

**where the disputed ballots are so few in number that, even if disregarded, they would not change the result of the election.**

In *Miller v Cooper* (§ 48.3, *infra*), involving a 1936 contest in the 19th Congressional District of Ohio, the contestant alleged that certain irregularities and frauds had occurred in Mahoning County, but not in the other two counties of the district. The committee found some irregularities with respect to the destruction of ballots, tabulations of the votes cast, and the method of conducting the election in Mahoning County. The committee further found, however, that even if it should disregard entirely the ballots cast in Mahoning County, it would not affect enough votes to change the result of the election.

### *State Court Recount*

**§ 39.6 A committee on elections stated that it was not bound by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.**

In *Kent v Coyle* (§ 46.1, *infra*), a partial recount was conducted by a state court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

## **§ 40. Grounds**

The precedents indicate that a recount will be ordered only when the contestant has satisfied his burden of proving that such recount would alter the result of the election,<sup>(12)</sup> based on evidence sufficient to raise at least a presumption of irregularity or fraud.<sup>(13)</sup> A mere suggestion of, or a speculative possibility of, error, is not sufficient for an election committee to order a recount.<sup>(14)</sup>

### *Justification for Recount*

**§ 40.1 An application for a recount of votes in an election contest must be based on evidence sufficient to raise at least a presumption of irregularity or fraud, and a re-**

12. See §§ 40.5–40.7, *infra*.

13. See §§ 40.1, 40.4, *infra*.

14. See §§ 40.1, 40.2, *infra*.

**count will not be ordered on the mere suggestion of possible error.**

In *Swanson v Harrington* (§ 50.4, *infra*), a 1940 Iowa contest, the Committee on Elections determined the central issue to be whether the contestant could show, by a preponderance of the evidence, that an application for recount was justified due to fraud or irregularity. The committee concluded that contestant had failed to carry the burden of showing that, due to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved.

**§ 40.2 An elections committee will not conduct a recount until the necessity therefor has been established by evidence showing a probability of error.**

In the contested elections case of *Stevens v Blackney* from Michigan (§ 55.3, *infra*), presented to the House on Sept. 22, 1949, the elections subcommittee informed a contestant prior to his taking any testimony that a recount would be ordered by the committee in precincts where the official returns were impugned by evidence. The committee rationale was that the probability of error should first be

shown in order to avoid subjecting a Member whose election had been certified to “fishing expeditions” and “frivolous contests.”

***Burden of Showing Fraud, Irregularity, or Mistake***

**§ 40.3 Where a party to an election contest claims that a recount of the ballots was in error, in that he was not credited with votes from a certain ballot box, he has the burden of proof to establish that through fraud or mistake such votes were removed from the box before the recount.**

In *Roy v Jenks* (§ 49.1, *infra*), a 1938 New Hampshire contest, the defeated candidate, Alphonse Roy, applied to the secretary of state of New Hampshire for a recount pursuant to state law. At the recount, at which both parties were represented, discrepancies were found resulting in a tie vote of 51,690 votes for each candidate. Both candidates appealed to the ballot-law commission for final determination. Subsequently, Arthur B. Jenks notified the Governor that he had obtained proof of a 34- or 36-vote discrepancy in his favor in the town of Newton, New Hampshire, and petitioned for a rehearing. The Committee on Elections placed the burden of

proof on Mr. Jenks to establish that there were 34 votes cast for him in the Newton precinct ballot box, which were not given to him on either recount, and “that these ballots by fraud or mistake were removed from this ballot box at some time before a recount. . . .” The committee accepted the original recount of the Newton ballots as the best evidence of the number of votes cast, and declared Mr. Roy elected by a majority.

**§ 40.4 The House will not order an elections committee to conduct a recount until the necessity has been established by evidence which warrants the presumption of fraud or irregularity.**

In the 1949 Michigan contested election of *Stevens v Blackney* (§55.3, *infra*), the House followed the majority report by declining to order a recount because the contestant had offered no evidence impugning the official returns. The rationale was that, unless error were first demonstrated, the Committee on Elections would be burdened with “frivolous contests”; and there was no proof that a House-conducted recount would be more accurate than the original count in any event.

***Burden of Proving Recount Would Change Election Result***

**§ 40.5 Where the contestant seeks a complete recount of votes, based on a partial recount, he has the burden of proving that such recount would change the result of the election—that is, would establish a majority for him.**

In *Moreland v Schuetz* (§52.3, *infra*), a 1944 Illinois contest, the committee found that a partial recount, which covered 42 percent of total votes cast and included over 56 percent of votes cast for contestee, reduced contestee’s majority, but not enough to change the outcome. The committee ruled that contestant had failed to sustain his burden of proof, and indicated that the partial recount was by no means conclusive proof that the trend of the change as shown by the recount in favor of the contestant would have continued throughout the recount of all ballots.

**§ 40.6 An election committee declared that it could proceed to a recount if some substantial allegations of irregularity or fraud are alleged, and the likelihood exists that the result of the election would be different**

**were it not for such irregularity or fraud.**

See the 1965 Iowa election contest of Peterson v Gross (§61.3, *infra*), where the election committee declined to order a recount and recommended dismissal of the contest, a recommendation with which the House later agreed, after finding that the contestant (who lost by 419 votes) had not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct. The contestant had admitted that he was not alleging fraud on the part of anyone.

**§ 40.7 A committee on elections will not order a recount of ballots where the contestant has merely shown errors in the official return insufficient to change the results of the election.**

In the 1934 Illinois contested election of Weber v Simpson (§47.16, *infra*), the contestee won by a plurality of 1,222 votes and the contestant requested that the committee order a recount after his examination of the tally sheets in all the 516 precincts in the district found discrepancies reducing the contestee's plurality to 920 votes. The committee denied the request, however, and rec-

ommended the adoption of a resolution that the contestee was entitled to the seat.

**§ 40.8 A committee on elections refused to conduct a partial recount where contestant failed to sustain the burden of proving fraud or irregularities sufficient to change the result of the election.**

In addition to failure to sustain the burden of proof of fraud as noted above, the contestant in O'Connor v Disney (§46.3, *infra*), was held not to have sufficiently demonstrated that proper custody of ballots was maintained subsequent to the election.

## **§ 41. Procedure**

### *Exhaustion of State Remedies*

**§ 41.1 To obtain an order from the House for a recount of votes in an election contest, contestant should show that he has exhausted state court remedies to obtain a recount under state law.**

In Swanson v Harrington (§50.4, *infra*), a 1940 Iowa contest, contestant claimed that certain votes had been cast by persons only temporarily within the district, and therefore unqualified, and sought an order from the