

Louisiana Law Review

Volume 14 | Number 3

April 1954

Confessions in Louisiana Law

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Repository Citation

Geraldine E. Bullock, *Confessions in Louisiana Law*, 14 La. L. Rev. (1954)

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gant be made amenable to suit in the state where the cause of action arises. The "estimate of inconveniencés" mentioned by the late Chief Justice Stone in the *International Shoe* case⁸⁰ allows Louisiana to go beyond its pre-1950 claims in asserting judicial jurisdiction over foreign corporations.

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Confessions in Louisiana Law

CONFESSIONS DEFINED AND DISTINGUISHED FROM ADMISSIONS

Confessions are one species of admissions.¹ Thus, a discussion of the subject of confessions requires discussion of admissions. Admissions are commonly defined as direct or implied statements by a party to a judicial proceeding of facts material to the issue which, together with proof of other facts, tend to establish his guilt or liability.² When made extra-judicially, as is usually the case where the question of their admissibility arises, admissions are received in evidence as a time-honored exception to the hearsay rule.³ According to Professor Wigmore, hearsay evidence is excluded primarily because the person whose statements are offered as evidence would otherwise, in effect, be permitted to testify beyond the reach of cross-examination.⁴ This exclusionary principle would seem to have no application if the extra-judicial statements were offered against the party who, having made them, may on trial explain or qualify their meaning. This is normally the situation when a party's admission is offered in evidence against him. For this reason, too, other dangers of admitting hearsay evidence—for example, that the declarant was not under oath⁵ or was not confronting the party

80. 326 U.S. 310, 317 (1945), using Judge Learned Hand's language in *Hutchinson v. Chase & Gilbert Inc.*, 45 F.2d 139, 141 (2d Cir. 1930).

1. 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 346, § 213 (16th ed. 1899); TRACY, HANDBOOK OF THE LAW OF EVIDENCE 241 (1952); 3 WIGMORE, EVIDENCE 231, § 816 (3d ed. 1940).

2. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE 507-08, § 265 (4th ed. 1935); 2 WHARTON, EVIDENCE IN CRIMINAL CASES 1081, § 645 (11th ed. 1935).

3. TRACY, HANDBOOK OF THE LAW OF EVIDENCE 231 (1952); 4 WIGMORE, EVIDENCE 2-6, § 1048. See also Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. OF PA. L. REV. 484, 564 (1937).

4. 4 WIGMORE, EVIDENCE 3-4, § 1048; 5 *id.* at 27, § 1365.

5. TRACY, HANDBOOK OF THE LAW OF EVIDENCE 218 (1952).

against whom the statement is being offered⁶—are not present in the use of admissions. It has also been said that the hearsay rule is relaxed for admissions because the probability is so great that a person speaking against his own interest is speaking the truth.⁷ No doubt a statement against his interest would ordinarily be entitled to greater weight than a self-serving or indifferent one. The force of this argument is squarely met, however, by the well-established practice of receiving in evidence, as admissions, statements which were clearly not against the party's interest when he made them.⁸ Since confessions are a species of admissions, the foregoing reasons for considering admissions an exception to the hearsay rule apply similarly to confessions.⁹

A confession, as defined by Professor Wigmore, is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it.¹⁰ The phrase "or of some essential part of it" makes this definition appear broader in scope than that adopted by the Louisiana legislature. Article 449 of the Code of Criminal Procedure provides that, to amount to a confession, a statement must be "an admission of guilt, not . . . an acknowledgment of facts merely tending to establish guilt."¹¹ A literal interpretation of this article would exclude from the category of confessions all statements not expressly containing the legal conclusion that the party is guilty of a crime.¹² Furthermore, under Article 449, "the term 'admission' is applied to those matters of fact which do not involve criminal intent."¹³ This might imply that a confession must necessarily contain an admission of criminal intent, thus

6. 5 WIGMORE, EVIDENCE 27, § 1365.

7. 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 347, § 214 (16th ed. 1899). The Louisiana decision, *State v. Alphonse*, 34 La. Ann. 9 (1882), touches on this subject at page 17, where it says: "As a general rule . . . the confession of a party, when conclusively established, is regarded as the highest species of evidence. Indeed, when we reflect on the powerful motives that would induce a guilty party to deny his guilt and seek to hide his crime, we can scarcely conceive of the possibility of an innocent person of sound mind, falsely confessing his guilt of an offense with which he is charged. Such confession, when made, might, therefore, be reasonably viewed as the very strongest, if not conclusive evidence."

8. 4 WIGMORE, EVIDENCE 4, § 1048.

9. TRACY, HANDBOOK OF THE LAW OF EVIDENCE 241 (1952); 3 WIGMORE, EVIDENCE 231, § 816.

10. 3 WIGMORE, EVIDENCE 238, § 821.

11. LA. R.S. § 15:449 (1950): "The term 'admission' is applied to those matters of fact which do not involve criminal intent; the term 'confession' is applied only to an admission of guilt, not to an acknowledgment of facts merely tending to establish guilt."

12. The wording of the statute could well be revised by the legislature. *Quaere*: Is it possible to confess a legal conclusion?

13. See note 11 *supra*.

rendering it impossible for one to confess to crimes not involving criminal intent, such as negligent injury¹⁴ and negligent homicide.¹⁵ However, the article has been interpreted by the courts to mean that a statement amounts to a confession when the accused has by means of the statement admitted the existence of facts which unequivocally imply the presence of all the essential elements of the crime charged.¹⁶ This definition is substantially the same as that advanced by Professor Wigmore¹⁷ and adopted by the majority of other jurisdictions.¹⁸

The difference, therefore, between an admission and a confession is that an admission is an acknowledgment of some fact or circumstance which only tends to prove ultimate guilt or liability, whereas a confession acknowledges a course of conduct which irresistibly implies the existence of all the essential elements of a crime.¹⁹

14. Art. 39, LA. CRIM. CODE (1942).

15. Art. 32, LA. CRIM. CODE (1942).

16. *State v. Crittenden*, 214 La. 81, 88, 36 So.2d 645, 647 (1948). (In this case defendant was convicted of negligent homicide. Counsel for the state contended that the rules applying to confessions do not apply to admissions not involving the existence of a criminal intent. In its opinion setting aside defendant's conviction, the court said: "In the present case, the accused stated in the confessions that the deceased died as a result from a blow on the neck delivered by the accused after he had been assaulted by the deceased. The accused related how he had buried the body and concealed its whereabouts by informing various parties that the deceased was visiting relatives. At the time that the confessions were made the only evidence pointing to the defendant's guilt was the fact that the body was found in a grave covered with rubbish in close proximity to the house where the defendant had resided, and the further fact that the deceased had disappeared while the defendant was living with him. The confessions reflect the existence of a criminal intent and they cannot be regarded as mere exculpatory statements."); *State v. Eisenhardt*, 185 La. 308, 323, 169 So. 417, 422 (1936) (In defining a confession, the court quoted *Corpus Juris* and said: "It [the confession] may be a naked statement by defendant that he is guilty of the crime, or it may be a full statement of the circumstances of its commission, including his part in it."); *State v. Elmore*, 177 La. 877, 880, 149 So. 507 (1933) (Statement by one that he and another conspired to rob deceased and that such other in the argument or scuffle which ensued killed deceased was considered a confession. The court said: "... it makes no difference which one of the conspirators actually did the killing, all were guilty of the homicide. . . .").

17. 3 WIGMORE, EVIDENCE 238-245, § 821.

18. For both federal and state cases, see the list prepared in UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE 508, § 265, n. 1 (4th ed. 1935). See also 2 WHARTON, EVIDENCE IN CRIMINAL CASES 954-58, § 580 (11th ed. 1935).

19. The following specific instances will illustrate generally the distinction between confessions and admissions:

Particular statements held admissions: *State v. Guin*, 212 La. 475, 32 So. 2d 895 (1947) (Murder prosecution. Signed statements by accused, in which he detailed the manner in which the shooting occurred and in which he admitted therein that the gun with which the deceased was killed was fired while in his hands, was not a confession but an admission, for in the same writing the defendants sought to show that the shooting was accidental.); *State v. Mattio*, 212 La. 284, 303, 31 So.2d 801, 807 (1947) ("... the statement

PREREQUISITE TO ADMISSIBILITY OF CONFESSIONS: VOLUNTARINESS

In general. Confessions are admitted into evidence under rules not generally applicable to ordinary admissions.²⁰ They have greater probative effect than admissions and are received in evidence only after close scrutiny by the trial judge of the circumstances in which they were made.²¹ Special caution in

given by the accused in the district attorney's office, although admitting the fatal cutting of decedent, tends to justify and vindicate his act. It is not, therefore, a true confession. . . ."); *State v. Taylor*, 173 La. 1010, 139 So. 463 (1931) (In prosecution for murder, evidence that the defendants talked freely of the robbery prior to the murder, describing their flight from the scene and the incidents leading to their arrest, was held to be an admission, for none of the defendants had admitted the shooting of the murdered victim.); *State v. Glauson*, 165 La. 270, 115 So. 484 (1928) (In prosecution for felonious burning of another's building, testimony as to what one of the defendants told witness shortly before the fire cannot be a confession but is considered as an admission.); *State v. Tatum*, 162 La. 872, 874, 111 So. 264, 265 (1927) (In trial for possessing intoxicating liquor for beverage purposes, the defendant's admission of his proprietorship of the raided premises and ownership of the beer found was considered an admission and not a confession. The court said: "Defendant's admission had reference only to his ownership of the premises and beer. It was not a confession of guilt of any crime. . . ."); *State v. Munston*, 35 La. Ann. 888 (1883) (The court, in considering the silence as an admission, held the following charge to the jury correct: "Standing silent when accused out of court is not presumed as a confession of guilt . . . [but is] a circumstance which, like others, [the jury] might consider and weigh."); *State v. Crowley*, 33 La. Ann. 782 (1881) (Murder prosecution. The court considered as an admission and permitted a witness to testify that he heard accused make the statement, in the presence of the other defendants, that they were going over the river to rob the person whom afterwards they were charged with having murdered.); *State v. Gilcrease*, 26 La. Ann. 622, 623 (1874) (Defendant was charged with the murder of his infant child. He made the statement: "Now don't you never tell that I whipped the child Friday." The court considered this an admission.)

Particular statements held confessions: *State v. Crittenden*, 214 La. 81, 36 So.2d 645 (1948) (Statement by accused that deceased died as a result of a blow on the neck delivered by accused after accused had been assaulted by deceased, was considered a confession. The court found that the statements reflected the existence of a criminal intent.); *State v. Elmore*, 177 La. 877, 149 So. 507 (1933) (Statement by one that he and another conspired to rob deceased and that such other in the argument which ensued killed deceased was a confession and not an admission.); *State v. Johnson*, 149 La. 922, 927, 90 So. 257, 258 (1921) (A statement by accused that he had killed the deceased because he thought deceased was going to raid his place was considered a confession. The court said: "This confession is proof, not only of defendant's motive, but of his intent.").

In *State v. Picton*, 51 La. Ann. 625, 628, 25 So. 375, 377 (1899), the court, in holding that the statement was an admission, expressed very well the distinction between an admission and a confession by saying: "A confession is limited in its precise scope and meaning to the criminal act itself. It does not apply to acknowledgments of fact merely tending to establish guilt, since a damaging fact may be admitted without any intention to confess guilt. . . . Where a person only admits certain facts, from which the jury may or may not infer guilt, there is no confession."

20. See page 650 *infra*.

21. 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 346, § 213 (16th ed. 1899) ("The term 'confession,' as indicating a statement subjected to peculiar rules for its use in criminal cases, seems in strictness to include only what

using them is also justified by the fact that, since they represent the accused's descriptive narratives of his own conduct, they are more apt to be inaccurate than mere acknowledgments of the existence of specific facts.²²

There is disagreement among legal scholars over whether or not any confession involuntarily made should be excluded from evidence. Professor Wigmore has criticized the view that all such confessions should be excluded as historically incorrect as well as presently inadequate.²³ He would erect safeguards to protect the accused only from *false* confessions, the only valid reason for excluding any confession being, in his opinion, that it is not trustworthy as evidence.²⁴ Other writers have favored the exclusion of all involuntary confessions, even if trustworthy.²⁵ They find in this approach an effective device for preventing abuse of accused persons by possibly over-zealous law enforcement officers, as well as a means of protecting the accused from the effect of false confessions.²⁶ The guarantee that no person

in common usage the term implies, namely, a direct assertion by the accused person of the doing of the act charged as a crime. It is for this sort of a statement that the particular ensuing rules of caution and limitation are intended,—the rule requiring some sort of corroboration, the rule requiring freedom from the inducement of hope or fear, and the like. It would seem to follow that these limiting rules about confessions do not apply to conduct or statements of the accused, when offered against him, other than those of the above sort.”).

22. 3 WIGMORE, EVIDENCE 231, § 816.

23. *Id.* at 255, § 826.

24. *Id.* at 246, § 822.

25. For an excellent discussion of these two views, see McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 451-57 (1938); Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507-09 (1952).

26. Professor McCormick says: “It well may be that the adherence of the courts to this form of statement of the confession-rule in terms of ‘voluntariness’ is prompted not only by a liking for its convenient brevity, but also by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected by the privilege against compulsory self-incrimination.” McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 452 (1938).

