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-

test, several witnesses testified that, in addition to their regular party affiliation, they had intended to vote for repeal of the 18th amendment, and had mistakenly voted for the "Wet Party." The committee noted that such ballots were not of the ambiguous or doubtful type, so as to permit consideration of the circumstances surrounding the election and explaining the ballot. The committee found the question of intention of the voters of such ballots to be a matter of conjecture. It concluded that the ballots were unreliable and properly rejected.

Effect of State Law

§ 38.4 Although the House of Representatives generally follows state law and the rulings of state courts in resolving election contests, this is not necessarily so with respect to the validity of ballots where the intention of the voter is clear and there is no evidence of fraud.

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 report posed, as the central issue to be decided, the question of whether the "House will necessarily follow State Court decisions in ruling on validity of questionable ballots, particularly when those decisions seem to be contrary to the intention of the voter in honestly trying to indicate a choice between candidates." The report then cited several "instances in which the House, through its Committee on Elections, has held that decisions of a state court are not binding on the House in the examination of ballots to correct deliberate or inadvertent mistakes and errors," specifically citing Brown v Hicks (6 Cannon's Precedents § 143), and Carney v Smith (6 Cannon's Precedents § 146).

§ 38.5 Where uncertainty existed in state law with respect to the validity of write-in votes in general elections, an elections committee decided that the will of the voters should not be invalidated by the uncertainty in the state law.

In the 1959 Arkansas investigation of the right of Dale Alford (§ 58.1, infra), to a seat in Congress, following his election victory as a write-in candidate, the elections committee disregarded an uncertainty which existed in state law with respect to write-in votes in general elections, and decided that the will of the voters should not be invalidated by an

uncertainty in state law. The committee noted that it had been the custom in Arkansas to accept write-in votes, that spaces had been provided on the ballots for write-in votes, and the House had always recognized the right of a voter to write in the name of his choice.

K. INSPECTION AND RECOUNT OF BALLOTS

§ 39. Generally

Recount by Stipulation of Parties

§ 39.1 By stipulation, the parties may agree to conduct a recount during an extension of time granted by the House for the taking of testimony.

In Moreland v Schuetz (§ 52.3, infra), a 1944 Illinois contest, the parties to an election contest agreed to conduct a recount in those wards where the vote had been questioned by contestant.

§ 39.2 The parties to an election contest may conduct their own recount, showing that one of the parties has received a majority of the votes cast, and this may be made the basis of a stipulation upon which the House may act.

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, the parties, having been denied a joint application for recount by the House, agreed to conduct their own recount, the results of which showed that contestee had received a majority of all votes cast. The House agreed to a resolution dismissing the case, based on a stipulation of the parties to that effect.

Unsupervised Recount

§ 39.3 The contestant may not, of his own accord and without evidence, conduct a recount of ballots without supervision of the House.

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), prior to presentation of the contest to the House, the contestant, on Feb. 10, 1949, applied to the Committee on House Administration to send its agents to a conduct recount. The committee, however, declined to do so on the ground that the probability of error should first be shown. The contestant then had a notary public of his own selection issue a subpena duces tecum to