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.

The committee found, however, that the question of the intention of the voters of the rejected ballots was a matter of conjecture and that the ballots were rightly rejected as this "was not the case of an ambiguous or doubtful ballot, where the committee can look at the circumstances surrounding the election explaining the ballots."

Ballots as Best Evidence

§ 37.2 In an election contest, the best evidence as to the number of ballots cast, and for whom they were cast, is the ballots themselves, and not tally sheets or check lists, provided the integrity of the ballot box has been pre-served and there is no evidence that the boxes have been tampered with or molested.

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, the issue to be decided was whether the tally sheet and check list of a certain precinct were to be considered the best evidence of the vote. The minority of the Committee on Elections claimed that the number of ballots cast as determined on recount, had been successfully impeached by contrary evidence of check lists, tally sheets, and sworn depositions of voters. But the committee did not accept such tally sheets and check lists as the best evidence of the number of votes cast for the parties in the precinct, and accepted the recount of the ballots in that precinct as the best evidence thereof.

Method of Proportionate Deduction

§ 37.3 Where it is impossible to determine for which candidate illegal absentee votes were cast, the proportionate deduction rule for deducting such votes is followed.

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat (§ 59.1, infra), the Committee on Elections found that in one precinct 42 absentee ballots had been illegally procured and cast, though there was no proof as to the person for whom they were cast. The committee first determined the total votes cast for each candidate in the precinct (615 for Mr. Roush and 352 for Mr. Chambers). The committee then determined the number of absentee ballots cast in the precinct for Mr. Roush, 20, and for Mr. Chambers, 42. Of the 62 total absentee ballots cast in the precinct, then, 68 percent were cast for Mr. Chambers and 32 percent were cast for Mr. Roush. Applying these percentages to the 42 votes

to be deducted, the subcommittee deducted 29 votes from Mr. Chambers' total and 13 votes from Mr. Roush's total. In following this procedure, the committee report cited precedents of the House in which this proportionate deduction method had been followed: Oliver v Hale (§ 57.3, infra); Macy v Greenwood (§ 56.4, infra); Wickersham v Sulzer and Grigsby (6 Cannon's Precedents § 113); Chandler v Bloom (6 Cannon's Precedents § 160); Bailey v Walters (6 Cannon's Precedents § 166); and Paul v Harrison (6 Cannon's Precedents § 158).

§ 37.4 Where absentee ballots should be rejected due to invalid envelopes and applications filed by voters, but it cannot be determined to which ballots the invalid material relates, an elections committee will apply the method of proportionate deduction as an equitable method of deducting votes from the totals of each candidate.

In the Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the committee cited the contested election case of Macy v Greenwood (§ 56.4, infra), as precedent for an equitable method of deducting 109 absentee ballots from the totals of the contestant and contestee. This method presupposed that each candidate received invalid ballots in the same proportion that he received his total vote in the election precinct. Thus, by dividing the number of absentee votes received by a candidate in a precinct by the total number of absentee votes cast in that precinct, and by then multiplying the fraction thereby obtained by the number of absentee votes rejected in the precinct, the committee determined that 86 votes should be deducted from the contestee's total and 23 votes from the contestant's total.

§ 37.5 When it cannot be ascertained for which candidate the illegal votes were cast, the votes will be deducted proportionally from both candidates according to the entire vote returned for each candidate.

In the New York election case of Macy v Greenwood (§ 56.4, infra), the contestant, who had lost by only 135 votes, alleged that 932 voters were not qualified as to residence because they had entered the district and voted although they had not been "for four months a resident of the county" as required by state law.

Although the committee found additional basis for disregarding the contestant's challenge and recommending dismissal of the contest, the committee report specifically stated the "general rule" that "had it found the 932 votes illegally cast, the votes presumably would be deducted proportionally from both candidates, according to the entire vote returned for each." The House subsequently dismissed the contest.

Interpretations of "Straight Ticket" Votes

§ 37.6 Where state law permits "straight ticket" voting by a mark in the appropriate circle, and also permits voting for only part of a ticket, a candidate for Representative is not entitled to ballots cast for his party's Presidential nominee but not marked for Representative.

In Ellis v Thurston (§ 47.6, infra), a 1934 Iowa contest, the contestant claimed all ballots that were cast for the Presidential nominee of his party, but which indicated no choice for Representative. The Committee on Elections ruled that voters in marking the squares opposite the Presidential and Vice Presidential candidates did not intend to vote a straight party ticket, as the statute provided that a cross be placed in a separate party circle in order to cast such a vote. The committee dismissed contestant's claim that "the intent of the voter should be given effect regardless of local Iowa laws," and refused to assume "that because voters voted for Roosevelt, or Hoover, who headed the respective tickets, that they intended to vote also for the candidates for Congress toward whom the voters indicated their neutrality."

