1984

Wilfcrd N. Hansen And Vada J. Hansen, Husband And Wife v. John J. Stewart And Alice E.K. Stewart, Husband And Wife : Brief of Respondents, John J. Stewart And Alice E. K. Stewart

IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD N. HANSEN and VERDA J. HANSEN, husband and wife,

Plaintiffs/Appellants,

vs.

Supreme Court No. 19383

JOHN J. STEWART and ALICE E. K. STEWART, husband and wife,

Defendants/Respondents

BRIEF OF RESPONDENTS, JOHN J. STEWART and ALICE E. K. STEWART

Appeal from the Judment and Decision of the
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH
the Honorable Omer J. Call, presiding

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BRIEF OF RESPONDENTS

Supreme Court No. 19383

NATURE OF THE CASE

This action was originally brought to determine the location of a boundary line between property owned by Plaintiffs and property owned by Defendants. Since the location of that boundary line hinged on the location of the northeast corner of the Lot 12, Block 34 of the Providence Farm Survey, and in an attempt to limit and simplify the issues at trial, all parties mutually stipulated to waive all other claims and to proceed to trial on the sole issue of the location of the lot corner, which would in turn establish the south boundary line of Defendants' property and the north boundary line of Plaintiffs' property. The Parties further stipulated that the prevailing party was entitled to judgement for monetary damages in the amount of $5,000.00.

DISPOSITION IN LOWER COURT

Respondents agree in principal with Appellants' statement regarding the disposition of the case in the lower court.

STATEMENT OF FACTS

Defendants purchased the property which is the subject matter of the above-entitled action in 1967. (TV.II, p.74,l.18) Plaintiffs purchased land adjoining Defendants' property on Defendants' southern and eastern boundaries in 1969. (TV.I, p.13, l.12-22) At the time Plaintiffs purchased the property, they were aware of a possible boundary dispute or at least the existence of some problems with the boundary location. (TV.I, p.14, l.18-21, p.35, l.3-13) Shortly after purchasing their property, Plaintiffs began making claims that the fence on Defendants' southern boundary was not the actual boundary line, claiming that the boundary line was actually north of the existing fence extending into property owned by Defendants.

Plaintiffs eventually filed this law suit. Thereafter, Defendants hired a registered land surveyor, Randy Bott, of Century Surveyors, to survey the property to determine the actual boundary. As a result of that survey (often referred to as the "Bott Survey"), it was discovered that the original northeast corner of Lot 12, Block 34, Providence Farm Survey, which was the beginning point of reference for Plaintiffs' legal description, was not where Plaintiffs had claimed it to be. The original northeast corner of Lot 12 was 33 feet south of where Plaintiffs claim the northeast corner to be. (TV.II, p.125, l.3-15) Defendants thereby discovered that their property not only went to the fence on the southern boundary, but extended a few feet beyond (south) the existing fence.

Except for the location of the northeast corner of Lot 12, Block 34, Providence Farm Survey, all other matters were stipulated to by the parties at trial. Pursuant to the stipulation of the parties, the only matter for determination by the jury was the location of the northeast corner, which would in turn determine the actual boundary line between the properties owned by Defendants and Plaintiffs.

The jury, after hearing the facts, evidence and testimony, (which primarily consisted of testimony from four expert witnesses; Ken Spires and Clyde Naylor testifying on behalf of Plaintiffs, and Randy Bott and Louis Hickman testifying on behalf of Defendants) determined that the northeast corner of Lot 12 was located where Defendants claimed it to be. (Verdict of the Jury, District Court Record, p. 52) Plaintiffs then filed a Motion for Judgement Notwithstanding the Verdict or for a New Trial. The trial court dismissed Plaintiffs' Motion and ordered that Judgement be entered according to the verdict of the jury. (Memorandum Decision, District Court Record, pp. 92, 93; Order, District Court Record, p. 100; See also Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgement Notwithstanding the Verdict) Plaintiffs then appealed this matter to the Supreme Court of the State of Utah.

ARGUMENTS

I.

DEFENDANTS ARE ENTITLED AS A MATTER OF LAW TO A JURY TRIAL.

