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NOTE

THE VIRGINIA ABSENT VOTERS SYSTEM

The urgent need for the revision of the absent voters system in Virginia has been recognized by the press[1] and many of the political leaders of the state.[2] The present Attorney General of the state has been quoted as declaring: "It is a notorious and disgraceful fact that in past elections political shysters, wardheelers, spurious notaries pulic, and even candidates for office have paraded the streets . . . with mail ballots in their possession, many of which were solicited and voted in violation of law. Some of these parasites have gone so far as to approach candidates . . . and endeavoured to bargain for the delivery of such votes under the absent voters law. Names have been forged . . . . Persons have registered and voted by mail who could neither read nor write."[3] A bill to repeal the absent voters act was rejected at the 1950 session of the General Assembly, and all attempts to modify the present law met with failure. The Assembly also turned down a proposal for study of the problem by the Advisory Legislative Council.[4] Passionate appeals for reform made on the floor of the General Assembly and criticisms of the existing situation in the press have seemingly made little impression on the legislature. Yet, even a brief examination of the Virginia absent voters legislation demonstrates serious flaws in the system which have led to flagrant election frauds, and reveals several points at which revisions should be made.

Absent voters' balloting privileges first received widespread sanction in America during the War Between the States and again a half-century later during World War I when many legislatures provided systems whereby soldiers might vote while away from their regular polling places.[5] While the practice grew out of the desire to avoid

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[1]See editorials in the Richmond Times-Dispatch, Jan. 4, 1950, p. 14, Feb. 4, 1950, p. 6, Feb. 18, 1950, p. 6, Mar. 7, 1950, p. 14, Mar. 9, 1950, p. 12.

[2]Governor John S. Battle, Richmond Times-Dispatch, Feb. 10, 1950, p. 2; State Senator Harry C. Stuart, of the 18th Senatorial District, Richmond Times-Dispatch, Jan. 3, 1950, p. 1, Jan. 11, 1950, p. 3, Feb. 11, 1950, p. 2; Mr. George C. Sutherland of Grundy, Va., Republican Congressional candidate from the 9th District, Richmond Times-Dispatch, Feb. 21, 1950, p. 3.

[3]The Honorable J. Lindsay Almond, Jr., Richmond Times-Dispatch, Mar. 3, 1950, p. 18.

[4]Richmond Times-Dispatch, Mar. 13, 1950, p. 4.

[5]See Commonwealth v. O'Connell, 298 Ky. 44, 181 S. W. (2d) 691, 695 (1944); Clark v. Nash, 192 Ky. 594, 234 S. W. 1, 2 (1921); Jenkins v. State Board of Elections, 180 N. C. 169, 104 S. E. 346, 348 (1920); Moore v. Pullem, 150 Va. 174, 184, 142 S. E. 415, 418 (1928); Notes (1921) 14 A. L. R. 1256, (1922) 19 A. L. R. 308, (1925) 35

disenfranchising service personnel, the statutes have continued in effect following war periods and have extended the absent voting privilege to other qualified citizens.[6]

Some of the early legislation was declared unconstitutional as not requiring a voter to make, at the polling place of his residence, an offer to vote, or as not requiring the personal presence of the voter at the polls;[7] but the validity of the modern statutes has generally been sustained.[8] The provision in the United States Constitution lodging in state legislatures the power to determine the manner in which United States Senators, Representatives, and Electors for President and Vice-President shall be selected serves to protect absent voters statutes from restrictive regulations in state constitutions which might otherwise apply to these federal officers.[9] In relation to the election of state government officials the absent voters acts have frequently been attacked on the ground that they violate state constitutional provisions regulating elections. In 1921, the Kentucky Supreme Court, while recognizing the high motive of the legislature in attempting to afford servicemen a means of voting, regretfully held the entire act to be in violation of the requirement in the state's constitution that the ballot be furnished, prepared in private, and deposited at the polls. It was reasoned that a ballot could not be furnished to the voter at the polls if it were in fact mailed to the voter at some point outside the state.[10] However, the North Carolina court decided that

A. L. R. 819, and cases therein collected and cited; Notes (1941) 8 U. of Chi. L. Rev. 563, (1942) 42 Col. L. Rev. 304.

[6]For example: Ala. Code Ann. (Michie, 1940) Tit. 17, § 57; Ark. Stat. (Bobbs-Merrill, 1949 Supp.) § 3-1124; Fla. Stats. (1941) § 101.01; Iowa Code (1946) § 53.1; Ill. Rev. Stat. Ann. (Smith-Hurd, 1944), c. 46 § 19-1, 20-1; Ky. Rev. Stat. (1948) § 126.140; N. C. Gen. Stats. (1943) § 163.54; Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.17; Va. Code Ann. (Michie, 1950) § 24-319; W. Va. Code Ann. (Michie, 1949) § 135.

