HOUSE . . . . . No. 28.

Commonwealth of Massachusetts.

House of Representatives, Jan. 26, 1883.

The Committee on Elections, to whom was referred the petition of Franklin Pease, for the seat as representative from the Fourth Franklin Representative District, submit the following

REPORT:

The Fourth Franklin Representative District is composed of the towns of Deerfield, Conway and Whately. At the election in November, there were three candidates for representative, — Mr. Foster, Mr. Allis, and the petitioner, Mr. Pease. The vote of the several towns in said district was, according to the returns, as follows: —

	Foster.	Allis.	Pease.	Total.
Deerfield, . . .	252	132	49	433
Conway, . . .	6	74	184	264
Whately, . . .	60	112	32	204
	318	318	265	901

From the above table it will be seen that the total vote of the town of Deerfield was almost one-half of the total vote of the entire district — nearly equal to the total combined vote of the other towns. In Deerfield, the petitioner received but 49 votes out of a total of 433. In Conway and Whately, taken together, he received a plurality. He now

asks that, in consequence of an alleged irregularity on the part of the selectmen of the town of Deerfield, the entire vote of said town shall be thrown out, and that he be declared elected, as having received a plurality in the remaining towns.

In his petition he also alleges that the ballots were not sealed up before the adjournment of the meeting at which they were cast, as the law directs, and that there were various other irregularities in the conduct of said election in the town of Deerfield. But, at the hearing, he expressly waived this, admitting that the ballots were sealed, and that the conduct of the election was in all respects regular, with the following exception.

The selectmen of the town of Deerfield, following a custom in vogue there for the past three or four years, appointed three tellers at the election, to sort and count the ballots. These tellers were admitted to be well known and highly respected citizens, of undoubted integrity; but they were not members of the board of selectmen, nor were they sworn. They sat at a table, some three or four feet distant from where the selectmen were receiving the ballots, and from time to time, during the day, the ballots were removed from the ballot-box by the selectmen, and turned over to the tellers, who then sorted and counted them. No member of the board of selectmen at any time personally sorted or counted any of the ballots, nor was any attempt made by them, or any of them, to verify the figures given by the tellers. They accepted the result as correct, and made their official return in accordance therewith. No claim, however, was made that, so far as the petitioner is concerned, the count was incorrect, nor that he would, under any circumstances, be entitled to more than the forty-nine votes with which he was credited.

The petitioner was represented at the hearing by counsel, who submitted a very able and elaborate brief, reviewing the precedents, and claiming that, as the selectmen had not followed the strict letter of the statute, and themselves in person "sorted and counted the ballots," the election in their town was illegal and void.

He admits, however, that although this question has been

many times before the House, he "cannot find that the House has ever directly decided" it. By his own showing, from the year 1852 down to the present time, numerous cases have arisen involving the question of the right of selectmen to appoint tellers, and committees have administered orthodox condemnation; but not one has ever gone so far as to hold that their appointment invalidated the election. Is it not fair to presume, then, that if it were a ground of avoidance some one of the committees would have so held? But he admits that none did. And he is obliged to exercise very considerable ingenuity to overcome the force of the case of Arnold *v.* Champney (House document 64 of 1867). In this case, the matter was squarely before the committee, and they were urged to declare the election null and void. They declined to formally pronounce an opinion, and reported the facts to the House. The House subsequently gave the petitioner leave to withdraw. Mr. Pease, through his counsel, claims that this case is not authority, because there is nothing to show the grounds upon which leave to withdraw was given. But the question was distinctly submitted to the House for its decision, and there seems to be no reason to doubt that such decision was involved in the vote. At all events, the case has since been regarded as establishing the doctrine that the appointment of tellers is "an insufficient cause for avoiding an election."

Your Committee, in reaching a decision, have been guided, to a great degree, by the words of Mr. Justice Morton, in the case of Elisha Strong, petitioner, 20 Pickering, 491, who, after stating the provisions of the statute touching the duties of the selectmen (among them, at elections, "to receive, sort and count the ballots") and town clerk, says: —

"What shall be the consequence of an omission by the selectmen or town clerk to perform any of these prescribed duties, and upon whom shall it fall? For a wilful neglect of duty the officers would undoubtedly be liable to punishment; but shall the whole town be disfranchised by reason of the fraud or negligence of their officers? This would be punishing the innocent for the faults of the guilty. It would be more just, and more consonant to the genius and

spirit of our institutions, to inflict severe penalties upon the misconduct, intentional or accidental, of the officers, but to receive the votes whenever they can be ascertained with reasonable certainty."

In this case, the result of the election, so far as the petitioner is concerned, can be ascertained, not only with reasonable, but with absolute certainty. It is evident, from the state of the polls, and from the evidence at the hearing, that Mr. Pease is not the choice of the district, and if a new election were to be held he could not be elected. His only chance of obtaining a seat in this House rests upon this technicality.

It is fair to say that the selectmen of the town of Deerfield do not admit that their act was illegal. They claim that they did constructively sort and count the ballots, that they had a perfect legal right to appoint tellers, that it is in accordance with precedent in their own town, and that the practice has prevailed for many years in most of the large towns in the Commonwealth.

Whether they had or had not the legal right, your Committee do not undertake to decide. At the worst theirs was an honest, even if erroneous, view of the law. They acted in perfect good faith, and the petitioner was in no way injured by their act. And your Committee cannot believe it wise or just, simply because of this honest error (if it is an error), to disfranchise an entire town, and seat a candidate who received but 49 votes out of 433 cast in the town, and but 265 votes out of 901 cast in the district.

They therefore recommend that the petitioner have leave to withdraw.

For the Committee,

GEORGE A. O. ERNST,
Chairman.