A quick review of the law on a party's right to a jury trial

in a quiet title action indicates that many states do not allow a trial by jury for such actions. However, Utah has long since decided that a party to a quiet title action has a right to demand a jury trial. In Holland v. Wilson, 327 P.2d 250, 252 (Utah 1958) this court stated:

> We are further of the opinion that although historically an action to quiet title was originally equitable and the law courts had no jurisdiction to grant such relief, that situation does not prevail in this case. Formerly the equity courts afforded relief because there was no adequate remedy at law. In this jurisdiction, however, there is an adequate remedy provided by statute under the provisions of chapter 40 of title 78 U.C.A. 1953. Likewise in this state the distinctions between law and equity actions have been abolished by Article VIII, Sec. 19, of the Constitution of Utah.
>
> We are further of the opinion that the right to a jury trial in this type of case is assured by Section 78-21-1, U.C.A. 1953 which declares:
>
> > Right to jury trial. - In actions for the recovery of specific real or personal property, with or without damages . . . . an issue of fact may be tried by jury, unless a jury trial is waived . . . .

The Holland case was an action by the plaintiff to quiet title to certain unpatented mining claims. In its pretrial, the trial court had designated as an issue of fact the question of whether the defendants had done assessment work for the year ending July 1, 1954 on the claims involved in the law suit. The trial court had refused the plaintiff's request for a jury trial, and on appeal the only question to be decided by the Utah Supreme Court was whether or not Plaintiffs had an absolute right to have the issues of fact determined by a jury when a proper demand was made therefor. This court stated: "We are of the opinion that there can no longer be any question as to this

right." 327 P.2d at 251. The Supreme Court further said:

> It is our opinion that the above language [refering to Section 78-21-1 U.C.A. 1953], if given reasonable and rational construction, must be interpreted as declaring that all issues of fact relating to possession of specific real and personal property may be determined by a jury unless a jury trial is waived. 327 P.2d at 252.

The instant case, as designated in Appelants' brief, is an action to quiet title to real property. The only issue put to the jury for the jury's determination was purely a factual issue, that being the factual location of the northeast corner of Lot 12, Block 34, Providence Farm Survey. At trial, Plaintiffs contended that the original northeast corner had moved and changed from where it had been placed and that by usage and history the original northeast corner became the corner of the Larsen fence. Defendants contended that the original northeast corner did not move; that it was located where the plats, surveys, deeds and other records indicated it would be, i.e. 1320 feet directly north of the southeast corner of Lot 12, Block 34. All of the evidence presented to the jury, which included the location of fences, monuments, possession lines, surveys, plats, deeds, techniques used in surveying, historical and common usage, etc., was presented in an attempt to convince the jury of the true location of that northeast corner, which was purely a factual issue properly put to the jury for its determination.

II.

THE JURY'S VERDICT MUST STAND UNLESS IT IS CLEARLY SHOWN THAT THERE WAS NO REASONABLE BASIS IN THE EVIDENCE TO JUSTIFY THE VERDICE AS GIVEN.

Utah case law is rich with authority detailing the scope of review and the Supreme Court's right to overturn the jury's

verdict. Those cases principally deal with the amount of evidence which is required to support the jury's verdict and in whose favor the evidence must be viewed. The following cases are a synopsis of rulings on this issue from the Utah Supreme Court:

> Ute - Cal Land Development Corp. v. Sather, Utah, 605 P.2d 1240, 1245 (1980): In viewing this evidence, this Court will upset the jury verdict only upon a showing by the appealing party that the evidence so clearly preponderates in his favor reasonable people could not differ on the outcome of the case. Also in determining if there was sufficient evidence to support the jury's verdict this Court will consider those facts which most strongly support the verdict and where there is any conflict in the evidence this Court will consider as true that evidence which supports the verdict.
>
> Gilhespie v. DeJong, Utah, 520 P.2d 878, 880 (1974): This case falls within these pronouncements we have often made: that the parties appear to have had what they are entitled to: a full and fair opportunity to present their contentions, and the evidence supporting them, to the court and jury, and to have a verdict and judgment entered thereon. When this has been done, all presumptions are in favor of the validity of the verdict and judgment; and this court will not distrurb them unless there is substantial and prejudicial error, absent which there is a reasonable likelihood that there would have been a different result.
>
> Gossner v. Dairymen Associates, Inc., Utah, 611 P.2d 713, 715 (1980): This Court assumes the jury believed those aspects of the evidence which sustain the findings and the judgment, and therefore makes its analysis of the case and draws its conclusions on the basis of the facts so found.
>
> E. A. Strout Western Realty Agency, Inc. v. W. C. Foy & Sons, Inc., Utah, 665 P.2d 1320, 1322 (1983): It is the prerogative of the jury to resolve issues of fact, and the accepted rules of appellate review preclude this Court from substituting its judgment for that of the jury on issues of fact. On appeal, we view the evidence in the light most supportive of the verdict, and assume that the jury believed those aspects of the evidence which sustain its findings and judgment. We will upset a jury verdict only upon a