Dean Wicker says: “Doubt as to trustworthiness is probably the chief principle behind the present rules relating to confessions, but this is not the only principle. Another basic determinant is the protection of the individual against physical and psychological abuses inherent in the traditional ‘third degree’ . . . Under this principle the protection of the privilege of the individual to be free from illegal coercive police pressures may justify a rejection for courtroom use of a confession which would otherwise be relevant and competent. This is certainly one of the immediate objectives. A long-range objective is discouragement of future official misconduct by refusing to permit courtroom use of the fruits of past misconduct of police officers.” Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507, 509 (1952).

See also McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239 (1946); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

should be compelled to be a witness against himself²⁷ also lends weight to this view, which reflects an attitude of fairness to those accused of crime.

The Louisiana decisions discussing admissibility of confessions are couched in terms of voluntariness.²⁸ Some of the cases applying the test of voluntariness are based upon the policy of promoting fair law enforcement,²⁹ but the majority seem to rest

27. LA. CONST. Art. I, § 11.

28. Cases cited throughout this comment indicate that "voluntariness" is the test used by the courts in determining the admissibility of a confession. For specific cases, see *State v. Alexander*, 215 La. 245, 40 So.2d 232 (1949); *State v. Cook*, 215 La. 163, 39 So.2d 898 (1949); *State v. Graffam*, 202 La. 869, 13 So.2d 249 (1943).

29. *State v. Robinson*, 215 La. 974, 985, 41 So.2d 848, 852 (1949). On rehearing, the court, through Justice Fournet, said: "The rule now universally obtaining in all countries where the common law prevails, that a confession of a person accused of a crime is admissible in evidence *only* if freely and voluntarily made, is the result of the humanitarian principles evolved by courts during civilization's progress from the ancient harsh and continental practice of putting a person charged with a crime to the torture and breaking him piece by piece until the confession was obtained, regardless whether a crime had, in fact, been committed, or, if committed, had been committed by the person being tortured.

"It was only natural, therefore, that this humane principle found its way into our system of law when our forefathers came to this country in their quest for full liberty and that there was included in the Bill of Rights to the Constitution of the United States the provision that no one could be compelled in a criminal case to be a witness against himself.

"The delegates representing the people of this state at the Constitutional Convention of 1921 included in the Bill of Rights to this Constitution a similar provision, and, in order to insure it would be beyond the power of the legislature or the judiciary to depart from what was the then accepted jurisprudence of this court, they added as a part of this same section, Section 11 of Article 1, the provision that 'No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made.'

"In conformity therewith, the legislature of 1928, in adopting a Code of Criminal Procedure, incorporated in its Articles 452 and 451 respectively the following provisions: 'No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel a confession of crime,' and 'Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises.'"

In *State v. Cook*, 215 La. 163, 39 So.2d 898 (1949) and *State v. Bessa*, 115 La. 259, 38 So. 985 (1905), the court held that if the confession is voluntarily made, the judge has no right to exclude it even when "it is shown on its face to be false." And in *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1929); *State v. Jones*, 174 La. 1074, 142 So. 693 (1932); and *State v. Graffam*, 202 La. 869, 13 So.2d 249 (1943), the court held that a confession which was not free and voluntary was not admissible in evidence no matter how true it may have been. The two latter situations seem to be inconsistent with the view that confessions are excluded because they may be untrustworthy as testimony, and the court in the *Graffam* case [202 La. 869, 889, 13 So.2d 249, 255 (1943)] quotes *American Jurisprudence* as follows: "A confession may be involuntary and yet be true. The courts, however, exclude involuntary confessions as evidence without regard to their truth, and in doing so they proceed not so much upon the ground of the unreli-

upon the lack of trustworthiness of involuntary confessions.³⁰ Perhaps it is felt that the same violence, threat, or promise which would render law enforcement unfair also would render confessions obtained by such means untrustworthy. The attempt to place the voluntariness test on both the principle of trustworthiness and the policy of fair law enforcement imparts a flexibility to the test, and is perhaps the safest position to be taken.

An interesting question is whether or not the use of admissions is restricted by the test of voluntariness. Article 454 of the Louisiana Code of Criminal Procedure expressly provides that admissions obtained by threat or promise are not for that reason inadmissible.³¹ No mention is made of corporal violence. Before

ability of the confession as upon a humanitarian ground. The rule is a manifestation of a spirit of fairness toward the accused which is different from the reason usually given that experience has shown that statements made under compulsion are likely to be untrue."

State v. Gilbert, 2 La. Ann. 244, 246 (1847) (In holding that a confession made by a slave while undergoing corporal punishment could not be received, the court said: "No rule is better understood than that which excludes from evidence the confessions of a person accused of a crime, to establish his own guilt, when made under the influence of threats or violence. A conviction upon such evidence is abhorrent to the principles of that humane system of laws from which we derive most of our rules of criminal proceedings, and cannot be countenanced.").

30. State v. Richard, 223 La. 674, 66 So.2d 589 (1953); State v. Doyle, 146 La. 973, 84 So. 315 (1920) (The question is: Was the situation such that there is a reasonable probability that the accused would make a false confession?); State v. Gianfala, 113 La. 463, 482, 37 So. 30, 36 (1904) ("... one of the main grounds of rejecting confessions—the danger of their not being true. . ."); State v. Havelin, 6 La. Ann. 167, 169 (1851) ("... the only principle upon which confessions are rejected in any case is, that they may have been obtained by such promises or threats as render it uncertain whether or not they are true."); State v. Jonas, 6 La. Ann. 695, 698 (1851) ("The true ground upon which confessions, extorted by violence or induced by promises, are excluded as evidence, is, that the violence and hope destroy all confidence in the confessions. . . . Upon true principles, the objections should go rather to the credit of the confessions than to their admission as evidence. We are not prepared to say the same strictness should be observed, so as to exclude the confessions of slaves as evidence; humanity and charity ought to be extended to them; but if their confessions are obtained without a violation of either, and under such circumstances as to force the belief that the confessions are true, they should be received as evidence.").

31. LA. R.S. § 15:454 (1950): "The rule that a confession produced by threat or promise is inadmissible in evidence does not apply to admissions not involving the existence of a criminal intent."

State v. Campbell, 219 La. 1040, 1043, 55 So.2d 238 (1951) (A bill of exception was taken because an oral admission of defendant was offered in evidence without the showing that such was free and voluntary. To this exception the court replied: "Counsel for the accused contends that it was mandatory on the state to show that this statement was free and voluntary. In analyzing what was said, what was done, and the locus of the interview, we do not share such a view. What was said and done . . . was in no sense a confession of the crime charged. Defendant admitted that he broke a pane of glass on the church property. This was not a confession of guilt. It was merely the acknowledgment of a fact tending to establish guilt. The Louisiana Code of Criminal Law and Procedure speaks: 'The term 'admis-

the enactment of this article, the Supreme Court in 1925 employed the self-incrimination provision of the Louisiana Constitution and held that an incriminating admission obtained by the use of violence was not receivable in evidence.³² If this decision is regarded as authoritative, and the negative implication of Article 454 is given effect, then admissions obtained by the use of force are not admissible in evidence. In that event, perhaps there should be some device whereby an accused might force the state to make a preliminary showing that the admission offered in

sion" is applied to those matters of fact which do not involve criminal intent . . . and "the term "confession" is applied only to an admission of guilt, not to an acknowledgment of facts merely tending to establish guilt." Article 449. Here the Code in exact terms makes a distinction between a confession and an admission."); *State v. Picton*, 51 La. Ann. 624, 628, 25 So. 375, 377 (1899) ("There was no confession of defendant, and being none, there was no basis for urging exclusion of the testimony because brought about by threats of prosecution on the one hand, or immunity from prosecution on the other. . . . It has been held that the rule of inadmissibility of a confession procured by threat or promise does not apply to admissions not involving the existence of a criminal intent.").

32. *State v. Simpson*, 157 La. 614, 617, 102 So. 810, 811 (1925): "It is argued that the evidence which the defendant was compelled to give against himself—his showing the deputy sheriff where to find the still and whiskey—was not a confession of guilt, and was therefore not subject to the rule forbidding involuntary confessions. If we were dealing only with the common-law rule, *nemo tenetur seipsum accusare*, the argument in support of the judge's ruling in this case might be sustained by quotations from the decided cases and from the text-books on the law of evidence. But we are controlled by the mandate in the Constitution, which is not limited to a prohibition against involuntary confessions. The mandate is that—
"No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution." Article 1, § 11.

"To compel a person accused or suspected of a crime to tell or indicate where evidence against him may be found is to compel him to give evidence against himself. Evidence discovered in that way is, of itself and apart from what was said or done by the person subjected to the threats or punishment, admissible in evidence against him, notwithstanding the illegal and reprehensible means of obtaining it. Therefore the fact that the deputy sheriff found the still and the whiskey where he did find them, and the articles themselves, were admissible in evidence, for all that they were worth, apart from any statement or indication which the defendant was compelled to give as evidence against himself. But the statement or indication which the defendant was compelled to give, that he knew where the still was, was not admissible in evidence. The Supreme Court of the United States has affirmed the doctrine that any statement which an accused person has been compelled to give is inadmissible as evidence against him when he is put on trial, even though the statement was not a confession or admission of guilt." The court then quoted from the case of *Bram v. United States*, 168 U.S. 532 (1897).

See also the case of *State v. Hayes*, 162 La. 310, 318, 110 So. 486, 489 (1926), in which the court, in holding that an incriminating admission, like a confession, must be shown to have been voluntarily made, said: "Since, when a confession is objected to as one not voluntarily made, the state must show that it was so made, before it can be received in evidence, and the defendant must be given an opportunity to offer in rebuttal his evidence, we think the same rule governs the admissibility of incriminatory statements, whether they are offered as substantive or impeaching evidence."

evidence was not extorted by violence.³³ The Code of Criminal Procedure provides for a preliminary determination of the admissibility of confessions,³⁴ but is silent on the necessity of such a determination when an admission is proffered.

Laying the foundation for the introduction of a confession. When an attempt is made to introduce a confession into evidence, the judge should retire the jury in order to ascertain in their absence whether or not the confession was voluntarily made and is thus admissible.³⁵ The nature and probative effect of confessions justify this time-consuming procedure.³⁶ Any attempt to get such evidence to the jury without this preliminary determination of its admissibility should be carefully guarded against.

Only such circumstances surrounding the making of the confession as are relevant to the issue of voluntariness should be considered by the judge in this hearing.³⁷ All other questions,

33. Certainly all admissions would not merit the time-consuming procedure of a preliminary examination. Perhaps a prima facie case of violence should be shown before a preliminary examination will be afforded for the determination of their admissibility.

34. LA. R.S. § 15:451 (1950): "Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary. . . ."

35. The preliminary examination to determine the admissibility of the confession is required only when an objection to the effect that the confession is inadmissible because involuntary has been properly interposed. See *State v. Green*, 221 La. 713, 730, 60 So.2d 208, 213 (1952) ("While it is unquestionably the correct practice to require that the jury be withdrawn when evidence is submitted for the purpose of laying the foundation for the admission of a confession, reversible error does not necessarily occur by permitting the jury to remain in the courtroom. . . ."); *State v. Lanthier*, 201 La. 844, 10 So.2d 638 (1942); *State v. Madison*, 47 La. Ann. 30, 33, 16 So. 566, 567 (1895) ("Counsel for the defendant urges in argument that no confession should be admitted in evidence unless it is shown to have been made voluntarily. It does not appear that the accused raised any objection to the admissibility of the evidence and that he asked to have it excluded from the consideration of the jury."); *State v. Davis*, 34 La. Ann. 351, 352-53 (1882) (" . . . in the absence of timely objection from the accused, the court will not exclude evidence of an alleged confession, because preliminary proof was not offered, on the part of the State, to show that the confession was made freely and voluntarily, unless it appear from the evidence itself that the confession was obtained from the accused by means of promises or threats, or, in other words, that it was not voluntary.

"At the instance of the accused, the court must exact proof to show the nature and the circumstances of the confession, but not otherwise.")

36. See page 653 *infra*.

37. *State v. Alexander*, 215 La. 245, 40 So.2d 232 (1949); *State v. Cook*, 215 La. 163, 39 So.2d 898 (1949); *State v. Graffam*, 202 La. 869, 13 So.2d 249 (1943); *State v. Silsby*, 178 La. 663, 674, 152 So. 323, 327 (1934) (" . . . by the strict letter of the law, he should have been taken direct to the parish jail, instead of to a police station or jail; but, if the confession be voluntary, the place where it is made is of no consequence."); *State v. Hughes*, 155 La. 271, 99 So. 217 (1924); *State v. Bessa*, 115 La. 259, 38 So. 985 (1905); *State v. Bartley*, 34 La. Ann. 147 (1882).

including whether or not the confession was in fact made,³⁸ must be left entirely to the jury.³⁹

In Louisiana, the burden is on the prosecution to prove that the confession offered in evidence "was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."⁴⁰ Without express legislative authority, the court has declared on numerous occasions that the state must prove this beyond a reasonable doubt.⁴¹ After

38. In *State v. Hughes*, 155 La. 271, 274, 99 So. 217 (1924), the court said: "The defendant denied that he made a confession . . . but whether or not the confession was made was a question of fact for the jury to determine. It was the duty of the court to ascertain if the alleged confession was freely and voluntarily made, and, if so, to admit the testimony and leave the determination of all other facts in relation thereto to the jury."

39. *State v. Dreher*, 166 La. 924, 118 So. 85 (1928). In this case the court held that the objection that defendant's statement was not admissible as a confession because not incriminatory went merely to the effect of the statement and not to the admissibility thereof.

