How to Make Contracts Illegible

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INTRODUCTION

In the more than 900 years that have elapsed since the invention of movable type,[1] there has been a steady development in the art of printing, to the end of making the reading process more easy, more pleasant, and more rapid. The twentieth century, with its emphasis on newspaper and periodical literature and its devotion to the advertising credo of "Tell 'em quick, and tell 'em often!" has marked an increasing attention to improvement of the readability of the printed word.[2]

The drive for typographical clarity has not, however, been welcomed in all quarters. The rules for the legibility of print inevitably have suggested to some the enchanting and sinister converse, *i.e.*, that a disregard of those rules will result in printing that cannot or will not be read. In certain hands, type becomes an instrument of concealment, "pestilent bits of metal suspected of destroying civilization and enlightenment."[3]

LEGIBILITY OF TYPE

Since about 1878, there has been in general use a classification of type according to a system of "points."[4] One point is .013837 inches[5] or about 1/72 of an inch. Type is measured by "the vertical size of the piece of metal on which the type face is cast."[6]

Type size alone is not the only factor making for legibility. It is perhaps the most important, and certainly the most obvious. Extensive data on the subject have been collected at the University of Minnesota through opinion sampling and psychological testing. The findings—restricted to the arm's-length, as distinguished from highway-billboard, reading—indicate that:

1. Type *larger* than 12-point is an unsatisfactory reading medium.

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1. 18 ENCYCLOPAEDIA BRITANNICA 499 (1950).

2. See, *e.g.*, PYKE, REPORT ON THE LEGIBILITY OF PRINT (London, His Majesty's Stationery Office 1926); PATERSON AND TINKER, HOW TO MAKE TYPE READABLE (1940); HATTWICK, HOW TO USE PSYCHOLOGY FOR BETTER ADVERTISING (1950).

3. BIERCE, THE DEVIL'S DICTIONARY 353 (1911).

4. A MANUAL OF STYLE 268–69 (University of Chicago Press, 11th ed. 1949).

5. *Id.* at 262.

6. *Id.* at 269.

2. Type *smaller* than 8-point is likewise unsatisfactory.

3. The reading public favors 11-point type.[7]

4. Type 6-point or less is illegible, from the standpoint of ordinary ease of reading.[8]

To illustrate:

This line is set in 11-point type.

This line is set in 5-point type.

The length of the printed line and the amount of so-called "leading" or white space between the lines likewise have a bearing on the readability of printed matter.[9] Color of print and background, paper surface,[10] illumination, habit, and interest,[11] are additional factors.

"Illegible" Case Law

California case law reveals a wide range of ingenuity in the reverse use of the rules of readability.

1. *The Squint Cases*

In *Merrill v. Pacific Transfer Co.*,[12] a common carrier attempted to limit its liability for loss by a fine-print inscription on its baggage check. While there was time enough and light enough to read the baggage check when it was handed to the plaintiff, Mr. Merrill testified that he did not read it, and the opinion notes: "[H]e could not with certainty have done so without using his eyeglasses."[13] Judgment for the plaintiff was reversed for failure to give an instruction to the effect that the question was: Would a prudent man have read the receipt?

Curtis v. United Transfer Co.[14] involved a receipt for a trunk purporting to limit the carrier's liability to $50.00. The pleading, if not eloquent, was at least precise:

> That the said statement was entirely in fine print, and that each letter of each word thereof, including the said words "Read Conditions of this

7. Paterson and Tinker, How to Make Type Readable 148 (1940).
8. *Id.* at 58.
9. *Id.* at 148–52.
10. *Id.* at 153–54.
11. Ettenberg, Type for Books and Advertising 38–40 (1947).
12. 131 Cal. 582, 63 Pac. 915 (1901).
13. *Id.* at 586, 63 Pac. at 916.
14. 167 Cal. 112, 138 Pac. 726 (1914).

> Contract," was less than one-sixteenth of an inch in height and less than one-sixteenth of an inch in width; . . .[15]

Plaintiff's complaint, in other words, was that the limitation, as well as the exhortation to read it, was in type of approximately 5-point,[16] which would look something like this:

Read Conditions of This Contract.

Curtis asserted that she had not read the fine print. Judgment for defendant on demurrer after refusal to amend was, happily, reversed.

2. *The Chinese System*

At the turn of the century, the California Supreme Court took under consideration a liquor-warehouse receipt in this form:[17]

Parties are reminded that transfers of merchandise are not complete unless made on the books of the warehouse.

GENERAL INTERNAL REVENUE BONDED WAREHOUSE No. 1.

First District of California.

No. 121.

BODE & HASLETT, Proprietors.
N.E. cor. Third and King Streets.

SAN FRANCISCO, January 20, 1896.

Received on storage from Louis Taussig and C.

Distiller and Brand.	*Numbers.*	*No. of Packages.*
American Dist. Co.	134901/964	64 sixty-four bbls. spirits.

Non-negotiable.

BODE & HASLETT.
W. A. JAMES.

This receipt is given in accordance with the California warehouse laws, as well as the laws of the United States. Loss or damage by fire, the elements, shrinkage, leakage, or natural decay, at owner's risk.

It is to be noted that in order to discover that the warehouseman is attempting to curtail his liability for loss by leakage, one must not only overcome a natural inclination to ignore fine print, but must also turn the page on its side to read the lines set vertically. The force of this double-barreled dose of inertia was too much for the plaintiff in *Taussig v. Bode & Haslett.*[18] He sued for the loss

15. *Id.* at 113, 138 Pac. at 726.