showing that the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.

> Green v. Tri-O-Inc., Utah, 667 P2d 598, 601 (1983): It is the exclusive province of the jury to determine the credibility of the witnesses, weigh the evidence, and make findings of fact. Williams v. Lloyd, 16 Utah 2d 427, 429-30, 403 P.2d 166, 167 (1965); Joseph v. W.H. Groves Latter-Day Saints Hospital, 10 Utah 2d 94, 99-100, 348 P.2d 935, 938 (1960). Where the evidence is conflicting and the jury is properly instructed, we do not upset those findings of fact on appeal except upon a showing that the evidence, viewed in the light most favorable to the verdict, so clearly preponderated in appellant's favor that reasonable persons could not differ on the outcome of the case. Ute-Cal Land Development Corp. v. Sather, Utah, 605 P.2d 1240, 1245 (1980); Nelson v. Watts, Utah, 563 P.2d 798, 799 (1977).

Each of the above-cited cases holds, in essence, that the Supreme Court must view the evidence in a light most favorable to the nonmoving party, the Respondant, and that the verdict of the jury can only be overturned if, in viewing the evidence in a light most favorable to the Respondant, the court finds that there is no substantial basis in the evidence which would support the jury's verdict or that there was substantial and prejudicial error, without which there is a reasonable liklihood that there would have been a different result.

III.

THERE IS CONSIDERABLE AND SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S VERDICT

In his Memorandum Decision denying Appellant's Motion for Judgement Notwithstanding the Verdict or for a New Trial, the Honorable Omer J. Call, trial judge in the instant action, stated:

> . . . suffice it to say that in the court's opinion

there was substantial competent evidence to sustain the jury's verdict and therefore the Plaintiffs' Motion for Judgement Notwithstanding the Verdict Or In The Alternative For A Retrial should be denied. The court regards the jury's decision as affecting the North South boundary line between these parties, and the other results stipulated to by the parties. (Memorandum Decision, District Court Record, p. 93)

The evidence referred to by the trial court consists primarily of Mr. Bott's survey (Exhibit 8), the Martineau Plat (Exhibit 1), the 1896 plat (Exhibit 30) the map of the Providence township (Exhibit 35) the Cache County Plat (Exhibit 2), the Albern E. Allen Abstract (Exhibit 37) which included numerous deeds, testimony from Randy L. Bott, a registered land surveyor, and testimony from Louis Hickman, a licensed engineer, land surveyor and certified abstractor.

In order to appeal the admissibility of evidence presented at trial, Appellants are required to make a timely objection at the time of trial. Appellants accepted both Mr. Bott and Mr. Hickman as expert witnesses (TV.II, p.106, l.18: TV.III, p.5, l.19) and did not object to the evidence presented by Defendants and received by the trial court. In fact, it was Plaintiffs who introduced the Martineau Plat and the Bott Survey into evidence. Plaintiffs cannot now attack the evidence presented by Defendants as unlawful, unfounded, or invalid or attempt to say what evidence is better than other evidence. It is the sole province of the jury to determine the credibility of the witnesses and exhibits and to weigh in their own minds the value of the testimony presented by both sides. E. A. Strout Western Realty Agency, Inc. W.C. Foy & Sons, Inc., supra; Groen v. Tri-O-Inc.,

supra; Cintron v. Milkovich, Utah, 611 P.2d 730, 732 (1980). Once the jury has weighed the evidence and entered its verdict, the sole issue on appeal is to determine if there is any reasonable basis in the evidence to support the jury's verdict or if there were subtantial and prejudicial errors, without which there is a reasonable likelihood the jury's verdict would have been different. In the instant case there is ample evidence to support the decision and there were no substantial and prejudicial errors committed at trial. Even if there were errors committed at trial, it is unlikely the jury's verdict would have been any different.

