CRIMINAL LAW—WITNESSES—FORMER TESTIMONY OF WITNESS WHO REFUSED TO TESTIFY ON SECOND TRIAL ADMISSIBLE.

On his first trial[1] the defendant, Park, was convicted of murder, but on appeal this conviction was reversed because the trial court refused to permit the defendant's counsel to make the opening and closing argument to the jury as is required by Georgia law[2] when a defendant fails to introduce any testimony (as was the case in the trial court). On the second trial,[3] two witnesses for the state, both of whom had testified against the defendant at the first trial and both of whom at that time had been co-indictees, refused to testify, relying on their privilege against self incrimination.[4] Thereafter, over the defendant's objection, the prior testimony of these two witnesses was read to the jury. Georgia Code Ann. § 38-314 (Rev. 1954)[5] permits this to be done when certain conditions are met, one being that the witness must be "inaccessible." The defendant claimed that since the witnesses were in the courtroom they were not "inaccessible" and their previous testimony could not be read to the jury without violating the statute.[6] This contention raised the issue as to whether "[A] witness [is] inaccessible when he is present in the courtroom but refuses to testify."[7] The Supreme Court of Georgia, in resolving this issue, held that: "The refusal to testify by a witness on the stand makes his testimony just as inaccessible as his refusal to return to the State,"[8] and, therefore, the trial court had committed no error in allowing the previous testimony of the two witnesses to be read to the jury.[9]

There has been much written on the subject of whether previous

1. Park v. State, 224 Ga. 467, 162 S.E.2d 359 (1968).

2. GA. CODE ANN. § 27-2201 (Rev. 1953) states, "After the testimony shall have been closed on both sides, the State's counsel shall open and conclude the argument to the jury, except that, if the defendant shall introduce no testimony, his counsel shall open and conclude after the testimony on the part of the State is closed."

3. Park v. State, 225 Ga. 618, 170 S.E.2d 687 (1969).

4. U.S. CONST. amend. V, as applied to the states through the due process clause of U.S. CONST. amend. XIV in Malloy v. Hogan, 378 U.S. 1 (1968) [GA. CONST. art. 1 sec. 1, para. 6, sec. 3, GA. CODE ANN. § 2-106 (Supp. 1969)].

5. The statute states, "The testimony of a witness, since deceased, or disqualified, or inaccessible for any cause, given under oath on a former trial, upon substantially the same issue and between substantially the same parties, may be proved by anyone who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies."

6. GA. CODE ANN. § 38-314 (Rev. 1954).

7. Park v. State, 225 Ga. 618, 622, 170 S.E.2d 687, 690 (1969).

8. *Id.*

9. *Id.*

testimony is hearsay when related to the court by one who heard the testimony at a prior trial. Wigmore insists that the test of hearsay is whether or not the testiony has been subjected to cross-examination.[10] Based on this test, testimony given at a prior trial and offered at a succeeding one would not be hearsay provided it had been subjected to cross-examination.[11] McCormick says, "Hearsay evidence is testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value on the credibility of the out-of-court asserter."[12] Based on this definition of hearsay evidence, previous testimony would be considered as hearsay when offered at a succeeding trial by someone who heard the testiomy at the first trial.[13] Georgia seems to adopt McCormick's definition of hearsay.[14] Depending, therefore, on which definition is espoused, Ga. Code Ann. § 38-314 (Rev. 1954), which allows a witness' previous testimony to be read to the jury when the witness is "inaccessible," either satisfies the rule or is an exception to it. One Georgia case states that the procedure allowed by the statute constitutes an exception to the rule,[15] but a later case speaks in terms of the rule's being satisfied.[16]

Whichever view of the statute is taken certain requirements must be met before it can become applicable to a case, one being, as stated before, that the witness must be "inaccessible." At common law a witness was "inaccessible" only when *physically* unavailable.[17] Later, the practice developed in chancery that a witness was "inaccessible" when he was *legally* as well as physically unavailable.[18] It seems that Georgia has never had occasion to rule on whether a witness is "inaccessible" within the meaning of the statute when he claims a privilege at a succeeding trial after having testified at a prior one. The Georgia courts have stated, however, that a witness is inaccessible when he is without the jurisdiction of the court,[19] when he cannot be found

10. 5 WIGMORE, EVIDENCE § 1362 (3rd Ed. 1940). "[The] hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.*" [Emphasis added].