In *State v. Cook*, 215 La. 163, 29 So.2d 898 (1949) and *State v. Bessa*, 115 La. 259, 38 So. 985 (1905), the court held that if a confession is voluntarily made, the judge has no right to exclude it even when "it is shown on its face to be false." And in *State v. Graffam*, 202 La. 869, 13 So.2d 249 (1943) and *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1928), the court held that a confession which was not free and voluntary was not admissible in evidence no matter how true it may have been. These are factors to be considered solely by the jury.

40. LA. R.S. § 15:451 (1950): "Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." See also *State v. Richard*, 223 La. 674, 66 So.2d 589 (1953); *State v. Green*, 221 La. 713, 60 So.2d 208 (1952); *State v. Lewis*, 175 La. 696, 144 So. 423 (1932); *State v. Johnson*, 30 La. Ann. 881 (1878). This view as to the burden of proof applies to cases where it does not appear whether or not the confession was made to persons in authority or where it appears that the confessions were made to persons not in authority [*State v. Doiron*, 150 La. 550, 90 So. 920 (1922); *State v. Young*, 52 La. Ann. 478, 27 So. 50 (1899) (to mob)]; and also in cases where the confessions appear to have been made to persons in authority. [*State v. Lewis*, 175 La. 696, 144 So. 423 (1932) (to coroner); *State v. Berry*, 50 La. Ann. 1309, 24 So. 329 (1898) (to constable); *State v. Auguste*, 50 La. Ann. 488, 23 So. 612 (1898) (to deputy sheriffs); *State v. Garvey*, 28 La. Ann. 925 (1876) (to chief of police); *State v. Nelson*, 3 La. Ann. 497 (1848) (slave to the son of his master)].

41. *State v. Green*, 221 La. 713, 60 So.2d 208 (1952); *State v. Jugger*, 217 La. 687, 47 So.2d 46 (1950); *State v. Joseph*, 217 La. 175, 46 So.2d 118 (1950); *State v. Wilson*, 217 La. 470, 46 So.2d 738 (1950); *State v. Wilson*, 214 La. 317, 324-25, 37 So.2d 804, 806 (1948) (The court, after quoting Article 351, said: "This court has construed that article of the Code of Criminal Procedure to mean that before what purports to be a confession can be introduced in evidence it must be shown, not only affirmatively but by proof beyond a reasonable doubt, that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."); *State v. Ellis*, 207 La. 812, 22 So.2d 181 (1945); *State v. Graffam*, 202 La. 869, 13 So.2d 249 (1943); *State v. Henry*, 196 La. 217, 198 So. 910 (1940).

the prosecution has offered its evidence,⁴² the defense may cross-examine the prosecution's witnesses and offer evidence on its own behalf that the confession was not voluntary.⁴³ The accused may take the stand for the purpose of contradicting the state's evidence without subjecting himself to cross-examination on the whole case.⁴⁴

42. The state must offer witnesses to testify that the accused had been offered no threats or promises or that the confession was voluntary. See *State v. Green*, 221 La. 713, 735, 60 So.2d 203, 215 (1952) (The court, speaking through Justice McCaleb, said: "It was incumbent upon the prosecution to produce the available witnesses who participated in the questioning of defendant for the purpose of obtaining a confession, in order for the court to have all the facts before it."); *State v. Thomas*, 208 La. 548, 23 So.2d 212 (1945); *State v. Lanthier*, 201 La. 844, 10 So.2d 638 (1942); *State v. Silsby*, 176 La. 727, 736, 146 So. 684, 686 (1933) ("So it seems hardly necessary to say that in this case every police officer who had the defendant in charge, from the time of his arrest to the time of his alleged confession, and everyone who had aught to do with the receiving of the alleged confession, was called to testify that the confession was freely given, without violence, duress, threat, or promise, of any kind."); *State v. Miller*, 42 La. Ann. 1186, 8 So. 309 (1890); *State v. Platte*, 34 La. Ann. 1061 (1882).

43. A witness by whom a confession is to be established must first be asked whether it was voluntary. At this point the defendant cannot object and offer another witness to show that the first had previously stated that threats or promises had been used to obtain the confession. The defendant must wait until the prosecution has laid the foundation and may then offer proof to impeach the statements of the witness for the state. See *State v. Thomas*, 208 La. 548, 23 So.2d 212 (1945); *State v. Lanthier*, 201 La. 844, 850, 10 So.2d 638, 640 (1942) ("If the accused is compelled to withhold his evidence tending to establish that the confession is not free and voluntary until such time as he offers his proof in defense, there would be very few cases where the purported confession would not get before the jury, because certainly the State is not going to offer evidence to prove that the confession was not free and voluntary."); *State v. Michel*, 111 La. 434, 437, 35 So. 629, 630 (1904) ("If there was anything about the place at which this confession is said to have been made, or in regard to the condition under which it was obtained, it devolved upon the defense to bring out the facts by needful cross-examination."); *State v. Miller*, 42 La. Ann. 1186, 8 So. 309 (1890); *State v. Platte*, 34 La. Ann. 1061, 1062 (1882) ("When the state offers to make such proof [of voluntary character of the confession], the issue as to the character of the confession is properly raised, and both sides have the right to be heard on this issue. The inquiry, on a point of such vital importance to an accused, should be free and full, and is not to be closed at the very instant that the state manages to eke out from the prosecuting witness, that she, the witness, had made no threats or promises, and all opportunity denied to the other party to be heard.")

44. In *State v. Thomas*, 208 La. 548, 554, 23 So.2d 212, 214 (1945), the court said: "In determining whether the confession is free and voluntary, the judge, in the absence of the jury, necessarily can admit only testimony relating to such issue. Testimony of that nature has no direct bearing on the guilt or innocence of the accused; it concerns solely facts occurring subsequent to the time of the commission of the crime. From this it follows, we think, that when a defendant is placed on the stand for the purpose of traversing the testimony of the state witnesses that a confession was free and voluntary, he is not undergoing the examination-in-chief contemplated by the referred to Article 376." Article 376 provides that a witness who testifies to a single fact in his examination-in-chief may be cross-examined upon the whole case.

MEANING OF THE TERM "VOLUNTARY"

In general. A voluntary confession is one that the accused made of his own free will.⁴⁵ The Louisiana courts state that a confession is deemed involuntary if influence of *any* degree has been exerted on the accused to obtain it, whether in the form of threats, promises, or violence.⁴⁶ If the underlying theory of the voluntariness test were that only untrustworthy confessions are not admissible, then it would seem that no confession obtained by influencing the accused's free will would be inadmissible unless the influence had been sufficiently strong to render the confession untrustworthy. A few Louisiana cases follow this approach.⁴⁷ But the majority position is in favor of excluding confessions obtained by the exertion of *any* influence on the accused's free will.⁴⁸ One explanation advanced for this is that the courts are not equipped to measure the effects of various influences upon the mind of the accused.⁴⁹ Such reasoning is not persuasive, since courts frequently gauge the effect of certain acts or events on persons' minds.⁵⁰

Physical and mental condition of confessor. The age, intelligence, and physical and mental condition of the accused are relevant factors in determining whether or not a confession made

45. For a discussion of this see 2 WHARTON, EVIDENCE IN CRIMINAL CASES 980, § 592 (11th ed. 1935).

46. *State v. Richard*, 223 La. 674, 66 So.2d 589 (1953); *State v. Ellis*, 207 La. 812, 22 So.2d 181 (1945); *State v. Lanthier*, 201 La. 844, 10 So.2d 638 (1942); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. Lewis*, 175 La. 696, 144 So. 423 (1932); *State v. Canton*, 131 La. 255, 59 So. 202 (1912); *State v. Young*, 52 La. Ann. 478, 27 So. 50 (1899).

47. *State v. Ross*, 212 La. 405, 31 So.2d 842 (1947); *State v. Doyle*, 146 La. 973, 84 So. 315 (1920); *State v. Williams*, 129 La. 215, 217, 55 So. 769 (1911) ("The true test seems to be: 'Was the inducement of a nature calculated, under the circumstances, to induce a confession, irrespective of its truth or falsity?' Wigmore, Evidence, vol. 1, § 832."); *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); *State v. Jonas*, 6 La. Ann. 695 (1851) (In this case, the court said that if confessions were received under such circumstances as to force belief that they are true, they ought to be received as evidence; that, upon true principle, the objection that the confession was extorted by violence or inducements should go rather to the credit of the confession than its admissibility.); *State v. Havelin*, 6 La. Ann. 167, 169 (1851) ("... the only principle upon which confessions are rejected in any case is, that they may have been obtained by such promises or threats as render it uncertain whether or not they are true.")

48. See note 46 *supra*.

49. See note 46 *supra*.

50. The courts, for example, rest their judgments on findings of subjective facts in cases involving mental pain and anguish [*Spearman v. Toyé Bros. Auto & Taxicab Co.*, 164 La. 677, 114 So. 591 (1927)], freedom of consent to marriage by the parties [Art. 91, LA. CIVIL CODE of 1870. See *Grundmeyer v. Sander*, 175 La. 189, 143 So. 45 (1932); *Fowler v. Fowler*, 131 La. 1088, 60 So. 694 (1913); *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836 (1895)] and defense of another in tort [*Goodwin v. Beene*, 147 La. 177, 84 So. 579 (1920)].

by him was voluntary.⁵¹ The reasons for this are obvious, and the extent to which these factors should be considered naturally varies with different factual situations. The fact that a person is a minor⁵² or mentally deficient⁵³ does not by itself render the confession he has made inadmissible. The situation from which the confession arose must be weighed in the light of the probable

51. *State v. Robinson*, 215 La. 974, 981, 41 So.2d 848, 851 (1949) ("While there can be little doubt that the insistence of the officer to confess because 'I have got you in the palm of my hand' would have influenced a man of judgment to some extent, an even more vigorous view of the declaration must be applied here—for it is apparent that appellant, being but 16 years of age, was mentally immature despite the fact that he was fully developed from a physical standpoint." Justice McCaleb explained his position by footnoting the remark, ". . . that, in view of the fact that appellant is a boy 16 years of age, the chances of influencing him were much greater than in the case of an adult." 215 La. 974, 981, n. 4, 41 So.2d 848, 851, n. 4 (1949)); *State v. Graffam*, 202 La. 869, 889, 13 So.2d 249, 255 (1943) ("Under the facts presented by this record we are constrained to hold that defendant's confession was not freely and voluntarily made. The situation of the defendant, the nature of his wound, the condition of acute shock from which he was suffering, his weakness resulting from the loss of blood, and the effect of the morphine and other treatment that was administered, or being administered to him, necessarily, overthrows any possible implication that his statement to Detective Schwehm in response to the detective's questions could have been the result of a purely voluntary mental action." The court explained that: "It is not enough that the confession was not induced by a promise or a threat in order to prove that it was voluntarily made. It is voluntary in law if, and only if, it is voluntary in fact."); *State v. Bernard*, 160 La. 9, 11, 106 So. 656, 657 (1925) (Fact that defendant was "an ignorant country negro" was considered in determining if the confession was voluntary. In that case the court said, "The language and conduct of the officers, considering the situation and character of the defendant, and the circumstances under which the defendant was called upon to disclose what he knew about the offense, must be held to be such 'treatment designed by effect on body and mind to compel a confession of crime.'"); *State v. Phelps*, 138 La. 11, 69 So. 856 (1915) (The fact that a colored boy was sixteen years of age and not possessed of normal intelligence was considered in determining whether his confession was free and voluntary, but did not make the confession inadmissible of itself.); *State v. Auguste*, 50 La. Ann. 488, 491, 23 So. 612, 613 (1898) ("And whether it was so made [without the application of hope or fear by any other person] or not is to be determined upon consideration of the age, situation, and character of the person, and the circumstances under which it was made.").

52. *State v. Phelps*, 138 La. 11, 69 So. 856 (1915) (defendant was a sixteen year old Negro boy).

53. *State v. Bernard*, 160 La. 9, 106 So. 656 (1925) (defendant was an "ignorant country negro"); *State v. Babineaux*, 146 La. 290, 292, 83 So. 558, 559 (1920) (The court, considering the mental condition of the defendant, said: "While the accused, who was sick, testifies to his having been out of his head when he made the confession, and the person to whom he made it says that the accused was very sick—said he had pneumonia—the fact remains that he was not so far out of his head as not to have been able to make the confession; and there is no pretense that he was induced to make it by any promise or prompting from anybody."); *State v. Phelps*, 138 La. 11, 13, 69 So. 856, 857 (1915) (The sixteen year old defendant did not possess normal intelligence. The court said: "We have no doubt that the trial judge gave due consideration to the mental caliber of the youth, in determining whether his confessions were made under an undue influence. But the fact that he is a colored boy only sixteen years of age and of less than normal intelligence did not, of itself, render confessions inadmissible in evidence.").

strength of the accused's will in determining whether his will, at the time of confessing, was free or not.⁵⁴

The excitement or nervousness of the confessor will not be considered by the court in determining the admissibility of a confession made while he was in that condition.⁵⁵ Such a mental condition would seem to detract from the reliability of statements made during its existence, and would certainly seem relevant in inquiring into the probable effect of external influences on the accused's will. But the accused's excitement usually comes from within himself as a result of the situation in which he finds himself, without inducements directed at his free will by other persons,⁵⁶ and this condition does not render his confession involuntary. If the nervousness or excitement were directly produced by extraneous pressure exerted by another person for the purpose of obtaining a confession, it would very probably be held that the confession so obtained is involuntary and not admissible.