Mr. Bott testified that the record distance, according to the Martineau survey and other plats and deeds, from the south line of Lot 12 (which is a known line agreed to by all parties) to the center line of 7th South Street was 2,065.23 feet (TV.II, p.119, l.25) and that he measured the distance on the ground as 2,065.55 feet. (TV.II, p.120, l.1) Mr. Spiers (expert witness for the Plaintiff) testified that the measured distance from the south line of Lot 12 to the center line of 7th South was 2,067 feet (TV.I, p.78, l.20-23; TV.I, p.82, l.8-12; TV.I, p.84, l.5-11) which is 1.77 feet farther than the record measurement called for in the ancient plats. Mr. Bott also testified that the record distance from the southeast corner of lot 12, which is agreed by all parties to be a known location, to the northeast corner of lot 12 was 1320 feet (TV.II, p122, l.20-25); that the original and subsequent plats and surveys called for a 66 foot road (4 rods) and that the distance from the southeast corner of

Block 8 to 700 South Street was 660 feet. (TV.II, p.122, l.14) Several witnesses testified that the measured distance from the southeast corner of Lot 12 to the present south line of 800 South (or what has been referred to in the trial as the Larsen fence and claimed by Plaintiffs as the northeast corner of lot 12) is approximately 1350.5 to 1354.5 feet (TV.I, p. 82, l.12; TV.II, p. 63, l.20; TV.II, p.121, l.6), and that the distance from the Larsen fence, on the present south side of 800 south to the fence on the north side of 800 South was 33 feet. Mr. Bott testified that the record distance from the southeast corner of lot 12 to the south line of lot 8, which is the north side of the present 800 south street, is 1320 feet plus 66 feet or 1386 feet. (TV.I, p.49, l.16-18; TV.II, p. 39, l.12-22; TV.II p. 125, l.10-11) The measured distance from the southeast corner of lot 12 to the south line of lot 8, or the north side of 800 South was measured by Mr. Bott to be 1386 feet, (TV.II, p.122, l.20-25, p. 123, l.1-6) which completely agrees with the record distances established in the ancient plat surveys; was measured by Mr. Spires to be 1387.5 feet (TV.I, p.82, p.84, l.11) for a diference of 1.5 feet; and was measured by Mr. Naylor to be 1386.5 feet, (TV.II, p.63, l.20, p. 39, l.21-22) for a difference of .5 feet.

Mr. Bott concluded therefrom, and so testified, that lot 12 had been laid out on the ground as a lot 1320 feet north and south by 660 feet east and west, that a 66 foot road had been laid out between lot 12 and lot 8, and that the south line of lot 8 was laid out to be 1386 feet from the south line of lot 12. (TV.II, p.142, l.6-21) This was confirmed by the record

measurements and by actual measurements on the ground. Mr. Bott also concluded that the northeast corner of lot 12 was 1320 feet directly north of the southeast corner of lot 12, (RV.II, p.125, l.3-15) ironically only about 33 feet south of where Mr. Spires and Mr. Naylor had placed the northeast corner of lot 12 and they both allowed for only a 33 foot road instead of 66 feet as called for in the ancient plats.

Mr. Hickman testified that the record distances indicated on the ancient plats and the measured distances in the Bott survey collaborated one another. (TV.III, p. 18, l.19-23) Mr. Hickman and Mr. Bott each testified that the standard historical distance of lots when originally platted and laid out on the ground was 80 rods by 40 rods (1320 feet by 660 feet), or a quarter of a mile by one eighth of a mile, and that a 4 rod (66 foot) road was also the standard width for platted roads.(TV.II, p.141, l.12-25; TV.III, p.9, l.3-24) This standard distance of 1320 feet from the southeast corner of lot 12 to the northeast corner of Lot 12 was also substantiated by the 1896 plat, (Exhibit 30), the Providence town map (Exhibit 35) and the official Cache County Plat (Exhibit 2). This distance is also well established in the original deeds transfering the property. The deeds referenced in the Albern Allen abstract (Exhibit 37), beginning with the transfer from Milton D. Hammond to Mattie Hansen (number 6 in said Abstract) dated January 12, 1877, transfered the "west part of the north part of Lot 12, block 34, Plat A, Providence Farm Survey," and stated that the dimensions of the parcel were 40 rods by 20 rods (1660 feet by 330 feet) and contained 5 acres.

