



HENRY ROGERS SELDEN

COURT OF APPEALS, 1862-1864

Frances Murray

Please see Albert M. Rosenblatt's *New York Court of Appeals* on page 467 for a useful introduction.

—The Editors

DESCRIBED BY A CONTEMPORARY HISTORIAN¹ as one of the most able and accomplished judges of the New York Court of Appeals, Henry R. Selden was distantly related to the noted English scholar, lawyer, and member of the Long Parliament, John Selden (1584-1654).² Henry Rogers Selden, the third son of Calvin Selden and Phoebe Ely Sel-

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¹ Sylvester, Nathaniel B. *History of Saratoga County, N.Y.* (Philadelphia. Everts & Ensign 1878) and Proctor, Lucien B. *The Bench and Bar of New York* (Diossy & Co., 1870).

² In 1877, in his honor, the Selden Society was founded to encourage the study and advance the knowledge of the history of English law. It still flourishes, and a Selden Society has been formed in America.

Frances Murray

den, was born at Tiffany Farm in North Lyme, Connecticut, on October 14, 1805. He had two older brothers and three sisters. An ancestor, Thomas Selden, had emigrated to America in 1636, and the Puritan family had settled in New England. When Henry was 15, his father died and a kindly step-uncle, Erastus, assumed responsibility for his upbringing. He was educated at local institutions. In 1824, at the age of 19, he served in the 3d Regiment, 3d Brigade, of the Connecticut militia.

The following year, 1825, he moved to Rochester. The journey was arduous – involving travel from Lyme to Saybrook in an oxcart, from there to New York City on a sailing ship, then by the newly established steamboat line to Albany, and, finally, by packet boat on the Erie Canal to Rochester.³ There, he joined his sister, Elizabeth, and her husband and his brother, Samuel Lee Selden, all of whom had recently relocated to the Rochester area. On his arrival, he began his legal studies in the law firm in which his brother was partner – Gardiner and Selden⁴ – and was admitted to the bar in 1830.

With Simeon B. Jewett as partner, he began a law practice on Ridge Road in Clarkson, Monroe County, 16 miles northwest of Rochester. It was a thriving village located on the great turnpike leading to Buffalo and the West. During this time (1832), he was also commissioned as judge avocate, 3d Division of Cavalry, New York militia.

Rising rapidly to prominence among American lawyers, he was held also in the highest regard as a teacher and mentor, as evidenced in the tribute paid to him by his former student, patent attorney William Macomber, in his 1909 treatise entitled *The Fixed Law of Patents*: “... one of our greatest patent lawyers, one of our great judges, and the greatest scholar of the law I have ever known.”

³ Selden, Clara Sayre. *Family Sketches* (1939). Manuscript available at the Smithsonian Institute (<http://americanhistory.si.edu/archives/ac-i.htm>) and the Rochester Public Library, Local History Section.

⁴ Addison Gardiner would later serve as lieutenant governor and as an associate judge of the New York Court of Appeals from 1847-53 and as chief judge from 1854-55. Samuel L. Selden was an associate judge of the Court of Appeals from 1856-61 and chief judge in 1862.