[7]Bourland v. Hildreth, 26 Cal. 161 (1864); Opinion of the Judges, 30 Conn. 591 (1862); People v. Blodgett, 13 Mich. 127 (1865); Opinion of Justices, 44 N. H. 633 (1863); Chase v. Miller, 41 Pa. St. 403 (1862); Opinion of the Judges, 37 Vt. 665 (1864); Note (1921) 14 A. L. R. 1256.

[8]Commonwealth v. O'Connell, 298 Ky. 44, 181 S. W. (2d) 691 (1944); Jenkins v. State Board of Elections, 180 N. C. 169, 104 S. E. 346 (1920); Goodwin v. Snidow, 150 Va. 54, 142 S. E. 423 (1928); Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1928); Notes (1921) 14 A. L. R. 1256, (1922) 19 A. L. R. 308, (1925) 35 A. L. R. 819, (1939) 121 A. L. R. 939. Contra: Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921) (the Kentucky Constitution § 147 was amended in 1948 to allow for absentee balloting); In re Opinion to the Governor, 41 R. I. 118, 102 Atl. 913 (1918).

[9]U. S. Const. Art. III, § 1 (President and Vice-President); Art. I, § 4 (representatives and senators); Art. VI (supremacy clause). See Commonwealth v. O'Connell, 298 Ky. 44, 181 S. W. (2d) 691 (1944) for decision in point and excellent discussion.

[10]Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921), construing Ky. Const. (1891) § 147 [since amended (1948) to make provision for absent voters].

the statute of that state did not violate the guaranty of a secret ballot nor the residence requirement for voters, and that the casting of an absentee ballot involved an offer to vote within the meaning of the state constitution. The latter term was said not to mean that the voter must be physically present at the polls, and the secret ballot was regarded as a personal privilege to protect the voter in the exercise of his suffrage, which he could waive if he chose to do so.[11]

In Virginia, the court in two decisions has upheld the validity of the absent voters statute.[12] Here, again, it was held that an offer to vote did not require the physical presence of the voter at the polls. And since the state legislature is given *unrestricted power* by the constitution to determine the methods by which elections are to be conducted, the exercise of this authority is not a violation of the secret ballot guaranty. The court further declared that even though fraud was committed by the misuse of the statute, this fraud was in spite of the statute, not because of it; and since the statute denounces fraud, any relief would have to be legislative.[13] It is felt that although the court referred to "unrestricted power," it actually meant unrestricted power *within specific constitutional limitations,* and that the legislature is given no blanket authority by this language to conduct elections in any manner it may see fit.

An examination of the debates of the Virginia Constitutional Convention of 1901-02 discloses how the secret ballot provision came into the Virginia constitution. When the Committees on Suffrage and on Privileges and Elections reported the suffrage sections of the constitution to the convention there was no provision for a secret ballot. An amendment to the section as reported was offered by a delegate, and in the short debate on this amendment is found both the purpose and intent of the constitutional guaranty of secret ballot. The text of the debate follows:

> "*Mr. Kendall:* 'I will say, gentlemen, that there is nothing in the article, as now framed, as far as I can see, that requires that the ballot shall be secret, and there is no reason why the ballot could not be thrown on a table where the ballot-boxes are kept, and anybody could go up and prepare a ballot there. That

[11]Jenkins v. State Board of Elections, 180 N. C. 169, 104 S. E. 346 (1920) construing N. C. Const. (1868) Art. 6, §§ 2, 6.

[12]Goodwin v. Snidow, 150 Va. 54, 142 S. E. 423 (1928); Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1928). These two cases were decided on the same day. The facts in the Goodwin case were not discussed by the court, which based its decision squarely on the Moore decision, stating that the cases were heard together.