Mr. Hickman testified that the with those stated dimensions for the west part of the north part of Lot 12, the dimensions of the entire Lot 12 would be 1320 feet by 660 feet, (TV.III, p.18, l.14-18) which were the platted dimensions on all of afore-referenced plats. That parcel continued to be a 5 acre parcel, 40 rods by 20 rods, until Albern Allen deeded a 40 foot strip at the bottom (south) of said parcel to Charles Miller, Appellants' predecessor in title. Mr. Allen then deeded the remainder of the parcel, which was then 620 feet by 330 feet (20 rods) to Respondant herein in 1967 who has held title to the property ever since. (Exhibit 9)

As stated earlier, although Plaintiffs/Appellants first introduced the Martineau Plat into evidence as Plaintiffs' Exhibit 1 and originally relied on said Plat as the basis for their current surveys,(TV.I, p.65, l.14-17, p.67, l.3-9) Appellants now attempt to disparage and discredit the Martineau plat as being an unauthenticated "office survey." It is stated in 12 Am Jur 2d, Boundaries, Section 113, that an ancient survey made by a competent authority and recorded or accepted as a public document, produced from proper custody, is admissible in evidence without further verification to prove the location of the boundary line. It is further stated in 12 Am Jur 2d, Boundaries, Section 115, that an original map, over 30 years old, found in proper custody, authorized and recognized as an official document, and free on its face of suspicion, is admissible in evidence as an "ancient document" to prove the location of the boundary line. Certainly the Martineau Plat dated 1880 and the

1896 plat (Exhibit 30) constitute ancient surveys and/or ancient documents which have been referred to by the witnessess and relied on by the witnesses and have been recognized as official documents by the Cache County Recorder.

The ancient documents, and other maps, plats, and deeds relied on by the Respondents, and the testimony of Respondents witnessess constitute substantial creditable evidence more than sufficient to justify the jury's verdict in favor of Respondents. Plaintiff's objections to the ancient plats, if given any merit at all, go to the weight of such evidence, not to the admissibility of said plats.

IV.

THE JURY'S VERDICT AFFECTS ONLY THE PARTIES INVOLVED TO ESTABLISH THE BOUNDARY LINE BETWEEN THEM AND DOES NOT IMPACT SURROUNDING PROPERTY OWNERS

Throughout the trial and this appeal Appellants have raised the emotional and rather imaterial claim that all property owners in the area will be affected by the jury's verdict, even suggesting that boundary lines would have to shifted. To the contrary, it is well recognized that the only parties affected by the decision of the jury are the parties involved in the litigation and the only impact of the jury's decision is to determine the location of the lot corner which in turn by stipulation determines the boundary line disputed by the parties.

In Fisher v. Davis, 77 Utah 81, 291 P. 493 (1930), an action to quiet title to mining claims in Wasatch County, the Supreme Court of Utah stated that the decree quieting title to the claims

would only bind the parties to the action. The Appellant in the case had maintained that the Court's decision was in error because it had been shown at trial that other parties may claim an interest in the mining claims. This Court held that those other parties could still maintain an action regarding the mining claims and that the decision to quiet title only affected the parties involved.

In the instant case, the verdict of the jury only decides and resolves the boundary dispute between the parties in this action and does not locate the northeast corner of lot 12 for any other person nor does the jury's decision adversely affect anyone else. Appellants' assertion otherwise would require the District Court in future actions to ignore the longstanding legal doctrines regarding res judicata and collateral estoppel.

V.

APPELLANTS CANNOT ASSIGN ERROR TO THE TRIAL COURT'S REFUSAL TO GIVE PROPOSED INSTRUCTIONS WHEN NO OBJECTION WAS ENTERED NOR ANY EXCEPTION TAKEN.