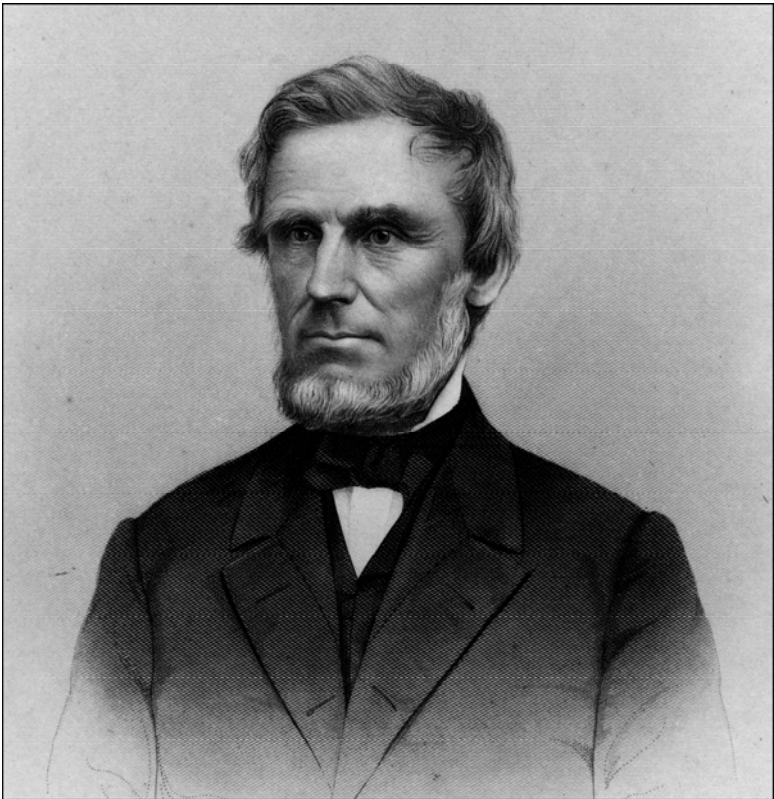
Henry Rogers Selden

Henry Selden married Laura Ann Baldwin of Clarkson on September 25, 1834. They had 12 children, 5 of whom survived infancy. Their eldest son, lawyer and inventor George Baldwin Selden, received a patent for “an improved road-engine,” the gas-powered automobile, and later engaged in litigation with Henry Ford over the patent. The state of New York has placed a historic marker outside their red brick house on Ridge Road in Clarkson that reads:

Henry R. Selden
1805-1885

Lieut. Gov. and Judge lived here.

George B. Selden, inventor of the
“Selden patent” for automobiles was born here



Frances Murray

By 1847, Rochester was emerging as a major center in western New York, and Henry Selden opened a law office at 5 Reynolds Arcade. For a time, he still lived in Clarkson, commuting to Rochester daily in a buggy drawn by two horses named Polly and Dolly. In 1859, the Selden family moved from Clarkson to Rochester. Their new home, located on South Avenue, was called "The Oaks."⁵ Henry Selden was admitted to practice before the United States Supreme Court in 1851 and, that same year, was appointed New York State reporter by the New York Court of Appeals, a position he held until 1854. In 1858, Yale conferred upon him an honorary degree of LL.D. In the 1870s, he authored *Selden's Notes of Cases in the Court of Appeals* (1st and 2d editions).

STATE POLITICS

Henry Selden fervently espoused the antislavery cause and in pursuance of this principle played a prominent part in the 1854 organization of the Republican Party. In 1856, he was elected lieutenant governor of New York as his running mate, John A. King, was elected governor. They were the first two members of the new party to enter public service. Selden was in Europe on business during the campaign, but his reputation was so strong throughout the state that he was elected in absentia with a very handsome majority. Historian William F. Peck⁶ stated that, as lieutenant governor, Henry Selden presided over the New York State senate at a time when skilled parliamentarians belonging to a party hostile to the Republicans were among the most influential and powerful members, but none of Lieutenant-Governor Selden's rulings ever suffered "the reproof of dissent." There was a confidence in his good judgment, his honesty, and his legal acumen. Mr. Peck stated:

⁵ This property, comprising three acres of land on an eminence commanding a view of the city, later became the original building of the Hahnemann Hospital, Pinnacle Highlands, opened in 1891 (http://www.rochester.lib.ny.us/~rochhist/v9_1947/v9i2-3.pdf).

⁶ Peck, William F. *Semi-Centennial History of the City of Rochester* (1884).

Henry Rogers Selden

The urbanity with which he presided in the Senate had so noticeable a judicial cast, that in July 1862, upon the retirement of his brother, Samuel Lee Selden, from the Chief Judgeship of the Court of Appeals, Governor Edwin D. Morgan appointed Henry Selden to the vacancy.

Honorable Hiram Denio, then eldest Associate Judge would, under the constitution of 1846, have succeeded as chief Judge in the course but for the Governor's appointment. This fact the generous-hearted appointee recognized, notwithstanding his clear right to the chief judgeship, and very characteristically deferred to, by waiving everything in Judge Denio's behalf and permitting that eminent jurist to go into and occupy the exalted judicial place at once, himself content to take the subordinate place of associate judge.