The intoxication of the accused at the time of making his confession does not by itself render the confession inadmissible.⁵⁷ His intoxication is material in inquiring into the weight his confession should be accorded by the jury, but not in deciding its admis-

54. See note 51 *supra*.

55. *State v. Doyle*, 146 La. 973, 992, 84 So. 315, 322 (1920) (The court, in refusing to exclude a confession because of testimony indicating that the defendant was laboring under an "emotional strain" or his mental condition was "not that of an ordinary sane man," said: "But the normal man in civilized life would probably exhibit some emotion in confessing a murder, and thereby subjecting himself to the penalty of death; and, if the normal man's mental state is affected, as it surely is, by the condition in which he finds himself, then the abnormal becomes the normal."); *State v. Jones*, 127 La. 694, 53 So. 959 (1911) (The court held that the mere fact that the confession was given in the course of an angry tirade of jealousy will not of necessity render a confession involuntary.); *State v. Pamela*, 122 La. 207, 47 So. 508 (1903) (A confession given while defendant was under arrest and while under great excitement and nervousness was admitted by the court.); *State v. Jones*, 47 La. Ann. 1524, 18 So. 515 (1895) (The court held that excitement and nervousness on the part of the accused at the time he made the confession to the jailer did not render it involuntary when there was no offer of violence or threats from any source whatever.).

56. See note 55 *supra*.

57. *State v. Alexander*, 215 La. 245, 251, 40 So.2d 232, 234 (1949) ("A review of the authorities brings us to the conclusion that the fact of the intoxicated condition of the accused at the time of making the confessions does not, unless such intoxication goes to the extent of mania, affect the admissibility of evidence of such confessions, if they were otherwise voluntary."); *State v. Hogan*, 117 La. 863, 867, 42 So. 352, 353 (1906); *State v. Berry*, 50 La. Ann. 1309, 1315, 24 So. 329, 331 (1898). In both the *Berry* and *Hogan* cases, the court quoted Wharton and said: "The mere fact of intoxication, unless amounting to mania, does not exclude a confession made during its continuance, even though the intoxication was induced by a police officer, who sought in this way to induce the prisoner to confess. Confession, however, produced by intoxication, is a fact for the jury, tending to discredit the confession'").

sibility.⁵⁸ The fact that the intoxicants were furnished by the officer having the accused in custody does not affect the admissibility of his confession,⁵⁹ unless they were furnished by the officer (or some other person) for the purpose of obtaining the confession. In the latter event, the court would undoubtedly take the opportunity of discouraging such a practice by holding the confession so obtained inadmissible. If the accused were intoxicated to the point of mania when he confessed, indications are that his condition would be viewed differently from that of mere intoxication.⁶⁰ Mere intoxication would probably not result in automatic exclusion of the confession, but it would have considerable weight as evidence of the strength of the accused's will in relation to external influences.

Hope or fear not produced by other persons. The influence which overcomes the will of the accused and leads the court to exclude the confession must be external, and not a result of the mere operations of his own mind.⁶¹ If hope or fear is not induced by third persons, the court will not hold the confession involuntary.⁶² The inducement to confess must come from some external source and the fact that a prisoner may of his own motion conclude that it will be advantageous to him to confess is immaterial. Where the violence used or threats made were for a purpose other than to induce a confession, and the accused was or as a reasonable man should have been aware of this fact, then the

58. See cases cited in note 57 *supra*.

59. See cases cited in note 57 *supra*. See also *State v. Eisenhardt*, 185 La. 308, 335, 169 So. 417, 425-26 (1936) (The court, in refusing to exclude a confession when alcohol was given to the accused by an officer, said: "The record is very far from showing that the defendants were plied with alcohol to affect them so as to more readily induce confessions during the interview with the district attorney and his assistant, as inferred in the brief of defendants. The facts are that during this interview the defendants themselves asked for a drink. A small drink was given each; and, after the interview, they asked if they could have what was left in the bottle, about a drink, and it was given them.").

60. See cases cited in notes 57 and 59 *supra*.

61. *State v. Griffin*, 48 La. Ann. 1409, 20 So. 905 (1896) (A confession to one who informed the defendant that he was a newspaper man seeking a statement for publication, and who used no violence and made no threats or promises but, on the contrary, informed the defendant that he could do nothing for her in the way of immunity from punishment, was held voluntary. The court held that the mere hope of immunity is not such an inducement as to make the confession inadmissible.); *State v. Havelin*, 6 La. Ann. 167, 169 (1851) (The court held the confession admissible when brought about by mere hope resulting from a conversation with a policeman who told the accused he had no power to make any promises and the court said "... that a mere hope resulting from a conversation, in which a promise was neither expressed nor implied, is not sufficient [to exclude a confession].").

62. See note 61 *supra*.

courts will consider the confession voluntarily given.⁶³ For example, a confession has been admitted in evidence where the violence or threat was used in order to enforce discipline in jail⁶⁴ or to reprimand an insolent prisoner.⁶⁵

Confessions made while in custody or under arrest. The Louisiana courts,⁶⁶ along with other state courts,⁶⁷ have always held that the mere fact that a confession is made while the accused is confined under arrest or in police custody is not sufficient in itself to affect its admissibility. There must be something more, some inducement held out or influence exerted to overcome the free will of the prisoner.⁶⁸ There is nothing in the fact of arrest, as such, which tends to produce an untrue confession of guilt or to violate the policy of encouraging fair law enforcement. If there

63. *State v. Lamotte*, 168 La. 837, 123 So. 591 (1929); *State v. Thomas*, 161 La. 1010, 109 So. 819 (1926).

64. *State v. Thomas*, 161 La. 1010, 1014, 109 So. 819, 821 (1926) ("The mere incident that the jailer stuck a gun in defendant's cell, and told him that if he did not clean up his cell he would come in and chastise him, did not constitute force or threats designed to compel or induce a confession, but was clearly intended as a firm means of enforcing prison discipline and sanitary conditions in the jail.").

65. *State v. Lamotte*, 168 La. 837, 841, 123 So. 591, 592 (1929) (The only force used upon the defendant was that of the constable. He slapped the defendant just before locking him in the city jail because he thought the defendant was being insolent. The court said: "While the constable was not justified in his action, yet his conduct was so disconnected with the making of the confessions to the police officers that we think that, resting upon obviously distinct motives, it could not have influenced them, and hence this conduct should not have the effect of vitiating the confessions.").

66. *State v. Scriber*, 178 La. 237, 151 So. 192 (1933); *State v. Brown*, 166 La. 43, 116 So. 588 (1928); *State v. Seminary*, 165 La. 67, 115 So. 370 (1928); *State v. Garon*, 161 La. 867, 109 So. 530 (1926); *State v. Bailey*, 146 La. 624, 83 So. 854 (1920); *State v. Doyle*, 146 La. 973, 84 So. 315 (1920); *State v. McGuire*, 146 La. 49, 83 So. 374 (1919); *State v. Rugero*, 117 La. 1040, 42 So. 495 (1906); *State v. Baudoin*, 115 La. 773, 40 So. 42 (1905); *State v. Lewis*, 112 La. 872, 36 So. 788 (1904); *State v. Berry*, 50 La. Ann. 1309, 24 So. 329 (1898); *State v. Jones*, 47 La. Ann. 1524, 18 So. 515 (1895); *State v. Johnson*, 47 La. Ann. 1225, 17 So. 789 (1895); *State v. Revells*, 35 La. Ann. 302 (1883); *State v. Alphonse*, 34 La. Ann. 9 (1882); *State v. Simon*, 15 La. Ann. 568 (1860); *State v. Hash*, 12 La. Ann. 895 (1857).

67. For cases on this see 2 WHARTON, EVIDENCE IN CRIMINAL CASES 1023, § 610, n. 6 (11th ed. 1935); 3 WIGMORE, EVIDENCE 311, § 851, n. 1.

68. In *State v. Auguste*, 50 La. Ann. 488, 491, 23 So. 612, 613 (1898), the court said, "The mere fact that a confession is made to a police officer, or other official, while the accused is under arrest in or out of prison, or was drawn out by questions, does not, it is true, necessarily render the confession involuntary, but such imprisonment or interrogation, and the circumstances and surroundings of the accused at the time, should be taken into careful account in determining whether or not the statements of the prisoner were voluntary." (Italics supplied.) And in *State v. Berry*, 50 La. Ann. 1309, 1314, 24 So. 329, 331 (1898), the court, with reference to confessions made by prisoners to parties arresting them, said, "The fact that a confession was made to such persons and under such circumstances, throws upon courts the duty of very closely scrutinizing the conduct of these officials, and making sure that the instrumentalities intended merely for the vindication of the law should not be converted into engines of oppression or wrong."

were, few confessions would ever reach the jury, since they are usually made after the prisoner is under arrest. Although no Louisiana decisions could be found on this point, it seems that since the only test of admissibility is that of voluntariness, a confession would be admitted even when made while the accused was illegally arrested.⁶⁹

Even the fact that the accused was shackled, handcuffed, or tied after the arrest is held not to be enough to deprive the confession of its voluntary character.⁷⁰ The result is different if the prisoner was shackled, handcuffed, or tied for the purpose of causing him pain, for such treatment is a violation of both the fair law enforcement policy and the principle of trustworthiness.⁷¹

The decisions dealing with the interrogation of an accused being held incommunicado reveal that the courts look into the circumstances of each particular case and regard such practice as only one element to be considered in determining whether or not the confession was voluntarily given.⁷²

Until 1943, both state⁷³ and federal courts⁷⁴ were in agreement that delay in taking an accused before a committing magistrate was only one of several factors to consider in determining voluntariness. In 1943, however, in *McNabb v. United States*,⁷⁵ the United States Supreme Court held that a confession obtained during a delay in arraignment contrary to express statutory provision was automatically inadmissible, regardless of its voluntariness.⁷⁶ The purpose of the *McNabb* rule was to prescribe

69. This rule has been followed in other jurisdictions. For cases see 2 WHARTON, EVIDENCE IN CRIMINAL CASES 1024, § 610, n. 7 (11th ed. 1935).

70. *State v. Joseph*, 217 La. 175, 46 So.2d 118 (1950); *State v. Holmes*, 205 La. 730, 18 So.2d 40 (1944); *State v. White*, 156 La. 770, 101 So. 136 (1924); *State v. McGuire*, 146 La. 49, 83 So. 374 (1919); *State v. Rugero*, 117 La. 1040, 42 So. 495 (1906). Moreover, the fact that the accused was placed in the stocks for safekeeping did not render his confession inadmissible. *State v. Nelson*, 3 La. Ann. 497 (1848).

71. *State v. Murphy*, 154 La. 190, 97 So. 397 (1923); *State v. Albert*, 50 La. Ann. 481, 23 So. 609 (1898).

72. *State v. Jugger*, 217 La. 687, 47 So.2d 46 (1950); *State v. Roberson*, 157 La. 974, 103 So. 283 (1925).

73. INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 209 (3d ed. 1953).

74. *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924); *Hardy v. United States*, 186 U.S. 224 (1902); *Bram v. United States*, 168 U.S. 532 (1897); *Wilson v. United States*, 162 U.S. 613 (1896).

75. 318 U.S. 332 (1943).

76. *Id.* at 344-45. Mr. Justice Frankfurter stated the circumstances under which the confessions were secured and explained the consequences as follows: "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty

certain "civilized standards" for federal law enforcement officers.⁷⁷ Although the Supreme Court's ruling in this case only affected the use of confessions illegally obtained by federal officers and placed no restriction upon the use of such confessions obtained by state or local officers,⁷⁸ there was some speculation at the time whether or not the state courts would be so influenced by the decision that they would adopt the same doctrine.⁷⁹ It has

enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law."

Although the above excerpt stresses both the unlawful detention and the coercive effects of prolonged incommunicado questioning, the Court in *Upshaw v. United States*, 335 U.S. 410, 413 (1948) pointed out the primary consideration: ". . . a confession is inadmissible if made during illegal detention due to the failure promptly to carry a prisoner before a committing magistrate, whether or not 'the confession is the result of torture, physical or psychological.'"

The *McNabb* rule was limited in *United States v. Mitchell*, 322 U.S. 65 (1944). The court held admissible a voluntary confession obtained a few minutes after arrest, even though the accused was subsequently detained illegally for eight days before being arraigned. Thus, a confession made during a period of legal detention should not be excluded on account of a subsequent unwarranted delay in arraignment.

Some excellent discussions of the *McNabb* rule can be found in the following: Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239 (1946); Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507 (1952); Note, *The McNabb Rule Transformed*, 47 COL. L. REV. 1214 (1947).

77. Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507, 514 (1952): "The rationale of this new federal rule is that of implementing the otherwise unenforceable arraignment statutes by giving to a prisoner, whose rights and privileges thereunder have been violated, the remedy of barring the evidence secured in such a manner, thereby depriving federal law-enforcing officers of the fruits of their wrongdoing."

78. The Fourteenth Amendment does not require the exclusion of a confession merely because it was obtained during an illegal detention. Thus the decision in the *McNabb* case does not impose a limitation upon criminal trials in state courts. See INBAU & REID, *LIE DETECTION AND CRIMINAL INTERROGATION* 209 (3d ed. 1953) and Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507 (1952).