Appellants have continually attempted to assign error to the trial court's failure to give certain jury instructions requested by Appellant at trial. The Utah Supreme Court has recently stated in State v. Evans, 668 P.2d 566, 568 (Utah 1983): "Generally for a party to be in a position to complain of the trial courts failure to give an instruction, he must first propose the instruction and then take exception to the courts refusal to give it." The Court cited State v. Pierren, 583 P.2d 69 (Utah 1978) wherein this Court had stated:

Generally, for a party to take advantage of the trial

court's failure to give full and correct instructions, he must first propose correct instructions, and should the court fail to give them, to then except thereto. 583 P.2d at 71.

It is further stated in Rule 51, Utah Rules of Civil Procedure: "no party may assign the error of giving or failure to give an instruction unless he objects thereto."

Appellants failed to enter objections to the trial court's refusal to give requested jury instructions in the record and failed to take exception to jury instructions given or not given. Appellants now attempt to create a record which never existed by listing in their brief jury instructions which may or may not have been requested of the court and by suggesting in their brief h instructions were modified by the trial court. Respondants do not wish to impune the character or integrity of Appellants or their counsel, but submit that Appellants cannot be allowed to create for this appeal a record not in existence when there is no possiblity of acurately establishing what actually transpired at the trial court level. Appellants must be bound by the record and transcript prepared by the duly certified shorthand reporter.

Furthermore, at the hearing requested by Appellants to settle the record regarding jury instructions held on November 18, 1983, more than five months after the trial, Judge Call stated that he did recall Plaintiffs' objecting to the court's allowing a jury trial (Transcript of Court Proceedings, November 18, 1983, p. 24, l.8-13) but also stated that he had no specific recollection regarding jury instructions (ibid p. 25, l.1-6) or that he had precluded anyone from excepting to instructions (ibid

p. 25, 1.6-10). If the trial court cannot make a determination regarding proposed jury instructions, certainly this Court cannot do so.

CONCLUSIONS

Appellants have failed to show any substantial and prejudicial error in the trial proceedings or that the outcome of the trial would have been any different if there were errors at trial.

The essence of Plaintiffs' appeal is a challenge of the facts, not the law. The parties at trial mutually stipulated to waive all other claims and to proceed to trial on the sole factual issue of the location of the lot corner.

Appellants now contend that the Bott Survey and other evidence and testimony presented by Respondents at trial was illegal, and thus, the jury's verdict is not supported by lawful evidence. Appellants however, failed to timely object to the evidence and testimony as being illegal. In fact, Appellants introduced some of the evidence relied on by Respondents.

Since all of the documents and testimony were received into evidence by the trial court without objection from Appellants, it was then up to the jury to determine the weight and credibility they wished to give the evidence and enter a verdict. There can no longer be any question as to the legality of the evidence and this court cannot second guess the jury in attempting to determine how the jury perceived the evidence. The Court must assume that the jury believed those aspects of the

evidence which sustain the verdict.

A review of the record transcript readily reveals that the recitals of fact in Appellants' brief are remarkably opinionated. Appellants subjective conclusions of fact merely reinforce the principal issue of this case, i.e., the same facts can be viewed differently by different people. Once evidence is received by the Court, however, it then becomes the sole province of the trier of fact (in this case the jury) and not the parties to determine what is to believed and accepted, and what is not.

In this action, the jury chose to believe the evidence which supported the Respondents' position, and so entered their vedict. It is respectfully submitted that the verdict is supported by substantial evidence; that no substantial and prejudicial errors were committed at trial; and that any error which may have been committed was inconsequential and would not have changed the verdict had there been no error.

Respondents respectfully request that the jury's verdict be sustained and that this appeal be dismissed as having no merit.

DATED this 1 day of March, 1984.

JAMES C. JENKINS & ASSOCIATES

James C. Jenkins
Attorney for
Defendants/Respondents

CASES AND AUTHORITY CITED

STATUTES

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the foregoing was mailed on the ___ day of March, 1984 to Bill Hansen, attorney for Plaintiffs at 201 East 100 North, P.O. Box 67, Payson, Utah 84651-0067, by depositing the same with the U.S. Mail postage prepaid and addressed as stated.

_____
Secretary