporation Commission, addressed the joint subcommittee to express their concerns. It was suggested that the statutory right, in fact, decreases the value of the property. A prospective purchaser would not be likely to pay as much for property which may be reclaimed by the owner who exercises his statutory right. The statutory right is similar to

lien. By analogy to foreclosure sales involving property which is subject to an I.R.S. lien, for example, it was suggested then that the number of bidders and the amounts bid at foreclosure would be significantly reduced. Further, the statutory right arguably increases the mortgagee's risk of loss on the loan. A study of residential foreclosures detailed in the Cornell Law Review indicated that the mortgagee was the purchaser at foreclosure in approximately 75 percent of the sales reviewed which were subject to the statutory right to redeem.<sup>14</sup> In almost half of these cases, the mortgagee was unable to recover the outstanding balance on the loan when the property was subsequently sold.

Any increase in risk of loss adversely affects the ability of the mortgagee to make future loans. Creation of a statutory right of redemption could restrict the availability of credit and increase the cost of credit, where available, in response to the increased risk of loss. It was noted that approximately three quarters of the banks doing business in Virginia currently serve rural areas and make agricultural loans.

The joint subcommittee does not believe a statutory right of redemption should be adopted in Virginia at this time. Although a number of states have enacted such a right, there is no evidence that landowners are exercising the right in those states in order to avoid strict foreclosure. There are indications that the statutory right would adversely affect the ability of persons of limited resources to obtain credit. Stricter requirements would in all likelihood be adopted and the costs of securing the loan would increase in order to minimize any increased risk of loss. The joint subcommittee believes such a result is undesirable.

The joint subcommittee also notes that debt restructuring is available for loans provided through the Federal Housing Authority and Federal Landbank.<sup>15</sup> This provides a viable means of property protection to a significant number of Virginia landowners.

## 2. Methods of Clearing Title to Real Property

The second issue considered by the joint subcommittee was a review and evaluation of the methods of clearing title to real property. Currently, an owner may seek partition or allotment of the property in order to obtain a clear title. Both actions involve suits in equity. See Article 9 of Chapter 3 of Title 8.01 (§ 8.01-81 et seq.) of the Code of Virginia. Neither action is a viable option in situations involving real property of limited value. The value of the property does not justify the expense of a law suit. Dr. Grace V. Norbrey conducted an analysis of problems experienced by 1,908 landowners in fifty-two VLIP programs in the Commonwealth. Three hundred ten of the landowners were involved in partition suits, but only sixteen heirs had been able to purchase the property.

The joint subcommittee focused its concern on limited value, family-owned property. This type of property has generally passed through several generations by intestacy. The failure to provide by will for the disposition of property over several generations makes it virtually impossible to determine all potential heirs to the property. The problem is compounded where, over time, various members of the family have moved away. The owner in possession of the property is unable to locate the many heirs having a claim. Partition is therefore impractical, and because of the limited value of the property and frequently limited resources of the owner, uneconomical.

House Bill No. 979 was intended to provide an alternative to partition. The bill was drafted using an Alabama statute as a model.<sup>16</sup> The bill would have revised the allotment process. Allotment is currently available when partition "cannot conveniently be made" and one of the parties (i.e., persons claiming an interest in the property) is willing to purchase the property from the others. The bill would require allotment in any case where the parties agreed to the sale. Procedures were specified for notifying the court of the agreement of sale and for the appointment of appraisers where the parties could not agree on the price.

The joint subcommittee felt the bill went too far. A summary procedure, less expensive and faster than partition, should be available to persons seeking to clear title to inherited family property. House Bill No. 979 would have applied to all types of jointly held real property. The joint subcommittee believes that current statutes on partition and allotment adequately protect most co-owners who seek to obtain clear title to property. The procedures ensure that proper notice is given to parties with an interest in the property and that those parties receive a fair price for their interests. But these procedures involve surveys and appraisals, for example, which greatly add to the expense of obtaining a clear title. As a policy matter, the law should reflect a desire to help individuals who are seeking to retain family-held property. Therefore, the joint subcommittee recommends adoption of a provision requiring the court to allot real property to a family member who is willing to pay an agreed upon price to all other known persons claiming an interest in the property. See draft legislation at Appendix C.

The mandatory allotment provision eliminates the possibility that a family co-tenant, in possession of the property, would lose the property to a non-family member in a bidding war at a public sale. In order to protect the known, non-purchasing, family member co-tenants, the legislation requires agreement as to the purchase price upon allotment. This ensures that a fair price is received for the interests being allotted. The joint subcommittee believes this legislation strikes a proper balance between the rights of co-tenants to receive a fair price for their interests in inherited property and the desire to allow limited resource landowners an opportunity to obtain a clear title to real property which they possess.