Judge Selden was popularly elected to the court for a full term in the election of 1863. He resigned due to ill health⁷ in January 1865 and departed immediately to Europe for treatment, which, fortunately, ameliorated the problem.

In the winter of 1865, having recovered his health, former Judge Selden returned from Europe and ran for a seat in the New York Assembly. He was elected, representing Monroe County, and resumed private practice in partnership with his son-in-law, Theodore Bacon. Following the reorganization of the New York Court of Appeals by the constitutional amendment of 1869, Henry Selden consented to be the Republican candidate for chief judge and ran against Sanford E. Church "knowing full well that political conditions at the time precluded the possibility of Republican success."⁸

In 1871, Henry Selden and his family moved to The Grove, the residence of his brother, the late Samuel L. Selden, on the corner of

⁷ He consulted a noted London specialist about the paralysis of the muscles of his larynx. A tracheotomy was advised, and a silver tube was inserted in his throat. Later, an instrument-maker in Philadelphia fabricated a tube with a valve controlled by a hollow aluminum ball that closed automatically on speaking (Selden, Clara Sayre. *Family Sketches* [see n. 3]).

⁸ From *Semi-Centennial History of the City of Rochester* by William F. Peck (1884) pp. 729-31. <http://www.rootsweb.com/~nymonroe/bios/biographies025.htm>.

Gibbs Street and Grove Place in Rochester. This building, beautifully restored, today houses the civil rights law practice of Van Henri White. It is also the location of the Center for the Study of Civil and Human Rights Laws, with exhibits devoted to Frederick Douglass, Harriet Tubman, and Susan B. Anthony.

THE ABOLITIONIST MOVEMENT

Henry Selden's adherence to antislavery principles was practical as well as philosophical. He told his son, George Baldwin Selden,⁹ that notwithstanding the *Dred Scott* decision, he would die before surrendering a fugitive slave. In Clara Sayre Selden's *Family Sketches*, there is a passage describing his involvement in preventing the arrest of fugitive slave Frederick Douglass. When John Brown was captured on October 17, 1859, following his raid on the U.S. Arsenal at Harper's Ferry, Virginia, his carpet bag contained letters from Frederick Douglass and other abolitionists. Federal warrants were issued for their arrest. Frederick Douglass, then in Philadelphia, left immediately for Rochester on an Erie train. By chance, Henry Selden, also traveling to Rochester, overheard the federal marshall bragging that he had come to arrest "a runaway nigger." Learning that the marshall proposed to stop for supper at the Brackett House, Selden went immediately to Douglass's house to tell him that the governor of New York State would be obliged to surrender him to Virginia and that, while the people of Rochester would not permit him to be taken south, in order to avoid confrontation and bloodshed, Douglass should quit the country. Acting on this advice, Douglas rode a horse, loaned by Mr. Selden, to Charlotte from where a sailing boat, owned by a fisherman who was a link in the "underground railroad," carried him safely to Canada. Clara Sayre Selden states: "the name of the man whose timely warning had enabled him to escape was not given in 'the Life and Times of Frederick Douglas' till a reprint after Judge Selden died in 1885."

⁹ Selden, Clara Sayre. *Family Sketches* (see n. 3).

NATIONAL POLITICS

Henry Selden was a delegate to the Republican Party convention in Chicago in 1860 where he supported William H. Seward for the presidency. Following the nomination of another candidate, Abraham Lincoln, as the party's candidate for President, Selden was offered the nomination for vice president.¹⁰ He declined both because he did not desire the honor and the worsening of a longstanding health problem. At his suggestion, Maine Senator Hannibal Hamlin was offered a place on the ticket. Twelve years later, in 1872, Selden was one of the callers of the Liberal Republican convention at Cincinnati. Dissatisfied with the result – the nomination of Horace Greeley for President – he withdrew from political involvement.