[13]Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1928).

defeats the object of a secret ballot, and it gives the fullest opportunity for fraud.'
Mr. Brooke: 'Is there anything in the article which would prvent the Legislature from passing such a law?'
Mr. Kendall: 'No, sir; but I want to make it mandatory upon them to do it.' "

The amendment was adopted, forty-two to twenty-six, and now appears in the Virginia constitution as the last sentence of section 27.[14] The purpose of amending the reported section is thus seen to be twofold: (1) to preserve the secrecy of the ballot; and (2) by preserving the secrecy of the ballot to reduce the opportunity for fraud in elections.

The debate also seems to disclose that the state constitution intended to impose an affirmative mandatory duty on the legislature to pass laws governing elections so that the secrecy of the ballot could not be violated. Since the Virginia court has held that the absent voters law is in all respects constitutional, and that the legislature has unrestricted power to prescribe the manner of conducting elections, the duty then lies on the legislature to pass election laws which will conform to the state constitution.

The Virginia absent voters law seems to fail to meet constitutional requirements in two important respects; first it does not preserve this absolute secrecy of the ballot, and second it does not provide that the ballot box be kept in public view, as is required by the Virginia constitution section 27, and in the Virginia Election Code 24-243.[15]

The absent voters statute provides that the ballots shall be in an envelope with the voter's name on the outside of the envelope, and that the election judges shall deposit the ballot, without examining it, in the ballot box with the rest of the ballots.[16] However, this system

[14]The text of the reported sections appears in 2 Debates Va. Const. Convention of 1901-1902, p. 2937. These sections have no provision for guarantee of secret ballot.

Text of the amendment of the reported sections: "So far as consistent with the provisions of this Constitution the absolute secrecy of the ballot shall be maintained, and to this end the General Assembly may enact such laws as may be necessary." 2 Debates Va. Const. Convention of 1901-1902, p. 3023.

Debate and vote on this amendment are found in 2 Debates Va. Const. Convention of 1901-1902, p. 3024.

Text of the amendment as written into the Virginia constitution: "So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained." Va. Const. (1902) § 27.

[15]Va. Const. (1902) § 27: "The ballot box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed nor counted, in secret." Va. Code Ann. (Michie, 1950) § 24-243: "The ballot box shall be kept in public view during all elections."

[16]Va. Code Ann. (Michie, 1950) §§ 24-334, 24-341.

obviously affords an opportunity for an election official to look at any ballot, despite the fact that he is not supposed to do so. When the voter goes to the polls and votes in person instead of voting by mail, the code provides that the voter shall mark and fold his own ballot and hand it to an election judge who deposits the ballot in the ballot box without inspection.[17] The vital difference between the two methods is that the voter who is present at the polls can watch the judge deposit the ballot, while the voter who is not present can not see that an election judge does not examine the absent ballot.

The Virginia constitution and the Election Code provide that the ballot box shall be kept in public view during all elections, and that the ballots shall not be canvassed or counted in secret.[18] The absent voters act directs that absentee ballots shall be kept in a "separate container" in the custody of the electoral board until the time that these votes are delivered to the judges at the polls.[19] Clearly this separate container is designed as a safeguard for the ballots, but the container might be anything from a shoebox to a black satchel. Manifestly the custody of the electoral board is not a *public view* as is required by the code and the constitution. The electoral board can actually have custody of the absentee votes for as long as sixty days prior to the election, and all this time out of the public view.[20] There is nothing to prevent a member of an electoral board from filling the separate container with fraudulent ballots before delivering them to the election judges at the polls.

The privacy given to the act of voting and the publicity given to the ballot box are precautions which guard against fraud. Any statute which offers a cloak of secrecy for conduct detrimental to pure elections is of doubtful wisdom, even in the exercise of an unrestricted power.

The mechanics of absentee balloting are similar in North Carolina, Tennessee, Kentucky, West Virginia and Virginia. In general the acts require: (1) that the voter give a personal or written offer to vote to the registrar or other election official, and this requirement is satisfied by the application for a mail ballot;[21] (2) that the official per-

[17]Va. Code Ann. (Michie, 1950) § 24-247.