#### CONCLUSION

The joint subcommittee is concerned that limited resource landowners in the Commonwealth may be involuntarily losing their property with increasing frequency. The joint subcommittee supports the efforts of VLIP to determine the extent of this problem and develop means to prevent it. Additional educational programs are needed, particularly in rural areas, to assist limited resource land owners. The programs should be broad in scope, providing legal information on a property owner's rights and responsibilities as well as basic information and assistance on property maintenance, cost-saving programs and the importance of having a will. A combined effort from the public and private sectors is needed. The joint subcommittee recommends that the Virginia State Bar, the Department for the Aging, the Department of Housing and Community Development, the Legal Aid Society and

others increase and combine their efforts to assist limited resource landowners in the Commonwealth to ensure that property ownership in Virginia does not become a privilege reserved for an elite few.

Respectfully submitted,

W. Tayloe Murphy, Jr., Chairman  
John G. Dicks III, Vice-Chairman  
Thomas M. Jackson, Jr.  
Daniel W. Bird, Jr.  
Joseph B. Benedetti



## Footnotes

1 Alabama (§ 6-5-230), Arizona (§ 12-1282, et seq.), Arkansas (§ 26-37-311), California (§ 729.020), Colorado (§§ 38-39-102, 38-29-103), Georgia (§ 48-4-40, et seq.), Idaho (§ 11-401, et seq.), Illinois (§ 12-122, et seq.), Iowa (§ 628.3, et seq.), Kansas (§ 60-2414), Kentucky (§ 426-530), Maine (§§ 6301 and 6313), Michigan (§ 600.3140), Minnesota (§ 580.23), Missouri (§ 443.410), Montana (§ 25-13-801, et seq.), Nevada (§§ 21-200 and 21-210), New Mexico (§ 39-5-18), North Dakota (§ 28-24-01, et seq.), Oregon (§ 23-530, et seq.), South Dakota (§ 21-52-1, et seq.), Tennessee (§ 68-8-102, et seq.), Vermont (§ 4528), Washington (§ 6.23.010, et seq.), and Wyoming (§ 1-18-103, et seq.).

2 See e.g., Nevada, Oregon, South Dakota and Colorado prohibit redemption if leasehold is less than 10 years.

3 See e.g., Colorado, Illinois, Kansas, South Dakota.

4 See e.g., Arizona, Iowa, Oregon, Wyoming.

5 See e.g., Oregon, Wyoming, Washington.

6 See e.g., South Dakota, Washington.

7 See e.g., Arizona, Colorado, Idaho, Minnesota, Montana, Washington, Wyoming.

8 See e.g., Alabama, California, Idaho, Illinois, Nevada, North Dakota, South Dakota, Washington, Wyoming.

9 Nevada.

10 Tennessee.

11 See e.g., Oregon.

12 See e.g., California, Idaho.

13 Bernard and Thorpe, Recent Illinois Mortgage Law Changes Affecting Commercial Mortgage Lending, 1988 Illinois Bar Journal 606 (July); Weschler, Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure - An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L.R. 850 (1985).

14 70 Cornell L.R. 850.

15 Agricultural Credit Act of 1987.

16 Alabama Code § 35-6-100 et seq.

## Index to Appendices

Appendix A	House Joint Resolution No. 185 (1988)
Appendix B	House Bill No. 979 (1988)
Appendix C	Draft Legislation

APPENDIX A

**GENERAL ASSEMBLY OF VIRGINIA -- 1988 SESSION**

**HOUSE JOINT RESOLUTION NO. 185**

*Establishing a joint subcommittee to study clearing title to property and a statutory right of redemption.*

Agreed to by the House of Delegates, February 16, 1988

Agreed to by the Senate, March 2, 1988

WHEREAS, many heirs spend a great deal of money in attempts to clear title to property they have inherited; and

WHEREAS, there is a need to evaluate the expense of this type of procedure especially in cases of inheritance of family property; and

WHEREAS, approximately 26 states allow for redemption of property with various time limits from six months to two years following foreclosure or forced sale for unpaid tax liens; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study a statutory right of redemption and less expensive methods for clearing title to property. The study shall also include such other issues as the joint subcommittee deems appropriate.

The joint subcommittee shall consist of five members, as follows: three members of the House Committee for Courts of Justice to be appointed by the Speaker of the House; and two members of the Senate Committee for Courts of Justice to be appointed by the Senate Committee on Privileges and Elections.