11. *See* 5 WIGMORE, EVIDENCE § 1370 (3rd Ed. 1940).

12. C. MCCORMICK, EVIDENCE § 225 (1954).

13. C. MCCORMICK, EVIDENCE § 230 (1954).

14. GA. CODE ANN. § 38-301 (Rev. 1954).

15. Walker v. Walker, 14 Ga. 242, 249 (1853).

16. Tanner v. State, 213 Ga. 820, 102 S.E.2d 176 (1958).

17. 5 WIGMORE, EVIDENCE §§ 1409-10 (3rd Ed. 1940) and footnotes cited therein. *See also* 2 U.C.L.A. L. REV. 138 (1954-55).

18. *Id.*

19. Smith v. State, 147 Ga. 689, 95 S.E. 281, 15 A.L.R. 490 (1918); Eagle and Phenix Mfg. Co. v. Welch, 61 Ga. 444 (1878); Norris v. State, 58 Ga. App. 399, 198 S.E. 714 (1938).

after a diligent search,[20] when he has escaped from a penitentiary,[21] when he is physically and mentally incompetent from old age and infirmity,[22] and when he is insane.[23] Based on the last two cases, it seems only logical that the Supreme Court of Georgia should have held that a witness is "inaccessible" within the meaning of the statute when he later claims a self-incrimination privilege, because inaccessibility resulting from a claim of privilege against self-incrimination is of the same specie of inaccessibility resulting from insanity and mental incompetence, *i.e.* both specie are examples of *legal* as distinguished from *physical* "inaccessibility." The court, therefore, could have analogized *Park* to these cases and reached a similar result. However, the court relied on a Michigan case[24] interpreting a statute[25] of that state, which was similar to Ga. Code Ann. § 38-314 (Rev. 1954). The Michigan statute provides that testimony of a witness taken at an examination, preliminary hearing, or at a former trial may be used by the prosecution whenever the witness cannot, *for any reason*, be produced at the trial. The Michigan court held that the phrase "cannot be produced for any reason" covered the situation in which a witness will not testify because he claims a privilege at the later trial, *i.e.*, where he, at the trial, is legally unavailable. Similarly, the Georgia statute permits prior testimony to be introduced at a later trial when the witness is "inaccessible for any cause."

Certainly, since the Michigan statute's phrase "cannot be produced for any reason" includes legal as well as physical reasons, the phrase "inaccessible for any cause" in the Georgia statute should include inaccessibility for legal as well as physical causes. The only difficulty in the case occurred as a result of the court's language in holding that "the refusal to testify by a witness on the stand makes his *testimony* just as inaccessible as his refusal to return to the State."[26] The dissent urged that the majority had interpreted the statute wrongly in that the majority said that the *testimony* was "inaccessible" and the statute says the *witness* must be "inaccessible." However valid this point may be it is

20. Robinson v. State, 128 Ga. 254, 57 S.E. 315 (1907).

21. Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940).

22. Cent. R.R. & Banking Co. v. Murray, 97 Ga. 326, 22 S.E. 972 (1895).

23. *See* Estill v. Citizens & Southern Bank, 153 Ga. 618, 113 S.E. 552 (1922) and cases cited therein. Technically, this statement by the court was dicta.

24. People v. Pickett, 339 Mich. 294, 63 N.W. 2d 681, 45 A.L.R. 2d 1341 (1954).

25. M.C.L.A. § 768.26 (1968) states, "Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testiomony can not, for any reason, be produced at the trial . . . ."

26. Park v. State, 225 Ga. 618, 622, 170 S.E.2d 687, 690 (1969).

doubtful if the majority actually interpreted the statute in the manner in which the dissent stated it did. The probable solution, it seems, is that the court intended to say that the witness' refusal to answer made *him* inaccessible, not the *testimony*. Especially is this so when the wording of what the court stated as the issue in the case is examined, *i.e.*, "whether a *witness* is inaccessible when he is present in the courtroom but refuses to testify."[27]

The rule laid down by the Georgia court in interpreting the statute seems to be an excellent one since it does nothing but deprive a party of the right to suppress evidence which justifiably should not be suppressed. Since the testiomony of the witnesses has been subjected to cross-examination, and since the first jury has weighed the demeanor of the witnesses and convicted the defendant, only to have the conviction reversed on a technical legal point, it seems as if justice would better be served by allowing the prior testimony to be read to the jury when a witness has become legally "inaccessible."

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27. *Id.*