[18]Va. Const. (1902) § 27; Va. Code Ann. (Michie, 1950) § 24-243.

[19]Va. Code Ann. (Michie, 1950) §§ 24-338, 24-340.

[20]Va. Code Ann. (Michie, 1950) §§ 24-321, 24-338, 24-340.

[21]Ky. Rev. Stat. (1948) §§ 126.150, 126.160; N. C. Gen. Stats. (1943) §§ 163-55, 163-71, 163-77.2; Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.18; Va. Code Ann. (Michie, 1950) § 24-321; W. Va. Code Ann. (Michie, 1949) § 136 (not required to be in writing).

sonally give the ballot or mail it to the voter;[22] (3) that the voter mark the ballot in privacy, have it notarized, and return it personally or by registered mail to an election official;[23] (4) that an election official keep custody of the ballot and deliver it to the judges at the polls;[24] and (5) that the election judges at the polls deposit the mail votes in the ballot box with the other votes without examination of the mail ballot.[25]

The provisions of the election codes of the above named states as to who is eligible to vote by mail differ widely. In Virginia, "any duly qualified voter who will, in the regular and orderly course of his business, profession, occupation, or other personal affairs, or while on vacation or during attendance, as a student at any school or institution of learning, be absent from the city, town or from the precinct in which he is entitled to vote, if in a county, and any such voter who may be physically unable to go in person to the polls on the day of election, may vote in any primary, special or general election, in accordance with the provisions of the [absent voters law]."[26]

The provisions of the other state codes are essentially similar except that North Carolina, Tennessee, and Kentucky, require the voter to be out of the county,[27] and West Virginia requires him to expect to be out of the state.[28] Reasons for absence from the polls, if any are specified in the codes, are given variously as business, health,

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[22]Ky. Rev. Stat. (1948) § 126.190 (method not specified); N. C. Gen. Stats. (1943) § 163.56 (personally or by mail); Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.19 (personally or by mail); Va. Code Ann. (Michie, 1950) § 24-322 (personally or by mail); W. Va. Code Ann. (Michie, 1949) § 139 (personally or by mail).

[23]Ky. Rev. Stat. (1948) § 126.230 (by mail); N. C. Gen. Stats. (1943) § 163-58 (by mail, or delivery in person, or by voter's family, if in the same county); Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.21 (registered mail, or in person if ballot personally delivered and voted in presence of a commissioner of election); Va. Code Ann. (Michie, 1950) § 24-334 (registered mail or in person); W. Va. Code Ann. (Michie, 1949) § 141 (registered mail or in person).

[24]Ky. Rev. Stat. (1948) §§126.260, 126.270 (the two dominant political parties can provide a guard for the absent ballot box); N. C. Gen. Stats. (1943) §§ 163-58, 163-59, 163-60, 163-61, 163-74 (military), 163-77.7; Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.24; Va. Code Ann. (Michie, 1950) § 24-338, 24-340; W. Va. Code Ann. (Michie, 1949) §§ 142, 143.

[25]Ky. Rev. Stat. (1948) § 126.270 (separate ballot boxes for absentee and regular returns); N. C. Gen. Stats. (1943) §§ 163-61, 163-74 (military); Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.24; Va. Code Ann. (Michie, 1950) § 24-341; W. Va. Code Ann. (Michie, 1949) § 144.

[26]Va. Code Ann. (Michie, 1950) § 24-319.

[27]Ky. Rev. Stats. (1948) § 126.140; N. C. Gen. Stats. (1943) §§ 163-54, 163-70 (military), 163-77 (military); Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.17 (voter or his wife accompanying him).

[28]W. Va. Code Ann. (Michie, 1949) § 135.

education, and travel. North Carolina seemingly restricts the right by a decision which holds that a voter who is in fact present in his county on election day and is physically able to go to the polls can not vote by absent ballot.[29] None of the codes of the other states has such a provision, nor is any decision to be found in Virginia, Tennessee, Kentucky, or West Virginia which is similar to the North Carolina case.[30]

The Virginia act is broader than any of the others in that it allows a voter who will be absent from his *precinct* for *personal affairs* to vote by absentee ballot.[31] According to the words of the statute, if a voter wanted to go fishing out of his precinct, if in a county, or out of his town or city, he could do so and vote by absent ballot. It would seem that this is an abuse of granting the suffrage privilege to absent voters, and that civic duty would require at least that the voter think enough of his elective privilege to stay at home and vote.