§ 37.7 In an election involving the use of "straight ticket" ballots, a candidate is entitled to the number of votes equal to the total number of "straight ticket" ballots cast for his party and on which his name appears undisturbed.

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois case involving the Australian (or so-called "straight ticket") balloting system, the issue was whether the defeated candidate, a Democrat, was entitled to be credited with the same number of votes cast for his party by the "straight ticket" voters.

The majority of the Committee on Elections found in favor of Democrat Kunz, notwithstanding the contention of the minority

that a number of straight Democratic ballots had been marked for his Republican opponent, Granata. The majority took the view that Mr. Kunz was entitled to every "straight ticket" ballot on which his name appeared undisturbed along with the names of the other Democratic candidates. The fact that the contestant did not receive the "straight ticket" vote in many of the precincts was considered conclusive evidence of fraud or gross irregularity, justifying a recount.

When the "straight ticket" vote was given contestant, he overcame the contestee's apparent majority, and was eventually seated as the Representative from his district.

§ 37.8 An elections committee will not presume ballots marked for contestant's party Presidential nominee to have been intended as "straight ticket" votes where state law provided a separate circle for casting "straight ticket" ballots.

In the 1934 Iowa contested election of Ellis v Thurston (§ 47.6, infra), the committee dismissed the contestant's claim that "the intent of the voter should be given effect regardless of local Iowa laws," holding instead that "to presume now that the voters intended to vote otherwise than as expressed by their marked ballots would be to indulge in a presumption not justified in law or facts." The contestant had argued that the voters, in marking the squares opposite the Presidential and Vice Presidential candidates, intended to vote a straight party ticket, although the statute provided that a cross be placed in the party circle in order to cast such a vote. The committee ruled otherwise, however.

Effect of Writing in Name of Listed Candidate

§ 37.9 Where voters write in the name of a candidate whose name is already printed on the ballot, but do not put an "X" in the box on the ballot opposite the name, the ballot may still be valid.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections validated two ballots on which the voter had written in the name of the candidate, but had not marked an "X" in the box opposite his printed name. In the absence of an Arkansas case on point, the committee cited a Pennsylvania case as authority.

Using Other Than Specified Mark

§ 37.10 Where the voter places some mark other than an "X" in the box opposite a candidate's name on a ballot, the ballot may still be valid if the intention of the voter is clear.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections validated 42 of 43 ballots on which the voters had placed some mark other than an "X" or check in the square opposite the name of the candidate, as the intention of the voter was clear.

§ 37.11 Where the name of a candidate has been written in and the box opposite his name checked, rather than "Xed" as required, the ballot may nevertheless be held valid.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the elections committee found the intention of the voters was clear and ruled valid 236 ballots in which the voters had written in the name of a write-in candidate and placed a check in the box on the ballot opposite his name, instead of placing an "X" in the box.

Incorrect or Wrong Name for Write-in Candidate

§ 37.12 Although a misspelling in the name of a write-in candidate on a ballot does not necessarily invalidate it, where the name provided is wrong or so badly spelled as to produce confusion as to the intent of the voter, the ballot should be rejected.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections validated 1,035 of 1,097 ballots on which the name of the write-in candidate was misspelled or only the last name used. The committee invalidated those ballots on which the wrong given name was written or the surname so incorrectly spelled as to render the intent of the voter uncertain.

Stickers Used in Lieu of Writing in Name

§ 37.13 Where state law permits, stickers bearing a candidate's name may be used in lieu of a "write-in" for the candidate.

In the 1959 investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections determined that an opinion of the state attor-

ney general, issued immediately prior to the election, to the effect that stickers were legal, was binding on the clerks and judges and they were required to count the sticker votes. Neither the defeated candidate nor any voter had appealed the attorney general's opinion. The committee also cited a 1932 Arkansas Supreme Court decision that ballots bearing stickers distributed at the polls were legal, as well as the 1919 Massachusetts contested election case of Tague v Fitzgerald (6 Cannon's Precedents § 96), in support of the proposition that the use of stickers in balloting should not void the ballots involved.

§ 37.14 Where the wrong end of a sticker has been placed on a ballot or the sticker partly covers marks on the ballot for the other candidate, the ballot is invalid.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections ruled invalid 52 ballots on which the wrong end of a sticker bearing the name of a write-in candidate had been placed on the ballot. The committee also found invalid seven ballots upon which stickers had been placed over or partially over marks for the other candidate.

Ballot Marked for Both Candidates

§ 37.15 Where the name of a write-in candidate has been written in, or placed on the ballot by sticker, and the box opposite the name of the other candidate has also been marked, a ballot will be declared invalid.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections ruled invalid 28 ballots, on the ground that a voter had voted twice on the same ballot for the same office.