79. For a list of the various federal and state statutes requiring prompt arraignment of a suspect after his arrest, see *McNabb v. United States*, 318

developed that most of the state courts have rejected the *McNabb* rule.⁸⁰ In 1952 the Louisiana Supreme Court expressly rejected the strict rule of the *McNabb* case,⁸¹ although Louisiana has a statute imposing upon law enforcement officials the duty of bringing arrested persons before a committing magistrate "without unnecessary delay."⁸²

Confessions obtained by physical force. One of the clearest cases of interference with the accused's free will which will vitiate a confession is corporal violence. All courts, both federal and state, seem to be in general agreement upon this rule.⁸³ There are numerous Louisiana cases where physical violence was administered to an accused and in each case the resulting confession was deemed involuntary and excluded.⁸⁴ Whether the violence was employed by a private individual⁸⁵ or by a person in authority⁸⁶ is immaterial—the confession obtained is inadmissible in either case. Confessions obtained by such methods as striking or whipping are excluded.⁸⁷ Solitary and "sweatbox" confinement

U.S. 332, 342 (1943); Note, *Illegal Detention and the Admissibility of Confessions*, 53 YALE L.J. 758, 759 (1944). For a discussion of the legislative history of the federal statutes, see Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 455-59 (1948).

80. For a list of the various state decisions to this effect, see INBAU & REID, *LIE DETECTION AND CRIMINAL INTERROGATION* 210, n. 157 (3d ed. 1953); Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507, 515, n. 28 (1952).

81. *State v. Solomon*, 222 La. 269, 62 So.2d 481 (1952).

82. LA. R.S. § 15:79, 80 (1950).

83. For a collection of cases involving a variety of forms of corporal violence, see McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239, 241-42 (1946); Note, 43 HARV. L. REV. 617 (1930); Note, 24 A.L.R. 703 (1923). See also 2 WHARTON, *EVIDENCE IN CRIMINAL CASES* 1016-1022, §§ 607-08 (11th ed. 1935).

84. *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1929) (Defendant was confined with scanty food, no heat, and little clothing. Resulting confession was excluded.); *State v. Murphy*, 154 La. 190, 97 So. 397 (1923) (Defendants were blindfolded, ropes were put around their necks, and severe punishment was inflicted on them for five hours. Confessions were excluded.); *State v. Young*, 52 La. Ann. 478, 27 So. 50 (1899) (A confession to a body of private citizens which had the accused in close custody with a rope around his neck was held involuntary.); *State v. Albert*, 50 La. Ann. 481, 23 So. 609 (1898) (Handcuffs were placed tightly on accused for purpose of extorting a confession; excluded.); *State v. Revells*, 34 La. Ann. 381 (1882) (Accused, a boy about eighteen years of age, was bound by tying a rope around his neck and arms. Confession excluded.); *State v. Gilbert*, 2 La. Ann. 244 (1847) (The court held that a confession made by a slave while undergoing corporal punishment is inadmissible.).

85. *State v. Young*, 52 La. Ann. 478, 27 So. 50 (1899); *State v. Revells*, 34 La. Ann. 381 (1882).

86. *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1929); *State v. Murphy*, 154 La. 190, 97 So. 397 (1923); *State v. Albert*, 50 La. Ann. 481, 23 So. 609 (1898); *State v. Gilbert*, 2 La. Ann. 244 (1847).

87. *State v. Murphy*, 154 La. 190, 97 So. 397 (1923).

have also served as bases for the exclusion of confessions from evidence.⁸⁸

Confessions obtained by threats. Confessions obtained by threats are usually inadmissible in evidence. What constitutes a threat that will render a confession inadmissible depends upon the circumstances of each case.⁸⁹ However, it seems that any threat which can reasonably be said to have placed the accused in fear that his life or liberty would be in danger if he did not confess will render his confession inadmissible.⁹⁰ The courts will not conclude that a confession has been induced by threats unless the person making the threats appears to have the power to carry them out. A threat of mob violence,⁹¹ a threat to strike, whip, or

88. *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1929) (Defendant was left for four days in an antiquated, unheated, windowless jail inhabited by rats. Confession was inadmissible.).

89. *State v. Newton*, 173 La. 382, 384, 137 So. 69, 70 (1931) ("One of the officers, in the course of the examination, told Edwards [the defendant] that he would try to get an order of court to have the bullet removed, [from the body of the defendant] and sent off, meaning, of course, though not saying it, to have it ascertained by an expert, whether or not the bullet came from the pistol of Nixon [the deceased].") The court held this was equivalent to a threat and considered this one of the factors in excluding the confession.; *State v. Jones*, 127 La. 694, 53 So. 959 (1911) (Court held that the confession was not inadmissible merely because an officer told the prisoner that he was "taking her to the pen," where the statement was in jest, and was immediately explained); *State v. Turner*, 122 La. 371, 47 So. 685 (1908) (Confession was not inadmissible merely because an interviewer told the prisoner that he could raise a mob of a hundred men to murder him, and that there was no possible escape for him, there being no indication of an intention to resort to mobbing); *State v. Robertson*, 111 La. 35, 35 So. 375 (1903) (Detention of the accused for a day and a half under some sort of surveillance in a store into which thieves had broken, while not entirely proper, was not a threat or intimidation which rendered the confession made by accused inadmissible.); *State v. Alphonse*, 34 La. Ann. 9, 17 (1882) (A statement of a police officer to the accused, "Maimie, don't cry; I would not cry if I was not guilty; you would do better if you told me who the parties are. . . . Now, remember, if you know the parties you had better tell me; I would not suffer for anyone else." was held not to contain a threat.). See also *State v. Thomas*, 161 La. 1010, 109 So. 819 (1926); *State v. Hogan*, 157 La. 287, 102 So. 403 (1924); *State v. Young*, 52 La. Ann. 478, 27 So. 50 (1899); *State v. Albert*, 50 La. Ann. 481, 23 So. 609 (1898); *State v. Auguste*, 50 La. Ann. 488, 23 So. 612 (1898); *State v. Revells*, 34 La. Ann. 381 (1882).

90. See cases cited in note 89 *supra*.

91. *State v. Revells*, 34 La. Ann. 381 (1882) (The court held that a confession made by an eighteen year old captive while in the hands of a hostile body of armed men, not known to him as officers, was involuntary.).

Confession held not induced by threat of mob violence: *State v. Hogan*, 157 La. 287, 289, 102 So. 403, 404 (1924) ("The mere fact that accused feared mob violence when he made a confession does not exclude it where such fear was not inspired by threats, express or implied," quoting from *Corpus Juris*); *State v. Turner*, 122 La. 371, 373-74, 47 So. 685, 686 (1908) (The accused had been told that the prosecutor [Price] had said that: "If defendant should be taken out of prison on a straw bond, he [Price] would not be responsible for the consequences, and that he [Price] could raise a mob of a hundred men to murder him, and that there was no possible escape for him." The court said: "What Price had said, if a threat at all, was not an unqualified threat, and still less a present threat.").

kill the accused,⁹² and a threat of prosecution⁹³ have all been held to render involuntary and inadmissible confessions by persons who did believe or reasonably can be said to have believed that such threats would be executed.

Confessions obtained by promises. As a general rule, a promise precludes the admissibility of a confession if it involves any assurance was given to him by someone who had the power or inquiry.⁹⁴ Such a promise usually has reference to the mitigation of the accused's punishment or his absolute escape from punishment. As with threats, the accused must have been in the position of believing or of having reasonable grounds to believe that the inducement was made to him by someone who had the power or authority to fulfill the promise.⁹⁵ Promises made after a confession are held not to affect the admissibility of the confession, regardless of the nature of the promise.⁹⁶

A promise of immunity from prosecution has always been held to be sufficient to deem a confession made in reliance thereon involuntary.⁹⁷ The typical example of this is that of a promise extended to an accomplice of persons charged with a crime to induce him to confess and testify on the state's behalf.⁹⁸ Even though the alleged accomplice who has made the confession

92. *State v. Albert*, 50 La. Ann. 481, 23 So. 609 (1898).

93. *State v. Vicknair*, 52 La. Ann. 1921, 28 So. 273 (1900) and *State v. Nash*, 45 La. Ann. 974, 13 So. 265 (1893) held that the threats under these particular circumstances did not amount to an extortion of the confession rendering it involuntary, but the court did indicate that the threat of prosecution in certain instances would render a confession inadmissible.

94. *State v. Bruce*, 33 La. Ann. 186, 187 (1881) (In this case the court, quoting from Wharton, said: "Difficult questions may arise where there is reason to believe that the confession was made with the hope of compromise, or of obtaining a lighter sentence. To exclude such confessions arbitrarily, would exclude almost all confessions. To work an exclusion there must be shown a causal connection between an authoritative promise and the confession. If this be not shown, the confession is admissible.").

95. *State v. Caldwell*, 50 La. Ann. 666, 23 So. 896 (1898); *State v. Griffin*, 48 La. Ann. 1409, 20 So. 905 (1896); *State v. Mims*, 43 La. Ann. 532, 9 So. 113 (1891); *State v. Revells*, 34 La. Ann. 381 (1882); *State v. Johnson*, 30 La. Ann. 881 (1878); *State v. Nelson*, 3 La. Ann. 497 (1848).

96. *State v. Green*, 210 La. 157, 26 So.2d 487 (1946).

97. *State v. Alexander*, 109 La. 557, 33 So. 600 (1903); *State v. Johnson*, 30 La. Ann. 881 (1878).

98. See cases cited note 97 *supra*. In the *Alexander* case the court held that because the chief of police had said to the accused that as soon as an accomplice was caught the latter was going to turn state's evidence and that, if the accused had anything to tell he had "better tell it now," the resulting confession was rendered involuntary, the impression made upon the mind of the accused by this statement being that, after he had turned state's evidence, he would be freed.

In the *Johnson* case, the court held that the police officer's holding out hope that the accused might be used as a state's witness rendered the resulting confession involuntary.

later refuses to testify, the courts have held that this will not render the confession admissible evidence against him.⁹⁹ A promise of release from arrest is in the same category¹⁰⁰ and has the same effect as a promise of immunity upon the admissibility of a confession.

The courts have held that if a confession is induced by a promise of leniency or clemency, even though complete immunity was not promised, it is inadmissible.¹⁰¹ Thus, a confession is not admissible if made in response to a promise to "make it lighter" on the accused if he confesses,¹⁰² or to recommend a life sentence to the jury instead of capital punishment.¹⁰³

Confessions made after advising the accused to speak the truth. The law is well settled that a confession will not be excluded because the accused was merely advised to speak the truth.¹⁰⁴ Obviously such a suggestion offers no temptation to an

99. See cases cited note 97 *supra*.

100. *State v. Albert*, 50 La. Ann. 481, 23 So. 609 (1898); *State v. Van Sachs*, 30 La. Ann. 942 (1878) (Promise to release from jail if the stolen property was returned.).

101. *State v. Crittenden*, 214 La. 81, 36 So.2d 645 (1948); *State v. Ellis*, 207 La. 812, 22 So.2d 181 (1945); *State v. Newton*, 173 La. 382, 137 So. 69 (1931); *State v. Bernard*, 160 La. 9, 106 So. 656 (1925); *State v. Mims*, 45 La. Ann. 532, 9 So. 113 (1891).

102. See cases cited note 101 *supra*. In *State v. Crittenden*, 214 La. 81, 85, 36 So.2d 645, 646 (1948), one of the officers had related to the accused the circumstances of a case where a person had escaped the electric chair by making a confession. In addition, one of the officers testified, "My line of questioning had to do with telling him that it would be much lighter on him if he told the truth." The court considered these factors in excluding the confession.

In *State v. Ellis*, 207 La. 812, 816, 22 So.2d 181, 182 (1945), a written and signed confession was held inadmissible because of a statement in the document that said: "We have definite proof and if you will tell us it will be better for you. It will go easier on you."

In *State v. Newton*, 173 La. 382, 384, 137 So. 69, 70 (1931), it was found that in the course of examinations the defendant was told: "If you will tell the truth I would like to see the court be lenient with you—if anybody gets leniency I would like for it to be you. . . ." The confession was excluded.

In *State v. Bernard*, 160 La. 9, 11, 106 So. 656, 657 (1925), in the examination of one of the law officers to whom the confession was made, it was found that the officer had said: "I asked him to confess if he had stolen the hog, because it would have been lighter for him, better for him." The confession was excluded.

103. *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1928) (It was urged by the defense that a certain confession was procured by a promise of immunity from the death penalty. The court found that the confession was made before the promise was made but indicated that a confession obtained under the circumstances alleged by the defense would be inadmissible.).

104. In *State v. Richard*, 223 La. 674, 678-79, 66 So.2d 589, 590-91 (1953), the deputy sheriff stated to the accused: "If you are guilty it might be easier on you [to make a confession], but don't confess anything you are not guilty of." The court said: "It is contended that this statement constituted an inducement or promise calculated to induce a confession by the defendant. The test in such cases, as stated by this court in *State v. Ross*,

innocent man to accuse himself falsely. It is not unusual, however, for such advice to be coupled with other statements or acts which contain an implied threat or promise and thereby render the resulting confession inadmissible.¹⁰⁵ The question whether or not the advice contains an implied threat or promise when accompanied by a guarded expression that it would be "better" for the accused to tell the truth has occasioned some difficulty.¹⁰⁶ According to our Supreme Court, "the real question in such case is whether the language used in regard to speaking the truth, when taken in connection with the attendant circumstances and with other language spoken in the same or at some prior interview, shows that the confession was made under the influence of some threat or promise, for in such case the confession is inadmissible."¹⁰⁷ When the advice was coupled with the stronger state-

212 La. 405, 31 So.2d 842, 847, is: 'Was the inducement of a nature calculated, under the circumstances, to induce a confession, irrespective of its truth or falsity?' The inducement here was not of that nature because it contained a warning to the accused not to confess anything of which he was not guilty." The confession was admitted.