The joint subcommittee shall submit its report and recommendations, if any, to the 1989 Session of the General Assembly.

The indirect costs of this study are estimated to be \$8,255; the direct costs of this study shall not exceed \$2,700.

## 1988 SESSION

LD1134450

## HOUSE BILL NO. 979

Offered January 26, 1988

A BILL to amend and reenact § 8.01-83 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 8.01-83.1 through 8.01-83.4, relating to partition of land by judicial sale.

Patron—Cunningham, J. W.

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-83 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding sections numbered 8.01-83.1 through 8.01-83.4 as follows:

§ 8.01-83. Allotment to one or more parties, or sale, in lieu of partition.—A. When partition cannot be conveniently made, the entire subject ~~may~~ shall be allotted to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to; ~~or in~~ provided that (i) the joint owners or tenants in common agree to such sale and (ii) the party or parties interested in purchasing such interests notify the court of such agreement no later than 10 days prior to the day of trial.

B. In any case in which partition cannot be conveniently made and no allotment is made in accordance with subsection A of this section, if the interest of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court, notwithstanding any of those entitled may be a person under a disability, may order such sale, or an allotment of a part thereof to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to, and a sale of the residue, and make distribution of the proceeds of sale, according to the respective rights of those entitled, taking care, when there are creditors of any deceased person who was a tenant in common, joint tenant, or coparcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors.

§ 8.01-83.1. Appointment of appraisers; report.—In such circumstances as described in § 8.01-83 A, and in the event the parties cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent real estate appraisers or commissioners, as the court shall approve, appointed for such purpose by the court. The appraisers or commissioners appointed under this section shall make their report in writing to the court within thirty days after their appointment.

§ 8.01-83.2. Payment of appraised value into court; time period; transfer of title.—After the report of the appraisers or commissioners, the party or parties seeking to purchase the interest of the joint owners or tenants in common shall have thirty days to pay into the court the price set as the value of those interests to be purchased. Upon such payment and approval of same by the court, the clerk shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers.

§ 8.01-83.3. Effect of failure to pay purchase price.—Should the joint owners or tenants in common fail to pay the purchase price as provided in § 8.01-83.2, the court shall proceed according to its traditional practices in such cases as described in § 8.01-83 B.

§ 8.01-83.4. Costs of appraisal.—The costs of the appraisers or commissioners shall be taxed as a part of the costs of court to those seeking to purchase or purchasing the interests.

1 D 9/30/88 Devine C 10/20/88 DF

2 SENATE BILL NO. .... HOUSE BILL NO. ....

3 A BILL to amend and reenact § 8.01-83 of the Code of Virginia,  
4 relating to allotment in lieu of partition; when required.

5

6 Be it enacted by the General Assembly of Virginia:

7 1. That § 8.01-83 of the Code of Virginia is amended and reenacted as  
8 follows:

9 § 8.01-83. Allotment to one or more parties, or sale, in lieu of  
10 partition.--When partition cannot be conveniently made, the entire  
11 subject may be allotted to any one or more of the parties who will  
12 accept it and pay ~~therefor~~ to the other parties such sums of money as  
13 their interest therein may entitle them to, ~~or in any case in which~~  
14 ~~partition cannot be conveniently made, if~~ . If the interest of those  
15 who are entitled to the subject, or its proceeds, will be promoted by  
16 a sale of the entire subject, or allotment of part and sale of the  
17 residue, the court, notwithstanding that any of those entitled may be  
18 is a person under a disability, may (i) order such sale, or an (ii)  
19 order allotment of a part thereof to any one or more of the parties  
20 who will accept it and pay ~~therefor~~ to the other parties such sums of  
21 money as their interest ~~therein~~ may entitle them to, and a sale of the  
22 residue, and make . If prior to offering the property for public  
23 sale the court finds that (i) all persons with an interest in the  
24 property claim under a common ancestor, (ii) the responding parties  
25 agree on the fair market value of the property and (iii) one or more

1 of the parties is willing to accept the property and pay to the other  
2 parties their proportionate share of the fair market value, the court  
3 shall order allotment to those parties who will so accept and pay f  
4 the property.

5 The court shall order distribution of the proceeds of the sale or  
6 allotment , according to the respective rights of those entitled,  
7 taking care, when there are creditors of any deceased person who was a  
8 tenant in common, joint tenant, or coparcener, to have the proceeds of  
9 such deceased person's part applied according to the rights of such  
10 creditors.

11

#

