the result of the election, and of proving such proper custody of ballots as to reasonably prevent tampering with them.

§ 36. Presumptions

Official Returns as Presumptively Correct

§ 36.1 A contestant in an election contest must overcome the prima facie evidence of the correctness of the election as established by the official returns.

In the 1934 Illinois election contest of Weber v Simpson (§ 47.16, infra), after the contestant examined the tally sheets in all of the 516 precincts of the district and found discrepancies in 128 of the precincts, he requested that the elections committee order a recount based on the discrepancies shown. The committee denied this request, finding no evidence of irregularities, intimidation, or fraud in the casting of ballots, concluding that "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee."

§ 36.2 The burden is on the contestant to present sufficient evidence to rebut the presumption that official returns are proof of the result of an election.

In the 1951 Pennsylvania contested election of Osser v Scott (§ 56.5, infra), the committee granted the contestant full opportunity for presenting testimony and hearing arguments of counsel supporting his claim, but still concluded that the contestant had not sustained his contention, stating:

> The returns of the election . . . and the certificate issued to [the contestee] are presumptive proof of the result of that election which will prevail unless rebutted by proper evidence.

The House then agreed to a resolution that the contestee was duly elected and entitled to his seat.

Similarly, in O'Connor v Disney (§ 46.3, infra), the Committee on Elections applied the principle that the burden of coming forward with evidence to meet or resist the presumption of irregularity rests with the contestant, and found that contestant had failed to overcome the presumption of correctness of official returns.

§ 36.3 Election returns prepared by election officials regularly appointed under the laws of the state where the election was held are presumed to be correct until

they are impeached by proof of irregularity or fraud.

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, an election contest involving alleged irregularities relating to precinct registration books, the Committee on Elections cited the presumption as to the correctness of election returns, and indicated that neither the House nor its committees were constituted as mere boards of recount.

§ 36.4 A contestant must overcome the presumptions that official returns are prima facie evidence of the regularity and correctness of an election and that election officials have legally performed their duties.

In Chandler v Burnham (§ 47.4, infra), a 1934 California contest, contestant alleged that in 14 precincts there had been instances of illegal ballot counting, improperly constituted election boards, unsworn officials, and unattested tally sheets as well as irregular ballots and envelopes, all of which warranted the rejection of the returns in total. The Committee on Elections determined that contestant failed to establish fraud or connivance on the part of the contestee or any election official. The committee noted that (1) the official returns are prima facie evidence of the legality and correctness of official action, (2) that election officials are presumed to have legally performed their duties, and (3) that the burden of coming forward with evidence to meet or resist these presumptions rests with the contestant.

§ 36.5 A contestant must overcome the presumptions that the official returns are prima facie evidence of the regularity and correctness of an election, and that election officials have performed their duties honestly. An elections committee will not determine certain irregular actions by precinct officers at an election supervised by a nonpartisan board to be fraudulent or the result of a conspiracy with contestee, absent a "fair preponderance of evidence" adduced by contestant to the contrary.

In Gormley v Goss (§ 47.9, infra), a 1934 Connecticut contest, according to the official returns, contestee received 42,132 votes to 42,054 votes for contestant—a majority of 78. Contestant alleged that a precinct official, acting fraudulently and in conspiracy with contestee, entered the voting booth and spoke to voters who

were casting ballots. The committee found that confusion existed among voters with regard to voting on a certain proposition and as to its placement on the voting machine. The committee further found that many voters were seeking information in this respect and that they were merely given assistance by the official in question. The committee also determined that the intent of the voter was not vitiated by any interference with the keys on the voting machine. The committee concluded that the contestant had failed to establish the allegations contained in the notice of contest, and had failed by a fair preponderance of the evidence to establish any fraud or conspiracy.

§ 36.6 Where the contestant has not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct, the elections committee will not order a recount.

In the 1965 Iowa election contest of Peterson v Gross (§ 61.3, infra), there was no procedure available under Iowa law for a recount in a contest in which the sitting Member had won by only 419 votes. The contestant, who made no allegations of fraud against anyone, sought to have the House order a recount, but the elections committee declined to do so in the absence of proof overcoming the presumption that the returns of the election officers were correct.