State v. Phelps, 138 La. 11, 69 So. 856 (1915); State v. Williams, 129 La. 215, 55 So. 769 (1911) (Exhortation to tell the truth, that his "conscience would be easier," does not exclude a confession); State v. Albert, 50 La. Ann. 481, 23 So. 609 (1898); State v. Caldwell, 50 La. Ann. 666, 23 So. 869 (1898) (Mere suggestion to accused by a friend, two months after the crime, that the prosecutor probably would help him out if he told the truth about the stolen money, did not vitiate the confession.); State v. Meekins, 41 La. Ann. 543, 6 So. 822 (1889) (Advice that "He had better tell the truth"—confession admitted.); State v. Alphonse, 34 La. Ann. 9 (1882); State v. Kitty, 12 La. Ann. 805, 810 (1857) (One of the witnesses testified: "I, then, . . . said to her, that "she must now tell all about it, that it would be better for her to do so, that it would be better for her to tell the whole truth about the matter."'" The court held this did not make confession inadmissible.).

105. State v. Ross, 212 La. 405, 31 So.2d 842 (1947); State v. Phelps, 138 La. 11, 69 So. 856 (1915).

106. State v. Ross, 212 La. 405, 419-20, 31 So.2d 842, 846 (1947) ("The jurisprudence is well settled that a confession will not be excluded because of a mere exhortation or adjuration to speak the truth, but such exhortation or adjuration, accompanied by an expression that it would be better for the accused to tell the truth, has been the subject of many conflicting decisions throughout this country. To us the real question in such case is whether the language used in regard to speaking the truth, when taken in connection with the attendant circumstances and with other language spoken in the same or at some prior interview, shows that the confession was made under the influence of some threat or promise, for in such case the confession is inadmissible."); State v. Williams, 129 La. 215, 217, 55 So. 769 (1911) ("It is well settled that a confession will not be excluded where there is a mere exhortation or adjuration to speak the truth. Where an exhortation is accompanied with an expression that it would be better for the accused to speak the truth, the authorities are divided. 12 Cyc. 467 and 468. In State v. Alphonse, 34 La. Ann. 9, and State v. Meekins, 41 La. Ann. 543, 6 So. 822, it was held that such an expression did not imply a promise or a threat. In State v. Alexander, 109 La. 557, 33 So. 600, it was held otherwise under a different state of facts. The true test seems to be: 'Was the inducement of a nature calculated, under the circumstances, to induce a confession, irrespective of its truth or falsity?' Wigmore, Evidence, vol. 1, Sec. 832.'").

107. State v. Ross, 212 La. 405, 420, 31 So.2d 842, 846 (1947).

ment that "the best thing to do is to tell the truth because we have the evidence against you," the courts have declared the confession obtained as a result inadmissible.¹⁰⁸

Confession obtained without cautioning confessor against later use in court. A confession is not rendered inadmissible by the fact that the accused was not warned that what he said might be used against him.¹⁰⁹ The rule is the same even when the confessor was under arrest or in the custody of the police at the time the confession was given.¹¹⁰ Obviously the failure to give such advice would have no appreciable effect upon the trustworthiness of the confession. The Supreme Court has held that it is not necessary that the prosecution show that the person confessing was informed of the effect or magnitude of the crime with which he would be charged as a condition precedent to admission in evidence of a confession made by him.¹¹¹

Confessions elicited by questions. The Louisiana Code of Criminal Procedure has an express provision that a "confession need not be the spontaneous act of the accused and may be obtained by questions. . . ." ¹¹² The circumstances of the inter-

108. *State v. Ross*, 212 La. 405, 421, 31 So.2d 842, 847 (1947). See also *State v. Phelps*, 138 La. 11, 13, 69 So. 856, 857 (1915) ("The only apparent reasons for excluding the evidence are that the accused was told that it would be better for him to tell the truth, and was told by the deputy sheriff that he, the deputy, 'had the dope on him,' when, in reality, the deputy sheriff had only a suspicion of the boy's guilt.").

109. Texas is the only state in which a statute makes such a warning necessary. TEX. CODE CRIM. PROC. ANN. Art. 727 (Vernon, 1941). For a list of cases from the various states, see INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 224, n. 217 (3d ed. 1953). Louisiana cases include: *State v. Alleman*, 218 La. 821, 51 So.2d 83 (1950); *State v. Byrd*, 214 La. 713, 38 So.2d 395 (1949); *State v. Burks*, 196 La. 374, 199 So. 220 (1940); *State v. Terrell*, 175 La. 758, 144 So. 488 (1932); *State v. Smith*, 156 La. 818, 101 So. 209 (1924); *State v. Birbiglia*, 149 La. 4, 88 So. 533 (1921); *State v. Doyle*, 146 La. 973, 84 So. 315 (1920); *State v. McGuire*, 146 La. 49, 83 So. 374 (1919); *State v. Canton*, 131 La. 255, 59 So. 202 (1912); *State v. Besancon*, 128 La. 85, 54 So. 480 (1911); *State v. Hogan*, 117 La. 863, 42 So. 352 (1906); *State v. Rugero*, 117 La. 1040, 42 So. 495 (1906).

110. *State v. Byrd*, 214 La. 713, 38 So.2d 395 (1949); *State v. Burks*, 196 La. 374, 199 So. 220 (1940); *State v. Terrell*, 175 La. 758, 144 So. 488 (1932); *State v. Doyle*, 146 La. 973, 84 So. 315 (1920); *State v. McGuire*, 146 La. 49, 83 So. 374 (1919).

111. *State v. Davis*, 162 La. 500, 110 So. 733 (1926) (statement that the person whom the confessor had stabbed had died).

112. LA. R.S. § 15:453 (1950): "A confession need not be the spontaneous act of the accused and may be obtained by means of questions and answers." Confessions are not involuntary because drawn out by questions propounded by the prosecutor [*State v. Turner*, 122 La. 371, 47 So. 685 (1908)]; *State v. Tazwell*, 30 La. Ann. 884 (1878)], or by the policemen or other officers holding accused in custody or arresting him [*State v. Doyle*, 146 La. 973, 84 So. 315 (1920); *State v. Hardy*, 142 La. 1061, 78 So. 116 (1918); *State v. Hogan*, 117 La. 863, 42 So. 352 (1906); *State v. Berry*, 50 La. Ann. 1309, 24 So. 329 (1898); *State v. Auguste*, 50 La. Ann. 488, 23 So. 612 (1898); *State v.*

rogation, however, must be taken into consideration in determining whether the confession was voluntary.¹¹³ Questioning may sometimes be so vigorous and persistent that the resulting confession would be considered the product of compulsion.¹¹⁴ The fact that questions are phrased in such form as to assume the guilt of the accused does not affect the voluntariness of the resulting confession.¹¹⁵

Sundry exhortations. The cases indicate that it is merely a question of degree what remarks to the accused will result in the

McGee, 36 La. Ann. 206 (1884); State v. Alphonse, 34 La. Ann. 9 (1882); State v. Mulholland, 16 La. Ann. 376 (1861)], or by the district attorney [State v. Murphy, 154 La. 190, 97 So. 397 (1923); State v. Canton, 131 La. 255, 59 So. 202 (1912)], or by the district judge [State v. Chambers, 45 La. Ann. 36, 11 So. 944 (1892)]. In the case involving the judge the court said that the conduct of the district judge in visiting accused in jail and interrogating him cannot be approved, but since the answers were freely given they are admissible.

113. State v. Silsby, 178 La. 663, 152 So. 323 (1933); State v. Scarbrough, 167 La. 484, 119 So. 523 (1923); State v. Seminary, 165 La. 67, 115 So. 370 (1927); State v. White, 156 La. 770, 101 So. 136 (1924); State v. Doyle, 146 La. 973, 84 So. 315 (1920); State v. Hardy, 142 La. 1061, 78 So. 116 (1918); State v. Vicknair, 52 La. Ann. 1921, 28 So. 273 (1900); State v. Auguste, 50 La. Ann. 488, 23 So. 612 (1898); State v. Berry, 50 La. Ann. 1309, 24 So. 329 (1898); State v. Tazwell, 30 La. Ann. 884 (1878).

See also Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507, 515 (1952).

114. State v. Crittenden, 214 La. 81, 86, 36 So.2d 645, 647 (1948) ("... any persistent effort to obtain a confession from a person in custody by repeatedly subjecting him to cross-examinations after he has refused to make such statement is treatment designed by effect on body or mind to compel a confession of crime." The accused made the confession after being subjected to repeated questioning over a period of three days and the court considered this element in excluding the confession.); State v. Newton, 173 La. 382, 137 So. 69 (1931) (The court excluded the confession after considering several factors, one being the repeated questioning of the accused.); State v. Roberson, 157 La. 974, 985, 103 So. 283, 287 (1925) (A confession was obtained from the accused after some three-to-four hours' questioning by the sheriff and his deputy on the third consecutive day of interrogation. The court thought that "any persistent effort to obtain a statement from a person in custody, by repeatedly subjecting him to cross-examination after he has refused to make such a statement, is 'treatment designed by effect on body or mind to compel a confession of crime'; and that a confession so obtained cannot be used against an accused."); State v. Lee, 127 La. 1077, 54 So. 356 (1911); State v. Albert, 50 La. Ann. 481, 485, 23 So. 609, 611 (1898) (In refusing as evidence a confession obtained after repeated interrogation, the court said: "For the purpose of ferreting out crime, the law provides a grand jury, with inquisitorial power. . .").

115. State v. Turner, 122 La. 371, 47 So. 685 (1908) (Owner of a stolen horse visited the jail at the defendant's request, assumed the accused was guilty, and told him that if he had caught him on the night of the theft he would have shot him. This did not deprive the accused's confession of its voluntary character.); State v. McGee, 36 La. Ann. 206, 209 (1884) (Confession made in response to a question by the deputy sheriff, "Why did you let the old cook-woman see you?" was voluntary.); State v. Tazwell, 30 La. Ann. 884 (1878) (Confession was not involuntary because made in response to the question whether or not the accused wanted to tell all he knew about stealing the prosecutor's corn.).

exclusion of his confession, but the determining question seems to be whether or not an implied inducement, either by way of threat or promise, can be found in them.¹¹⁶ For example, the statement: "Now remember, if you know the parties you had better tell me; I would not suffer for anyone else" was held not to render the confession inadmissible for having been involuntarily obtained.¹¹⁷ But the following expressions, addressed to the accused, have been held to render his confession inadmissible: "If I was in your place and was the right man, I would try and effect a compromise";¹¹⁸ "Boy, I have got you in the palm of my hand. You had better confess to me";¹¹⁹ "If you have got anything to say, you had better say it now."¹²⁰

PROOF AND EFFECT OF CONFESSIONS

Proof that confession was made. By statute the prosecution is required to inform the jury in its opening statement that it intends to offer the confession of the accused in evidence.¹²¹ As

116. For a general discussion of the law regarding such expressions, see 3 WIGMORE, EVIDENCE 277 *et seq.*, §§ 838-39.

117. *State v. Alphonse*, 34 La. Ann. 9, 17 (1882).

118. *State v. Lee*, 127 La. 1077, 1079, 54 So. 356, 357 (1911) (The court, in excluding the confession, said: "The advice of the sheriff, under these circumstances, that it would be better for him to compromise, or, in other words, to confess ('to compromise' could not, under the circumstances, mean anything else than to confess, since a confession was all the man had to offer to the state by way of compromise) must have sunk deep into his mind. . .").

119. *State v. Robinson*, 215 La. 974, 980, 41 So.2d 848, 850 (1949). Moreover, the defendant testified that the police officer had ". . . told me that if the dirt [from the scene of the crime] turned out to be like the dirt in the paper that he had [just raked from the pants of the accused by the state officer], that I could give my soul to 'God and you know what to me.'" The confession was excluded. 215 La. 974, 988, 41 So.2d 848, 853 (1949).

120. *State v. Alexander*, 109 La. 557, 558, 33 So. 600 (1903).

121. LA. R.S. § 15:333 (1950). See also *State v. Sanford*, 218 La. 38, 47, 48 So.2d 272, 275 (1950) ("The district attorney is not required to either read the confession to the jury or to detail the substance thereof" in his opening statement in a prosecution for aggravated rape, after stating that the confession is to be introduced into evidence. The court also pointed out that the district attorney is not required in his opening statement to state that the confession was free and voluntary.); *State v. Ward*, 187 La. 585, 175 So. 69 (1937); *State v. Bishop*, 179 La. 378, 154 So. 30 (1934) (District attorney in his opening statement informed the jury that he expected to establish crime of robbery by facts which would include voluntary confession but failed to inform the jury whether the confession was made orally or in writing. The court thought that the district attorney had followed the "letter and spirit" of LA. R.S. § 15:333 (1950) and held the confession admissible.); *State v. Silsby*, 176 La. 727, 146 So. 684 (1933).