Failure to Mark in Designated Place

§ 37.16 Where the intent of the voter can be ascertained, a vote is valid even though the voter fails to mark a cross in the square provided on the ballot.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections ruled that 415 ballots which had the name of a write-in candidate written in, or placed on the ballot by sticker, but which did not contain any mark in the box opposite the name, were valid. In ruling that

the cross in the box opposite the name was not necessary, the committee cited the election contest of Tague v Fitzgerald (6 Cannon's Precedents § 96).

Necessity of Detaching Stub From Ballot

§ 37.17 A ballot will be invalid if it does not have the stub detached as required by state law.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections cited an Arkansas statute which required that the voter detach the stub from the ballot and deposit it separately, in ruling that each of 48 ballots which did not have the stubs detached were invalid. The committee also cited a Kentucky case which declared that detaching the stub is mandatory in order to comply with requirements for preserving the secrecy of the ballot.

Marking With Improper Instrument

§ 37.18 An elections committee has regarded state laws as merely directory which provided that ballots were invalid if marked with some instrument other than a blue pencil.

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House (§ 59.1, infra), the Committee on Elections ruled that 436 ballots that were marked with other than a blue pencil were valid, despite Indiana court decisions that had invalidated ballots marked with ink or lead pencil. The committee cited House precedents, Goodich v Bullock and Kearby v Abbott (2 Hinds' Precedents, §§ 1038, 1076 respectively), in which the House had held state statutory requirements that ballots be marked with designated instruments to be directory, and not mandatory.

Integrity of Ballots

§ 37.19 The integrity of ballots is preserved where it is shown that election officials have supervised the counting and storage of such ballots in conformity with state law.

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois contest, a contention that the integrity of the ballots had not been preserved was rejected by the Committee on Elections majority, where it was found that the ballots had been preserved as provided by law and kept under the supervision and control of the clerk of the Board of Election Commissioners, and that the ballot boxes were all opened

under his supervision, and that after being counted the ballots were replaced in boxes as required by law and put in the proper depository.

§ 37.20 A committee on elections refused to conduct a partial recount, in part because contestant failed to prove such proper custody of ballots as to reasonably prevent the opportunity for tampering with them.

In O'Connor v Disney (§ 46.3, infra), the committee on elections applied the principle that, to entitle a contestant in an election case to an examination of the ballots, he must establish, in part, that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them. In this case, some actual evidence of tampering with the ballot box existed.

Ballot Tallies

§ 37.21 An uncorroborated tally of ballots by contestant, taken without the knowledge of contestee during an examination thereof by both parties, will be rejected by an elections committee as an inadmissible self-serving declaration.

In Chandler v Burnham (§ 47.4, infra), a 1934 California contest, the official returns gave a plurality of 518 votes to contestee from a total of 87,061 votes cast. At the time, state law did not provide machinery for conducting a recount. Contestant alleged that his own informal recount of approximately one-third of the ballots cast showed that he had been elected. He contended that during the taking of testimony under subpena, at which time the ballots had been examined in the presence of both parties and their counsel, he had kept a tally of votes cast, including certain ballots he declared to be void or otherwise improper. The committee found that since contestee had not known that contestant was conducting such a tally, and was not given the opportunity to identify the ballots tallied, the testimony of contestant was uncorroborated and constituted a self-serving declaration of no probative value. The committee therefore ruled out, as inadmissible, evidence concerning the tally as well as the tally itself. The committee report was also critical of inconsistent or contradictory allegations it attributed to contestant—namely, that on the one hand, an examination of the ballots as shown by his tally indicated that he had been elected

and, on the other hand, that the ballots were not preserved and returned in the manner required by law. The committee ruled that these dual contentions could not be maintained, and indicated that votes could not be asserted as legal for one purpose and illegal for another.

§ 38. Determination of Voter Intention

Voter Intention as Paramount Concern

§ 38.1 In the absence of proof of fraud, the intent of the voter rather than a showing of irregular official conduct should govern the decision whether to disenfranchise those voters.

In the 1933 Maine contested election of Brewster v Utterback (§ 47.2, infra), after the contestant had apparently abandoned his allegations of fraud and relied upon proof of negligence and irregularities by officials to support his contest, the committee accepted the recommendations of an advisory opinion of the Supreme Court of Maine rendered to the Governor and his executive council. Accordingly, the committee refused to "disenfranchise the voters in the 16 precincts . . . because of some alleged breach of official duty of the election of officers."

§ 38.2 An elections committee has applied state laws that required ballots not be counted if the voter's choice could not be ascertained for any reason.

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the Committee on House Administration considered 142 disputed regular ballots and applied the state law which required that a ballot could not be counted "if for any reason it is impossible to determine the voter's choice." The application of the law made little difference, however, as the committee determined that 57 votes had been cast for each candidate and that 28 votes could not be ascertained.

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

In Fox v Higgins (§ 47.8, infra), a 1934 Connecticut election con-