§ 36.7 The official returns of an election are prima facie evidence of its regularity and correctness.

In the 1934 Illinois election contest of Weber v Simpson (§ 47.16, infra), the elections committee recommended adoption of a resolution dismissing the contest and declaring the contestee to be entitled to the seat after it concluded that the "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee."

Effect of Absence of Witnesses for Contestant

§ 36.8 Where a contestant is unable to produce witnesses as to any errors in the counting of ballots in certain precincts, an election committee may presume that there has been a fair and honest count in those precincts.

In the 1949 Michigan election contest of Stevens v Blackney (§ 55.3, infra), although the con-

testant produced evidence showing that the counting in four of 207 precincts had been erroneous, the majority of the committee applied a principle of evidence to presume that the contestant's failure to produce party election officials and challengers from any of the other precincts as witnesses must have been "because their testimony would show an honest and fair count." The House agreed to a resolution seating the contestee.

Correctness of Tally Sheets

§ 36.9 An official return based on tally sheets and check lists is only prima facie evidence of the correctness of the result of the election. This presumption may be overcome by a recount of all ballots where such ballots are preserved as required by law and their integrity is unimpeached.

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, one of the parties claimed that he had not received credit, upon recount, for ballots from a certain precinct. The committee ruled that the presumption as to the correctness of the official return had been overcome by a recount of all ballots, including those from the disputed precinct; the committee accepted the recount as the best evidence of the number of votes cast, and noted that the ballots had been preserved as required by law and their integrity unimpeached.

Effect of Failure to Challenge Voter

§ 36.10 Persons voting without challenge on election day are presumed to be entitled to vote, and election officials receiving the votes are presumed to do their duty properly.

In the New York contested election case of Macy v Greenwood (§ 56.4, infra), arising from a 1950 election which the contestant lost by only 135 votes, contestant alleged for the first time that a number of the voters were not qualified as to residence because they had not been residents for the four months preceding the election, as required under state law. The committee observed that the contestant had not made any challenges under state law which permitted challenging of voters at the time of registration or of voting. Furthermore, the committee report could not cite a single instance wherein the House had rejected votes as illegal for the reason that the voter had not resided in the county for the statutory period of time. The report further

stated, "It is apparently the settled law of elections that, where persons vote without challenge, they are presumed to be entitled to vote and that the election officers receiving the votes did their duty properly and honestly."[11]

Effect of Closeness of Result

§ 36.11 The mere closeness of the result of an election raises no presumption of fraud, irregularity, or dishonesty. Fraud is never presumed but must be proven.

In Chandler v Burnham, a 1934 California contest (§ 47.4, infra), the official returns gave to contestee a plurality of 518 votes from a total of 87,061 votes cast. The contestant alleged a wide variety of procedural irregularities on the part of election officials. The committee determined, however, that contestant had failed to establish fraud or connivance and cited the general rules that fraud is never presumed, and that the mere closeness of the result raises no presumption thereof.

§ 37. Ballots

Ambiguous Ballots

§ 37.1 In determining voter intention, an elections committee should distinguish between ambiguous ballots, which permit examination of the circumstantial evidence surrounding an election to determine voter intent, and ballots mistakenly marked for two parties, as to which voter intent would be a matter of conjecture.

In the 1934 Connecticut election contest of Fox v Higgins (§ 47.8, infra), the "Australian ballot," on which voters could vote a "straight ticket" by marking an "X" in the circle above a party column, was employed as the official ballot. State law voided ballots marked with an "X" in more than one party circle. By inadvertence, the committee found, the contestee had caused the ballots to be printed with the party name "Wet Party" near the question on repeal of the 18th amendment. The contestee had been charged with the responsibility of preparing the ballots, being the Connecticut secretary of state at the time. The effect of the juxtaposition was that, as several witnesses testified, they inadvertently voted for more than one political party when they intended to vote their regular party affiliation and for repeal, and had mistakenly voted for the "Wet Party," a local political entity.

11. Citing the election contest of Finley v Bisbee, 2 Hinds' Precedents § 933.