See also the following cases, in which the entire confession was read by the district attorney in his opening statement: *State v. Wilson*, 217 La. 470, 476, 46 So.2d 738, 741 (1950) (The court, citing *State v. Cannon*, said: "A conviction and sentence will not be set aside where the district attorney reads a confession to the jury in his opening statement if the confession is subsequently admitted in evidence."); *State v. Cannon*, 184 La. 514, 520,

indicated above,¹²² the state must then prove to the judge beyond reasonable doubt that the confession was voluntarily made. The question whether or not the confession was in fact made by the accused is for the jury to decide.¹²³

Numerous difficult problems may arise in the proof of a confession. For example, is parol evidence admissible to prove an oral confession stenographically reduced to writing, signed by the defendant and available to the prosecution? Is the unsigned stenographic transcript of an oral confession admissible in proof of the oral confession? Two principles would seem to govern in this area. Article 436 of the Louisiana Code of Criminal Procedure provides that "the best evidence which from the nature of the case must be supposed to exist, and which is in a party's control, must be produced." Article 437 provides that "the contents of a document may be proved by parol if its loss or destruction be shown, or if it is in the possession of the adverse party and he fails to produce it after reasonable notice." If an oral confession has been stenographically reduced to writing and signed by the defendant, it may be possible to prove, as entirely distinct confessions, either the words spoken by the accused or the contents of the writing which he signed. Clearly, if an attempt to prove the contents of the writing is made, Article 437 applies and the writing must be produced if available. But what if the prosecution seeks to avoid production of the writing by contending that it wishes to establish the oral confession by means of parol evidence? There would seem to be three possible approaches to this problem. The court might hold, Professor Wigmore to the contrary notwithstanding,¹²⁴ that the oral confession "merged" into the signed transcript of it, that is, that the upshot of the transcription of the oral confession was one confession, not two. Therefore, evidence of the oral confession would not be admissible. On the assumption that there are two confessions, a written one and an oral one, the court might consider the written transcript the best evidence of the oral confession and hold that, under Article 436, the signed transcript must be produced. On the other hand, the court might hold that the testimony of witnesses

166 So. 485, 487 (1936) (The district attorney read "the defendant's confession to the jury before it was offered or admitted in evidence. This would certainly have been reversible error if the confession, when offered, had been excluded by the court, but in this case it was admitted. Hence defendant's case was not prejudiced thereby. Courts are not warranted in reversing verdicts except where error prejudicial to the defense occurs.").

122. See page 651 *supra*.

123. *State v. Hughes*, 155 La. 271, 99 So. 217 (1924).

124. 4 WIGMORE, EVIDENCE 648, § 1328.

present when the oral confession was made is the best evidence.¹²⁵ The transcript may have been made by an unskilled stenographer and reliable, alert witnesses to the confession might be available to testify. In that event, Article 436 would require that their testimony be produced. These questions seem never to have been presented to the Supreme Court.

The admissibility of parol evidence of an oral confession reduced by a stenographer to a writing never signed by the defendant and the admissibility of the writing itself in proof of an oral confession may be discussed together. In 1912, the Supreme Court, holding admissible parol evidence of the defendant's testimony (not amounting to a confession) at a coroner's inquest, thought that "[w]hile the testimony, as reduced to writing by the coroner, may be the most reliable evidence of what the testimony was, it is not the best evidence in the sense of the rule of best evidence."¹²⁶ In 1936, the court was of the opinion that "without his signature to the [transcript of defendant's oral] confession, evidencing that it is his, the only way that it may be proven is by oral evidence."¹²⁷ Insofar as this dictum suggests that the unsigned transcript of an oral confession is not admissible in proof of the confession, it must be considered nullified by a 1938 decision¹²⁸ holding such a transcript admissible, at least in support of parol evidence of the confession. In 1953, the Supreme Court went further and held¹²⁹ that the unsigned transcript of the defendant's oral statements (apparently not amounting to a confession) must be produced as the best evidence of those statements under Article 436. Obviously, no clear rule-of-thumb can

125. *State v. Bishop*, 179 La. 378, 154 So. 30 (1934); *State v. Terrell*, 175 La. 758, 144 So. 488 (1932); *State v. McCullough*, 168 La. 161, 121 So. 609 (1929); *State v. Natchisse*, 133 La. 584, 63 So. 182 (1913); *State v. Desroches*, 48 La. Ann. 428, 19 So. 250 (1896); *State v. Avery*, 31 La. Ann. 181 (1879).

126. *State v. Lazarone*, 130 La. 1, 6, 57 So. 532, 534 (1912) (Although the statement involved in this case was not a confession, the rule would no doubt be the same for a confession.). See also *State v. Bailey*, 146 La. 624, 638, 83 So. 854, 859 (1920) ("... it is true that, if defendant had made but one confession, and it had been reduced to writing, the written instrument would be the best evidence of the matters confessed; but that was not what happened. The confession offered by the prosecution purports to include all that was said on that particular occasion, and was not reduced to writing. As to it, therefore, the best evidence was the testimony of those by whom it was heard; and that testimony was none the less admissible because defendant made another confession, at another time and place, which was reduced to writing.").

127. *State v. Terrell*, 175 La. 758, 770, 144 So. 488, 492 (1932).

128. *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938).

129. *State v. McMullan*, 223 La. 629, 66 So.2d 574 (1953).

be extracted from this line of decisions. Indeed, this entire area of problems awaits clarification by the legislature or the court.¹³⁰

An interesting development in the method of proving confessions in Louisiana is a recent decision that a confession may be proved by playing a wire recording of it to the jury.¹³¹ The decision is in accord with the majority of American courts to which the question has been presented.¹³²

130. For other interesting questions presented to the Supreme Court, see *State v. Comery*, 214 La. 245, 250, 36 So.2d 781, 782 (1948) ("It appears that the district attorney made some notes, or a narrative, while he and the sheriff were questioning the accused, which were given to a stenographer to be typewritten. After the stenographer had prepared the typewritten instrument, it was read to the accused in the presence of the district attorney, the sheriff and a deputy sheriff, and was signed by the accused. The lower court took the position that the instrument, read to the accused and signed by her, was the original confession. We think the trial judge's ruling was correct. . . ."); *State v. Murphy*, 154 La. 190, 201, 97 So. 397, 401 (1923) ("Although, as above stated, their confessions were taken down by a stenographer, the lower court refused to compel the district attorney, when requested to do so by counsel for the accused, to produce the stenographic report, either for examination or use by the defense, or for submission to the jury, for the reason, as stated, by the court, counsel for the state claimed it had been incorrectly transcribed and contained many errors. Considering the circumstances . . . , and in view of the exclusion of the stenographic report of the confessions, which was unquestionably important and material, not only upon the point as to what was actually said by the accused, but as to such evidences as it might have borne as to the manner and methods used in having it made, we think the court erred in admitting the confessions. We are not to be understood as meaning by this that, if the report had been produced, it would have made the confessions any the less objectionable; it is simply mentioned as a circumstance tending to show the insufficiency of the state's proof in attempting to establish that they were voluntarily made.").

131. *State v. Alleman*, 218 La. 821, 831, 51 So.2d 83, 86 (1950) ("Counsel contends that to permit a wire recording as such to be admitted in evidence would be to open the door to possible fraud and illegal evidence, in that substitutions of the recording are possible. . . . The fact that the statement of the accused was taken by means of a wire recording, in itself, in our opinion in no way affects the admissibility of the statement so taken. This question has never before been presented to this court. However, the courts of other states have had occasion to pass on the same or similar questions, and in every instance, insofar as we have ascertained, have concluded that statements taken in such a manner were admissible in evidence [citing numerous cases]. . . . The question of fraud or substitution is one for the trial judge in each particular case."). The court also said: "The State concedes that the accused did not know that the questions and answers were being recorded, but this fact would not, in our opinion, make the statement, which was freely and voluntarily given, inadmissible in evidence as a confession." 218 La. 821, 829, 51 So.2d 83, 86 (1950).

132. For a list of cases see INBAU & REID, *LIE DETECTION AND CRIMINAL INTERROGATION* 228, n. 226 (3d ed. 1953).

Wigmore recommends the promulgation of a Rule of Court to the effect that no confession made to the police or a prosecuting officer shall be received in evidence unless it has been recorded on sound film. He believes that such a requirement would eliminate most of the current abuses found in continuous interrogation by the police. According to him, an apparatus for recording confessions can be obtained for five hundred dollars or less—"a sum within the budget of any police department." 3 WIGMORE, *EVIDENCE* § 851a (Supp. 1951).

Confession must be given in entirety. The Louisiana Code of Criminal Procedure requires that any confession sought to be used must be used in its entirety.¹³³ "Entirety" embraces the whole of the statement or conversation containing the confession and includes any exculpatory or self-serving declarations connected with it in any manner.¹³⁴ If the parts relied on to establish the guilt of the prisoner are received, the explanations with which they are accompanied should obviously not be rejected. A full explanation might establish the complete justification for the crime committed. The Supreme Court has pointed out, however, that it must appear clearly that the exculpatory or self-serving statements were made in the same conversation as the confession sought to be introduced and not on other occasions or to other witnesses.¹³⁵

133. LA. R.S. § 15:450 (1950): "Every confession . . . sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." For cases on this point, see *State v. Birbiglia*, 149 La. 4, 88 So. 533 (1921); *State v. Donelon*, 45 La. Ann. 744, 12 So. 922 (1893); *State v. Hughes*, 29 La. Ann. 514, 516 (1877) ("We are not disposed to relax this salutary rule [that a confession must be used in entirety]; for although such evidence, when we have satisfactory guarantees of its accuracy, may amount to the strongest proof, yet in a majority of instances, owing to infirmities of memory, or to inattention, or misunderstanding in those called to state conversations with others, it is not very trustworthy. It would be utterly unreliable if fragmentary portions of conversations were received, for then a man might be made to say directly the contrary of what he did say."); *State v. Isaac*, 3 La. Ann. 359, 361 (1848) ("When confessions of guilt are given in evidence, the whole must be taken together. If the parts relied on to establish the guilt of the prisoner be received, the explanations with which they were accompanied cannot be rejected. Although all the parts of the confession are not entitled to equal weight, the whole must be submitted to the jury, who are to determine, under all the circumstances, how much of the entire statement is worthy of belief.").

134. See cases cited in note 133 *supra*. In the *Isaac* case, 3 La. Ann. 359, 361 (1848), the court said, "The witness testified: 'That the accused came to him the morning after the affray, and told him that he had killed the slave Jim, and commenced justifying the act, when the witness stopped him, and told him that he intended to deliver him over to be punished.' The confession appears to have been voluntary, but should have been excluded on the ground that it was interrupted and never completed. . . . In the present instance, the prisoner was not permitted to make a full statement. It is evident that he intended to state circumstances in justification, which the witness refused to hear. A full explanation might have established a complete justification, and the narrative might have been so consistent and probable as to command the belief of the jury. Having been deprived of the benefit of the explanations with which he intended to accompany his admission, and which, if they had been made, would have been admissible in evidence, justice requires that his incomplete disclosure, consisting only of the fact unfavorable to himself, should not go to the jury."

135. *State v. Jones*, 47 La. Ann. 1524, 1531, 18 So. 515, 518 (1895) (" . . . he [the trial judge] says that, 'if these declarations had been made at the time that the confession was made, then they should have been admitted as part of said confession, but, having been made long subsequent thereto, they were clearly objectionable, and they were, therefore, excluded.' It is quite evident

Although the code provides that the confession should be received in its entirety, an important judicial modification has been placed on this rule. There are numerous cases holding that the inability of a witness to remember the entire conversation containing the confession does not make him incompetent to testify regarding what he does remember.¹³⁶ Thus, where it ap-

that these statements constituted no part of the confession. . . ."); *State v. Johnson*, 35 La. Ann. 968, 969 (1883) ("The rule is undoubted that, when confessions or statements of an accused are offered, they must go in all together; but that only applies to declarations made at one time or having some connection with each other. Here we find no connection whatever between the admitted confessions and the rejected declarations, the former having been made six weeks after the latter.").

136. *State v. Jugger*, 217 La. 687, 709, 47 So.2d 46, 54 (1950) ("While Stewart was unable to remember all that had been said, he was able to state the substance of the confession. This suffices and its admission in evidence was proper."); *State v. McCullough*, 168 La. 161, 164, 121 So. 609, 610 (1929) ("The witness was present during the entire time the conversation was had, when the confession was made, and experienced no difficulty in hearing what was said. The witness testified that, while he did not remember the conversation verbatim, he remembered the substance of it, and, after he had narrated what purports to be the substance of the confession, he said that what he had testified to was the substance of everything that was said at the time. While some of his answers to questions suggest that possibly he did not remember all that was said, yet his evidence as a whole conveys the impression that he did. We think that the witness qualified sufficiently to testify to the confession. It is enough to enable a witness to testify to a confession that he is able to state the substance of it."); *State v. Natcisse*, 133 La. 584, 63 So. 182 (1913); *State v. Gianfala*, 113 La. 463, 470, 37 So. 30, 32 (1904) ("We do not think, in order that evidence of the confession may be admissible, that it is necessary for the witness to repeat the conversation with severe exactness. It is sufficient if the witness repeats, in the main, all that was said, and if it be evident to the trial judge that no prejudice is done by a slip of the memory here and there in regard to what was said."); *State v. Kellogg*, 104 La. 580, 29 So. 285 (1901); *State v. Desroches*, 48 La. Ann. 428, 429, 19 So. 250 (1896) ("The court certifies that the witness said that he could not repeat, verbatim, all that the accused uttered, but that he could repeat the substance of his utterances. While, in order to be admissible, such evidence must not be fragmentary portions of a conversation, not the less an exact recital of the words is not required."); *State v. Madison*, 47 La. Ann. 30, 33, 16 So. 566, 567 (1895) (purporting to quote from *State v. Thomas*, 28 La. Ann. 827 (1876), the court said: "A confession by a person charged with a crime is not necessarily inadmissible because the person to show it was made testifies that he does not remember all the confession, but only some of the particular points thereof."); *State v. Avery*, 31 La. Ann. 181 (1879) ("The witnesses who testified to the confessions of the accused stated, in effect, that they could not and would not undertake to swear to the precise words of the prisoner; but that they did remember the substance of his declarations. This was sufficient. To require more would be to effectually close the mouths of conscientious men when called on as witnesses to testify to such confessions."); *State v. Hughes*, 29 La. Ann. 514 (1877); *State v. Thomas*, 28 La. Ann. 827, 828 (1876) (The court, in holding that the confession made by the accused to an individual, is admissible in evidence even if the witness does not remember the whole confession, said: "The objection went to the effect of the testimony, and not to its admissibility.").