In view of the unusually broad scope of the absent voting privilege extended by the Virginia statute and the obvious opportunities for fraud created by the system, careful provision should be made to facilitate the prosecution of any who attempt to perpetrate election frauds through absentee ballot manipulations. To aid in the procurement of evidence of election irregularities, the state legislatures have generally offered some sort of immunity from prosecution to witnesses in election contests or other litigation growing out of illegal election procedure. The Virginia code provides: "No witness giving evidence in any prosecution or other proceeding under the preceding sections of this chapter shall ever be proceeded against for any offense made penal by any of such provisions, or any of the other election laws of this State, committed by him at or in connection with the same election, primary, or convention."[32] The code further provides that a witness in an election contest shall not be compelled to testify in other manner than any other witness in a civil suit.[33]

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[29]Robertson v. Jackson, 183 N. C. 695, 110 S. E. 593 (1922). This decision was based on a former law which did not include those physically unable to vote, but inasmuch as part of the votes held invalid were those of physically able voters it is felt that a decision under the present statute would not hold those voters in the county who are physically able to come to the polls entitled to absentee ballots.

[30]Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.18 does provide that a voter, while within the county, applying for an absentee ballot, "shall attach to said notice a statement from a licensed physician certifying that the illness or disability of said voter is such that said voter cannot safely appear at the voting precinct in person."

[31]Va. Code Ann. (Michie, 1950) § 24-319.

[32]Va. Code Ann. (Michie, 1950) § 24-449.

[33]Va. Code Ann. (Michie, 1950) § 24-424.

The North Carolina Election Law provision is almost exactly the same as Virginia's as to the immunity of a witness, as is the code of Tennessee.[34] However, the Tennessee court has held that the statute applies only to witnesses in criminal proceedings, and implies that a witness cannot be compelled to testify or be punished for contempt for failure to give evidence in a civil proceeding growing out of a fraudulent election.[35] The North Carolina code provides that a witness must give evidence in criminal proceedings resulting from irregular elections.[36] The Kentucky Election Code compels a witness to testify before a grand jury, or on behalf of the Commonwealth, and seems to grant complete immunity for witnesses in these two categories only.[37] West Virginia's Election Code does not have a section on immunity or compulsion of testimony but the sections of the West Virginia code dealing generally with immunity provide that evidence compelled to be given shall not be used against the witness in another proceeding.[38]

The Virginia law thus extends broader protection to witnesses than those of her neighboring states, except possibly North Carolina.[39]

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[34]N. C. Gen. Stats. (1943) § 163-198; Tenn. Code Ann. (Williams, 1949 Supp.) § 11342.

[35]Lindsay v. Allen, 113 Tenn. 117, 82 S. W. 648 (1904). This decision interprets a former Tennessee statute, the wording of which has not been materially changed in the present code.

[36]N. C. Gen. Stats. (1943) § 163-198.

[37]Ky. Rev. Stat. (1948) §§ 124.300, 124.310, 124.330. The latter section also provides that a witness giving testimony in any case pending under parts of the Corrupt Practices Act shall not have the evidence used against him in any prosecution or civil proceeding.

[38]W. Va. Code Ann. (Michie, 1949) §§ 5726, 5742.

[39]Two Virginia cases have interpreted the immunity clause in the Virginia Election Laws, Flanary v. Commonwealth, 113 Va. 775, 75 S. E. 289 (1912) and Stanley v. Commonwealth, 116 Va. 1028, 82 S. E. 691 (1914).

The immunity section of the election code by its literal words should extend only to offenders testifying under a few sections of the Pure Election Chapter of the Virginia Code [Va. Code Ann. (Michie, 1950) §§ 24-440 to 24-448 inclusive], which sections in general cover bribes and excess expenditures.