THE SUFFRAGIST MOVEMENT

The most celebrated case of his career was his defense of Susan B. Anthony. She and Henry Selden had known each other for many years, through the antislavery movement and Frederick Douglass. When consulted by her concerning a woman's suffrage, both he and his brother, former Chief Judge Samuel Lee Selden, advised her that she had the right to vote. In a letter to suffragist Elizabeth Cady Stanton, Anthony wrote:

Well I have been & gone & done it!! – positively voted the Republican ticket – strait this a.m. at 7 o'clock – & swore my vote in at that – was registered on Friday ... then on Sunday others some 20 or thirty other women tried to register, but all save two were refused ... Amy Post was rejected & she will immediately bring action for that ... & Hon Henry R. Selden will be our Counsel – he has read up the law & all of our arguments & is satisfied that we our right & ditto the Old Judge Selden – his elder brother.

¹⁰ Biographical Sketch. Rochester and the Post Express (1895); Obituary. New York Daily Tribune, Sep. 19, 1885, p. 5, col. 5.

Frances Murray

A Democratic poll watcher named Sylvester Lewis¹¹ filed a complaint charging Anthony with casting an illegal vote. United States Commissioner William C. Storrs acted on Lewis's complaint by issuing a warrant for Anthony's arrest on November 14, 1872. The warrant charged Anthony with voting in a federal election "without having a lawful right to vote and in violation of section 19 of an act of Congress" enacted in 1870, commonly called the Enforcement Act. Four days later, she was taken to the commissioner's examination room, which, she was quick to note, was the same room where in former days fugitive slaves were examined and returned to their masters. Anthony refused to enter a plea, and Storrs scheduled a preliminary examination for November 29. In a letter dated November 27, 1872, Henry Selden reacted to news of her arrest:

In my opinion, the idea that you can be charged with a crime on account of voting, or offering to vote, when you honestly believed yourself entitled to vote, is simply preposterous, whether your belief were right or wrong. However, the learned gentlemen engaged in this movement seem to suppose they can make a crime out of your honest deposit of your ballot, and perhaps they can find a respectable court of jury that will be of their opinion. If they do so, I shall be greatly disappointed.

However, at the close of the preliminary examination, Commissioner Storrs concluded that Anthony probably violated the law. The commissioner determined to hold her for federal trial, fixing bail at \$500. Anthony – alone among those charged with Election Day offenses – refused bail, and Commissioner Storrs ordered her held in the custody of a deputy marshal until the grand jury had a chance to meet in January to consider issuing an indictment. In a December 26 letter, Anthony wrote confidently: "We shall be rescued from the Marshall hands on a Writ of Habeas Corpus – & case carried to the Supreme Court of the U.S. – the speediest process of getting there."

¹¹ Selden, Clara Sayre. *Family Sketches* (see n. 3). A full description of the arrest and trial can be found at: <http://www.law.umkc.edu/faculty/projects/ftrials/anthony/sbaaccount.html>.

Henry Rogers Selden

At a hearing in Albany before Judge Nathan K. Hall on January 21, 1873, her counsel were Henry Selden and John Van Voorhis.¹² Henry Selden asked U.S. District Judge Hall to issue a writ of habeas corpus ordering the release of Anthony from the marshal's custody and argued that she had a constitutional right to vote and, in any event, had no criminal intent.

Judge Hall denied Selden's request and said he would "allow defendant to go to the Supreme Court of the United States." He then raised Anthony's bail from \$500 to \$1,000. Anthony again refused to pay, but Selden decided to pay Anthony's bail with money from his own bank account. Following the hearing, Anthony's other lawyer, John Van Voorhis, told Anthony that Selden's decision to pay her bail meant "you've lost your chance to get your case before the Supreme Court." Shaken by the news, Anthony confronted Selden. By way of explanation, he stated: "I could not see a lady I respected put in jail."

On January 24, 1873, a grand jury of 20 men returned an indictment against Anthony, charging her with "knowingly, wrongfully, and unlawfully" voting for a member of Congress "without having a lawful right to vote ... the said Susan B. Anthony being then and there a person of the female sex." The trial was set for May 1873.