When confessions are in writing, apparently the same rule will apply. *State v. Brasseaux*, 163 La. 686, 698, 112 So. 650, 654 (1927) ("Even in dictation of last wills and testaments, the most solemn and formal of all the legal instruments known, it is not necessary that a notary public in this

pears to the court that the witness remembers the substance of the conversation, he is allowed to testify as to what he remembers, even though he cannot recall everything that was said. The reason for such a modification is obvious. Precise reproduction is often impossible. It is the substance, not the form, of the confession that is material. The fact that the witness is unable to remember the exact words of the accused may be considered by the jury in its weighing of the evidence.¹³⁷

Instruction to jury and scope of jury consideration. After the confession has been admitted in evidence and placed before the jury, the question arises what instruction should be given by the judge and what should be the scope of the jury's consideration. Is an accused entitled to have the jury instructed that it must determine whether or not the confession is voluntary and accept or reject it accordingly, or is the jury to be instructed that they are to accept the confession and determine only the weight to be given it under the circumstances shown? There are no clear Louisiana decisions on this point. There are cases holding, however, that the question of whether a confession is involuntary and thus inadmissible in evidence is a matter to be determined by the court alone.¹³⁸ Although evidence regarding voluntariness may be repeated in the presence of the jury, it is admitted for the sole purpose of aiding them in determining the weight to be given to the evidence offered to prove the confession.¹³⁹

state take down the language of the testator in ipsissimis verbis; the substance of the disposition being all that is required, by law, to be reduced to writing by that officer. This is the rule also in the matter of written confessions, ex necessitate rei. Any other rule would defeat, in a very large measure, the admissibility of confessions in criminal cases, as it is not practical for any witness to repeat, or to inscribe word for word, any incriminatory statement made by a defendant unless such statement should be so brief that it may be readily recalled or written in the precise language in which it has been made.").

137. See cases cited in note 136 *supra*.

138. *State v. Jagger*, 217 La. 687, 711, 47 So.2d 46, 55 (1950) ("It is the established jurisprudence that the proper time for determining whether a confession is free and voluntary is when the state is making out its case preparatory to offering it in evidence."); *State v. Wilson*, 217 La. 470, 485, 46 So.2d 738, 743 (1950) ("The admissibility of a confession is determined by the trial judge and not the jury. The effect of the confession is to be determined by the jury after it has been held by the trial judge to be admissible."); *State v. Robinson*, 215 La. 974, 41 So.2d 848 (1949); *State v. Thomas*, 208 La. 548, 23 So.2d 212 (1945); *State v. Lanthier*, 201 La. 844, 850, 10 So.2d 638, 640 (1942) ("The admissibility of a confession is a question which the trial judge must decide and not the jury. Jurors pass upon the effect of the confession after it has been held by the trial judge to be admissible as a result of the State laying the proper foundation for the introduction thereof."); *State v. Doiron*, 150 La. 550, 90 So. 920 (1922).

139. *State v. Doiron*, 150 La. 550, 552, 90 So. 920, 921 (1922): "When a

Another question arising in connection with the judge's charge to the jury is whether or not any instruction should be given regarding the weight to be attached to the confession. Although one decision indicates that it would probably not have been error for the district judge to instruct the jury, as he refused to do, that the confession "should be received with great caution," the court in that case said it agreed with the judge's charge to the jury that "a free and voluntary confession by a person accused of crime, is evidence against him; and it is with the jury to attach to a confession, that weight to which it is entitled."¹⁴⁰ The probative weight of a confession must therefore be determined by the jury in the same fashion as they determine the weight of

confession is offered and objection is made, as in this case, it is the burden and duty of the state to show the circumstances under which it was made, [citing cases] . . . that is, that it was voluntary; and this must be done, when said objection is made, in the presence of the jury, in order that they may have the benefit of such circumstances to determine the weight to be given to the evidence to prove the confession. As before stated, we can see no reason why the trial judge cannot send the jury out, and first determine for himself the question of the admissibility of the alleged confession, in order that, if he decides to exclude it, the jury may not be affected by any prejudicial matter preliminarily brought out. But where he does determine that it is admissible, the accused is entitled to have all the circumstances go before the jury as a preliminary matter, for they have the right to determine the weight of all evidence, and to say whether statements alleged to have been voluntarily made, were in fact so made, and, if not, to disregard them. What is done out of the presence of the jury in a criminal trial, is as if it had not taken place at all."

Justice O'Niell, in a concurring opinion, 150 La. 550, 554, 90 So. 920, 922 (1922), disagreed with the court on this point: "Of course, when a confession is offered in evidence against a party on trial for crime, the state must first prove that the confession was made freely and voluntarily. It was proven by the testimony of Dr. Martin, taken out of the presence of the jury, that the confession made to him was a free and voluntary confession. When the doctor was called as a witness before the jury, to relate the confession, and defendant's counsel objected on the ground that a foundation had not been laid for the introduction of the confession, the counsel did not offer to question the doctor on that subject. There was the opportunity to let the jury know the circumstances under which the confession was made. The manifest reason why the doctor was not examined on the subject by defendant's counsel, in presence of the jury, was that defendant's counsel had heard the testimony given by the doctor out of the presence of the jury, and knew that the confession was a free and voluntary one. In fact, the first question asked the doctor when he was called before the jury, by the district attorney, was whether the confession was free and voluntary, and it was to that question alone that defendant's counsel objected. There was no cause or reason whatever for the objection, and the court very properly overruled it."

140. *State v. Bungler*, 14 La. Ann. 461, 464 (1859). See also *State v. Gunter*, 30 La. Ann. 536, 537 (1878) (The lower court had charged the jury "that they were the judges of the law and the evidence; that they could believe the confession of the prisoner as true or false; that they had the right to believe a part and reject the other if they saw fit, or reject the whole; the truthfulness or falsity of all evidence, and the weight to be attached to it, being left exclusively to them." This charge was upheld.).

any other evidence.¹⁴¹ This includes taking into consideration all the circumstances of the case and considering all the testimony given. The rule that a confession is to be considered in its entirety does not compel the jury to give the same credence to every part of it.¹⁴² They may attach such credit to any part of it as they deem it worthy of, and may reject any portion of it which they do not believe. The circumstances surrounding the case must determine how much of the confession will be believed and how much will be rejected by the jury.¹⁴³

Weight and effect of confessions. The general rule in Louisiana is that an accused party's confession does not alone justify a conviction.¹⁴⁴ There must be other evidence that a crime has been committed.¹⁴⁵ The question what amount of proof is necessary to establish the *corpus delicti* of the crime is not settled, but in one case the Supreme Court indicated that such evidence need not be sufficient in itself to establish beyond a reasonable doubt that the crime was committed.¹⁴⁶ According to the tenor of that case, the evidence of the *corpus delicti* is sufficient if, when taken together with the confession, the jury is satisfied beyond a reasonable doubt that the crime was committed and that it was the defendant who committed it.

141. See cases cited in note 140 *supra*. See also *State v. Sears*, 220 La. 103, 55 So.2d 881 (1951).

142. *State v. Robinson*, 215 La. 974, 41 So.2d 848 (1949); *State v. Johnson*, 47 La. Ann. 1225, 17 So. 789 (1895); *State v. Gunter*, 30 La. Ann. 536 (1878); *State v. Wedemeyer*, 11 La. Ann. 49 (1856).

143. See cases cited in note 142 *supra*.

144. *State v. Calloway*, 196 La. 496, 506, 199 So. 403, 406 (1940) (Although citing only one Louisiana case (*State v. Morgan, infra*), the court cited numerous decisions from other states, and said: "It is conceded that the jurisprudence of this State is well settled that the uncorroborated confession of an accused will not of itself sustain a conviction but that there must be other proof of the corpus delicti." In this case the defendant was charged with "assault with intent to rape." He contended that he should have been charged only with "assault, beating, and wounding" as there was no complete proof that he attempted to rape the victim. The court considered all the circumstances and concluded: "It is our opinion that the corpus delicti of the crime was sufficiently proved by evidence independent of the confession."); *State v. Morgan*, 157 La. 962, 964, 103 So. 278, 279 (1925) (Appeal from carnal knowledge conviction. The prosecutrix had retracted her previous statements and the district attorney, knowing she would testify in favor of the defendant, refused to call her as a witness. It was admitted by the district attorney that no evidence tending to establish the crime was introduced, except the confessions of the accused, which confessions were wholly relied on by the state for a conviction. The court, after citing numerous cases from other states, said: "We prefer, however, to follow the rule, as definitely established—as we take it—by a great majority of the states, to the effect that an accused party cannot be legally convicted on his own uncorroborated confession without proof that a crime has been committed; in other words, without proof of the corpus delicti.").

145. See cases cited in note 144 *supra*.

146. *State v. Calloway*, 196 La. 496, 199 So. 403 (1940).

EVIDENCE DISCOVERED AS RESULT OF INVOLUNTARY CONFESSION

Evidence discovered as the result of a confession is not rendered incompetent because the confession itself was found inadmissible.¹⁴⁷ There is considerable diversity of opinion, however, as to whether or not the confession itself should be admitted when part of it has been confirmed by subsequent facts.¹⁴⁸ Under the theory that involuntary confessions are excluded because their reliability is doubtful, it would seem that where a search is made and facts are discovered which confirm a confession in material points, the confession could be considered trustworthy. Yet, even under these circumstances there is a possibility of unreliability, for the accused may know of the crime and of the location of certain evidence without having committed the crime. Under the fair law enforcement policy, there is no doubt that the confession would be excluded even if it were confirmed by the discovery of subsequent facts. Courts throughout the country have taken three different approaches to this problem.¹⁴⁹ In some jurisdictions, courts admit all of a confession when part of it has been confirmed by the subsequent discovery of facts.¹⁵⁰ In others, "so much of the confession as relates strictly to the fact discovered by it" is received.¹⁵¹ In still others, even though part of it has been confirmed, no part of the confession is received.¹⁵² Louisiana has taken this third approach.¹⁵³ Whether or not it is permissible for the prosecution to show that the discovery was made as a result of information given by the accused is questionable. Some jurisdictions admit evidence to that effect,¹⁵⁴ and two early Louisiana decisions indicate that this was at one time the rule in this state.¹⁵⁵ In the light of a more recent decision, however, it is

147. Where the accused, in confessing, points out or tells where the stolen property is [State v. George, 15 La. Ann. 145 (1860)] or where he gives a clue to other evidence which proves the case [State v. Garvey, 28 La. Ann. 925 (1876)], all such discovered evidence is admissible.

148. 3 WIGMORE, EVIDENCE 337 *et seq.*, §§ 856-58.

149. *Ibid.* See footnotes to these sections for cases from the various jurisdictions.

150. *Id.* at 338-39, § 857, n. 1.

151. *Id.* at 339, § 857, n. 2.

152. *Id.* at 339 *et seq.*, § 858, n. 2.

153. State v. Gebbia, 121 La. 1083, 47 So. 32 (1908); State v. Garvey, 28 La. Ann. 925 (1876); State v. George, 15 La. Ann. 145 (1860).

154. 3 WIGMORE, EVIDENCE 339 *et seq.*, § 858, n. 2.

155. State v. Garvey, 28 La. Ann. 925, 927 (1876) ("Whether the finding of the brickbat, stove-pile, and 'other facts' corroborated the alleged confession or not, is immaterial in considering the admissibility of the confession. These facts might have been proved, and even that they were discovered in consequence of information received from the accused, without making a confession unduly obtained admissible."); State v. George, 15 La. Ann. 145, 146 (1860) ("So much of the declarations of the slave George, as led

doubtful that the Louisiana courts would take this position at the present time.¹⁵⁶

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to the discovery of the stolen goods, was properly received; but his confession of guilt, procured through inducements held out to him by those who had arrested him, and had him in their custody, should have been excluded.").

156. *State v. Simpson*, 157 La. 614, 620, 102 So. 810, 812 (1925) ("Two Louisiana cases are cited to sustain the proposition that, when a person suspected of a crime has been compelled by threats or violence to disclose where evidence of the crime may be found, his statement or disclosure, as well as the evidence found in consequence of the disclosure, is admissible in evidence against him, viz.: *State v. Slave George*, 15 La. Ann. 146; and *State v. Gebbia*, 121 La. 1083, 47 So. 32. In neither case was there any mention of the distinction between admitting in evidence the facts found in consequence of an involuntary statement of the accused party and admitting in evidence the involuntary statement or disclosure itself. What was said in that respect in the case of the slave, George, was obiter dictum, because the verdict and sentence were annulled for the reason that the judge had allowed the involuntary confession of the slave to be admitted in evidence. The doctrine stated in *Gebbia's Case* (page 1107 of the report), that facts discovered in consequence of a confession improperly obtained are admissible in evidence, was correct, as an abstract principle of law, and apart from the recitals in the bill of exceptions.").