In the Flanary case the Supreme Court of Appeals upheld a conviction for contempt of court against the accused who had refused to testify in the prosecution of one Burchett on the grounds of self-incrimination. Burchett had been indicted for an offense not covered by the immunity section. The accused had testified before a grand jury as to offenses committed in the same election and covered by the immunity section, as well as to the offense committed by Burchett. In holding this grand jury testimony to be a bar to prosecution, and the immunity to satisfy the constitutional right of not testifying against oneself, the court said: "The immunity is as complete with respect to offenses against other election laws as it is with respect to an offense against the particular act within the terms of which the immunity is found." 113 Va. 775, 786, 75 S. E. 289, 293 (1912).

In the Stanley case the court granted immunity because the accused had testi-

The purpose of the provision in the Virginia code, to enable the courts to arrive at the proper result of a contested election by enabling the witness to give testimony without fear of prosecution, is commendable. The practical result of this provision, however, is that the Virginia absent voters law can be used with impunity by election officials as a means of defrauding the public.

The Virginia absent voters act was adopted with a purpose of preventing an absent voter from being deprived of his right of suffrage.[40] "But the motives for legislative acts are not fit subjects of judicial inquiry. If the power can be exercised for one purpose, it may be for another; the intention may always be effectually concealed. It is the principle of the law, and its capacity to be exerted for other objects than that which it professes to aim at in the particular case, that it is proper and necessary to look to."[41] The capacity of the Virginia absent voters act to be used for other purposes than were intended raises a serious threat to fair elections.[42] For example: (1) The

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fied in a previous election contest. The petition in the contest had alleged irregularities in violation of the Barksdale Pure Election Law, as well as other irregularities not expressly covered by the immunity section of the statute.

Considering these two cases together with their holding (1) that a grand jury proceeding is a "proceeding" under the immunity section; (2) that immunity is granted for testimony in a grand jury proceeding which testimony incidentally includes matter falling under the immunity section; (3) that an election contest is a "proceeding" under the statute; and (4) that immunity is granted for testimony in an election contest when the petition for contest includes matter both under and not under the immunity section—it is practically inescapable that any witness in an election contest who testifies as to violations of the immunity section will himself be immune.

[40]See Va. Acts of Assembly (1916) 633 (preamble); Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1928).

[41]From the contention of the successful plaintiff-in-error in Brown v. Maryland, 12 Wheat. 419, 425, 6 L. ed. 678, 680 (1827), opinion of the court by Marshall, C. J.

[42]While the examples set out in the text are hypothetical, many actual abuses have been made of the Virginia absent voters law. The instances below are taken from the depositions of a Scott County election contest which did not reach a court of appellate jurisdiction.

1) Absent voter who did not remember whether he ever had the ballot in his hand.
2) Absentee ballot of a voter partially marked by a candidate for office.
3) Absent voter within his own precinct on election day who had no idea of being absent from precinct on election day.
4) Absent voting by a voter who did not know whether he voted and registered at the same time.
5) Statement from absentee voter who was in precinct on election day: "I decided to vote at home and save running around."
6) Absent voter who never signed application for absentee ballot.
7) Voter who registered in Wise County to vote in Scott County by absentee ballot.

secretary of an electoral board, having connived with one of the candidates, decides to stuff a ballot box. He fills the separate container in his custody with fraudulent mail ballots, and turns these in to the judges at the polls. The defeated candidate contests the election and proves the ballots were invalid. The contestee would have the secretary subpoenaed and have him testify to violation of laws covered by the immunity section; the Virginia code thus gives him complete