In the interim, Miss Anthony undertook an intensive campaign to publicize her side of the case throughout Monroe County, rendering the selection of an impartial jury difficult. The case was transferred to Ontario County, where she was tried in the courthouse in Canandaigua on June 17-18, 1873, by the U.S. Circuit Court, Northern District, of New York, the Hon. Ward Hunt presiding.¹³ Susan B. Anthony was declared incompetent to be a witness in her own defense because she was a woman. Henry Selden then testified that she had voted on his advice, and his subsequent

¹² He is the grandfather of John Van Voorhis (1897-1983) who served on the New York Court of Appeals 1954-67.

¹³ Judge Hunt (1810-86) served on the New York Court of Appeals (1866-68) and the United States Supreme Court (1872-82).

argument to the court lasted over three hours. His address, in part, stated:

No injustice can be greater than to deny to any class of citizens not guilty of crime, a share in the political power of a state, that is, all share in the choice of rulers, and in the making and administration of the laws. Persons to which such share is denied, are essentially slaves, because they hold their rights, if they can be said to have any, subject to the will of those who hold the political power. For this reason it has been found necessary to give the ballot to the emancipated slaves. Until this was one their emancipation was far from complete. Without a share in the political powers of the state, no class of citizens has any security for its rights, and the history of nations to which I briefly alluded, shows that women constitute no exception to the universality of this rule.¹⁴

It was all to no avail. Judge Hunt, who had written his opinion before hearing any arguments, directed the jury to find Anthony guilty. Judge Hunt stated that franchise was a privilege, not a right, and its regulation was a matter of state regulation, not federal. Selden's request that the jury be individually polled was refused, as was his application for a new trial. Susan B. Anthony was sentenced to pay a fine of \$100 plus costs. She refused, and Judge Hunt, realizing that imprisonment would give her an opportunity to appeal, ordered that she should not be imprisoned until the fine was paid.¹⁵

TELEGRAPHY

Samuel L. Selden, Henry R. Selden's elder brother, was a major force in the early commercial applications of telegraphy in western New York. Henry Selden was one of the investors in his brother's ventures and was president of the New York and Mississippi Valley Telegraph Co.,¹⁶ which was founded in 1851. Five

¹⁴ <http://www.pbs.org/pov/pov2008/election/wvote/selden.html>.

¹⁵ Rochester History, Vol. vii, No. 2 (Apr. 1945).

¹⁶ Smithsonian Institute, Coll #205, Box 64, Folder 6.

Henry Rogers Selden

years later, this company became the Western Union Telegraph Company. Minutes of the board (now part of the Smithsonian Institute's collection) indicate that Henry Selden was appointed counsel to the corporation on March 17, 1856. In July 1874, ill health forced Samuel Selden's resignation from the board of directors, and Henry Selden was elected to the board in his place.

During his lifetime, and for many years thereafter, commendation of Henry Selden's integrity and legal acumen were common. The residents of Brookhaven Township's "Westfield" decided to rename the town "Selden" in his honor.¹⁷ Legal scholars, too, paid tribute. In the esteemed 1905 discourse *A Treatise on Equity Jurisprudence* (and still, in 2005, a leading treatise on the subject), author John Norton Pomeroy, discussed *Ireland v City of Rochester* (51 Barb. 415), in which Henry R. Selden was the counsel to the plaintiff. Quoting Mr. Selden's argument that "avoiding a multiplicity of law suits is good ground for equity jurisdiction," Mr. Pomeroy continues:

The argument of counsel is not often cited as authority. But all who know Mr. Selden will agree with me that no member of the bar of the state of New York had a more extensive knowledge of or a greater familiarity with the principles of equity jurisprudence and jurisdiction than he.

Judge Selden died at his residence, The Grove, in Rochester, New York, on September 18, 1885, and was buried at Mount Hope Cemetery. The *New York Daily Tribune* obituary (September 19, 1885) paid tribute stating: "As a man among men, a lawyer at the bar, as a magistrate, he was the peer of the noblest of those who surrounded him."

An obituary that appeared in the *Albany Law Journal* on October 3, 1885, concluded:

His dignity, purity and great learning are familiar to the lawyers of our State, and his work as a reporter and a judge has rendered him famous in other States. He will always be

¹⁷ http://long-island.com/Selden/town_content.htm.

Frances Murray

ranked among the leading lawyers of our State, one of the not very numerous body worthy of the often-used but seldom deserved appellation of jurist.

PROGENY

Direct descendants include Sherman Selden of Pittsford, N.Y., and his daughter, Samara Selden; Stefanie Selden, Esq., of Boulder, Colo.; Roxanne Selden of Seattle, Wash.; and Jeffrey Selden of Colo.

SOURCES CONSULTED

Albany Law Journal on Oct. 3, 1885.

Archives of the Smithsonian Institute.

McAdam, David. *History of the Bench and Bar of New York*. [New York], 1897, Vol. 1, p. 472.

National Cyclopaedia of American Biography, (1897), Vol. 4, p. 154.

New York Daily Tribune, Sep. 1885.

Peck, William F. *Semi-Centennial History of the City of Rochester* (1884), pp. 729-31.

Proctor, Lucien B. *The Bench and Bar of New-York* (Diossy & Co., 1870).

Rochester History, Vol. vii, No. 2 (Apr. 1945).

Selden, Clara Sayre. *Family Sketches* (1939). Manuscript available at the Smithsonian Institute and the Rochester Public Library, Local History Section.

The Green Bag: An Entertaining Magazine of the Law (1889-1914), Vol. II, p. 283 (1890).

PUBLISHED WRITINGS

Notes of cases decided in the Court of Appeals of the State of New York, to which are added a table of cases and index (Albany: W.C. Little & Co., 1878).

Rights of women to vote: argument of Henry R. Selden on behalf of Susan B. Anthony, on habeas corpus, before the Hon. N.K. Hall, U.S. district judge for the Northern District of New York, at Albany, Jan. 21, 1873.

Argument for the Bay de Noquet & Marquette R.R. Co. and the Marquette & Ontonagon R.R. Co. (Boston: Alfred Mudge & Son, 1872).

Henry Rogers Selden

Speech of Hon. Henry R. Selden, of Monroe, on the New York Central Railroad Fare Bill: in Assembly, Apr. 4, 1866.

Can an obligation for the payment of "gold or silver coin" be discharged by a tender of treasury notes?: an argument submitted to the treasury in the matter of the contract of Nehemiah Osburn, for the construction of a courthouse at Baltimore, Md., May 1866. To the public: we feel called upon, by respect for public opinion and just regard for our own reputations, to reply to the attack made upon us through the *Pennsylvanian*, on the 12th inst. by the proprietors of Morse's Magnetic telegraph (1856).

The New York Court of Appeals Reports, Vol. 5-10 [1851-54] (Albany, H.B. Parsons).

A full report of the trial and conviction of the Rev. Washington Van Zandt, of the Episcopal Church, Rochester, N.Y., for the seduction of Miss Sophia Murdock (16 years of age), a member of his church. To which is added: the speech of Hon. Mark H. Sibley of Canandaigua, for the defense of Henry R. Selden of Clarkson, and Judge Sampson of Rochester, for the prosecution: Together with Judge Dayton's charge, of Lockport, to the jury [Rochester, N.Y.]: M. Miller, 1842.



This extension of the suffrage is regarded by many as a source of danger to the stability of free government. I believe it furnishes the greatest security for free government, as it deprives the mass of the people of all motive for revolution; and that government so based is most safe, not because the whole people are less liable to make mistakes in government ... but because they have no interest which can lead them to such mistakes, or to prevent their correction when made. On the contrary, the world has never seen an aristocracy, whether composed of few or many, powerful enough to control a government, who did not honestly believe that their interest was identical with the public interest, and who did not act persistently in accordance with such belief; and, unfortunately, an aristocracy of sex has not proved an exception to the rule.

Henry R. Selden

*Speech as defense attorney for Susan B. Anthony,
at her trial for voting illegally, June 17, 1873*