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8) Election workers bringing absent ballot to voter working on a farm. Voter had made no application for absentee ballot.
9) Absentee voter who lived less than 100 yards from polling place and had no idea of being absent on election day.
10) Absent voter who voted at home because she did not want to go to the polls without her husband.
11) Absentee voter had ballot delivered to him by person he did not know, voted under this person's supervision, and returned ballot to the stranger. "...just kinda like a dream to me...."
12) Absent voter describing how he applied:
Q—"...just tell me exactly what...happened...."
A—"They just wrote a piece of paper and then signed my name to it, that was all. They did not ask me any questions at all."
13) Resident of Tennessee voting by absentee ballot in Virginia election.
14) Semi-literate voter having been voted by others by absentee ballot:
Q—"Did they mark it to suit themselves or to suit you?"
A—" To suit themselves."
15) Absentee voter who had his vote solicited:
Q—"Tell us exactly what happened."
A—"They opened it and told me they wanted me to vote and I told them I would rather not vote that way."
Q—"How did they tell you they wanted you to vote?"
A—"...and I told them I would rather not vote that way and they kept on, and I told them I didn't like to do that, it might get me in trouble, and they said no, there would not be any trouble to it."
...
"Q—"And you wanted to mark it yourself?"
A—"Yes, sir, I asked them to and they said they wanted to mark it themselves."
Q—"And you let them mark it."
A—"Yes, sir."
...
Q—"You know whether they marked it republican or democratic?"
A—"I don't know."
16) Absentee voter in precinct on election day:
Q—"How did you happen to vote by mail?"
A—"I thought it would save me a trip to the polls."
17) Q—"...didn't you have their ballots in the absent voters ballot box and deliver it to the judges of election...without saying one word about whether or not they were legal voters, isn't that a fact?"
A—"Yes, sir."
18) Party worker took ballots from Scott County to Wise County to be voted by absent voters who had made no application.
19) Candidate for public office prepared absentee ballot for a blind man.

immunity from prosecution. (2) The Virginia absent voters law provides that "No registrar shall solicit any application for a ballot."[43] The local registrar, scheming with a candidate, decides to solicit votes from people known to favor his candidate. When the other candidate loses, he contests the election. The scheming candidate would have the registrar testify and thus secure for the registrar complete immunity to prosecution for his fraud. (3) An election judge knows that one candidate will attempt to use fraudulent mail votes. When the absentee vote is delivered to the judges at the polls, the judge does not say anything about the wet glue on the envelopes containing the ballots. If the other judges do not notice the wet glue (or are in on the plot), the ballots are deposited in the ballot box. When the election is contested the contestee calls his fellow conspirators as witnesses and they are forever immune to prosecution.

In all of the above examples the absent voters act enables the officials to commit the fraud, and the immunity section of the code protects them. These officials have nothing to lose. If the fraud is not detected the election is won by fraud, and if the fraud is detected the official purges himself by his own testimony.

Thus the Virginia absent voters statute, in its present form, tends to compromise the secret ballot, to deny the absentee ballots the publicity attendant on actual physical voting at the polls, to place a cloak of secrecy around the absentee ballot box, and to place in the hands of any unscrupulous election official an instrument of fraud. The immunity section of the code, although designed to facilitate the discovery and correction of illegal elections, can readily be put to the practical use of protecting the very persons who committed the illegal acts.

Several alternative solutions to the problem are available. (1) The absent voters act might be repealed in its entirety. Approximately the same percentage of both parties in a general election or of both sides in a primary election will be absent on election day, so that in any *honest* election the absent voters act will have little or no bearing on the result.

(2) If public policy dictates that some absent voters be allowed to vote, the privilege could well be limited, among physically able voters, to servicemen only, or to those who are *actually* out of the state, and, among those physically disabled, to those voters who are permanently disabled, and who produce a doctor's certificate of physical disability to attend the polls.

[43]Va. Code Ann. (Michie, 1950) § 24-329.

(3) If absentee voting must be maintained, the provisions in the code allowing personal delivery of any absentee ballot or application should be eliminated. Instead, it should be required that *all* absentee ballots and applications be sent and returned by *registered mail;* that the outside of the mailing envelope for the ballot have printed on it in large letters, in front and back, ABSENTEE BALLOT; that the voter fill in on the back of the mailing envelope across the seal his full name; that the ballots be delivered to the physical custody of the clerk of the circuit court, to be held by him in constructive custody of the circuit judge; that the clerk deliver the *mailing envelopes* to the election judges at the polls on election day; and that the election judges then check the United States mail registration stamp on the envelope, and also check the list of absentee ballots issued against sending and receipt mail registry, and against the names on the mailing envelopes received, and then open and deposit the ballots. All steps of this procedure should be mandatory. Even these stringent rules could not, of course, completely eliminate dishonesty in the conduct of elections, as, for example, the solicitation of absentee ballots by a registrar. Nevertheless, increased protection would be given to the secrecy of the ballots of honest absent voters, and formidable obstacles would be created to deter fraudulent use of the absent voting system.

EMORY WIDENER, JR.