16. The expression "approximately 5-point" is used advisedly. Since points are measured by the size of the metal body on which the type face is seated, a measurement of the type face itself will ordinarily give a smaller dimension than the actual point size of the type.

17. Taussig v. Bode & Haslett, 134 Cal. 260, 265, 66 Pac. 259, 260 (1901).

18. *Ibid.*

of 181½ gallons of spirits which vanished by leakage at the warehouse. In reversing a judgment for plaintiff for erroneous instruction as to the defendant's duty of care, the court stated:

> We think it clear that the notice is a part of the contract. It was printed plainly [*sic*] on the fact of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is that they did read it. *Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do.* [Emphasis added.][19]

Whether or not it be "clear" that the notice was part of the contract and "printed plainly," the opinion is clearly not helpful to the practitioner. When does a presumption arise which would bar evidence that one has not read a document he did not sign? Is it merely when one has had an "opportunity" to read? Or must there be "opportunity," coupled with a finding as a matter of law that the document is "printed plainly"?

The statement in the *Taussig* case that one is presumed to have read a receipt, and that evidence to the contrary is inadmissible, has been quoted,[20] and the case itself has been cited repeatedly.[21] But the fact is that litigants continue to declare that they have not read the fine print, with or without an opportunity to do so.[22] It is not clear that such evidence has come in over objection, but a

19. *Id.* at 265–66, 66 Pac. at 260–61.

20. Constantian v. Mercedes-Benz Co., 5 Cal.2d 631, 634, 55 P.2d 841, 843 (1936); Nichols v. Hitchcock Motor Co., 22 Cal. App.2d 151, 155–56, 70 P.2d 654, 657 (2d Dist. 1937); Cunningham v. International Committee of Y.M.C.A.'s, 51 Cal. App. 487, 491, 197 Pac. 140, 141 (1st Dist. 1921).

21. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 849, 205 P.2d 1037, 1041 (1949); Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 712, 258 Pac. 596, 601 (1927); U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal. App.2d 782, 787, 71 P.2d 354, 356 (App. Dep't Superior Ct. L.A. 1937); The Home Insurance Co. of N.Y. v. Los Angeles Warehouse Co., 16 Cal. App.2d 737, 739, 61 P.2d 510, 511 (2d Dist. 1936); England v. Lyon Fireproof Storage Co., 94 Cal. App. 562, 571, 271 Pac. 532, 536 (3d Dist. 1928).

22. See George v. Bekins Van & Storage Co., 33 Cal.2d 834, 848, 205 P.2d 1037, 1041 (1949); Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 712, 258 Pac. 596, 601 (1927); Curtis v. United Transfer Co., 167 Cal. 112, 113, 138 Pac. 726 (1914); McQueen v. Tyler, 61 Cal. App.2d 263, 266, 142 P.2d 466, 468 (1st Dist. 1943); U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal. App.2d 782, 786, 71 P.2d 354, 356 (App. Dep't Superior Ct. L.A. 1937). See also Scott's Valley Fruit Exchange v. Growers Refrigeration Co., 81 Cal. App.2d 437, 446, 184 P.2d 183, 188 (1st Dist. 1947), where the printed provision referring to a warehouse receipt *was* read, but plaintiff's testimony was that he had no knowledge of the terms of an incorporated document. And see Los Angeles Investment Co. v. Home Savings Bank of Los Angeles, 180 Cal. 601, 613, 182 Pac. 293, 297–98 (1919) *semble*; May Hosiery Mills v. G. C. Hall & Son, 77 Cal. App. 291, 296, 246 Pac. 332, 333 (1st Dist. 1926) *semble*.

decent respect for the talent of the bar raises a strong presumption that timely protest was made.

3. *Psychological Concealment*

It is a common courtroom experience that several witnesses may tell several different stories of how the same accident happened, and none may be guilty of perjury.[23] An honest eyewitness reports what he has seen. But he does not "see" everything within the range of vision. According to psychologists, one "sees" only those objects upon which the attention is focused.[24] Hence, advertisers prefer attention-attracting print to sell their wares.[25] And conversely, some draftsmen of legal instruments prefer attention-deflecting print—psychological camouflage—to conceal the dynamite-packed words that should be there, but not observed.

A California court has taken specific note of this device. In *U Drive & Tour, Ltd. v. System Auto Parks, Ltd.*,[26] the driver parked his car in defendant's lot in downtown Los Angeles at 15 minutes before midnight, paid the 15-cent fee, took his parking check, and left. Forty minutes later he returned to find the lot dark, and his car gone. The car was recovered several days later, stripped. Plaintiff owner sued the parking lot proprietors for the damage. In rejecting the defense that a sign on the parking lot advised that there was a midnight closing, Justice Schauer stated:

> . . . [There was] a small sign appearing inconspicuously (according to a photographic exhibit) on the north side of its lot, reading "Close 12 P.M." The striking contrast in size and prominence of display accorded by defendant to signs advertising its name and business as measured with the physically modest and psychologically comparatively concealed words "Close 12 P.M.," as to this phase of the defense, suggests an effort on defendant's part technically to comply with a city ordinance mentioned in the testimony as requiring the posting of a stated closing time rather than ordinary care in good faith to acquaint its customers with the fact that their cars would be left unlocked (or with keys equally available to thief and owner) and unattended after midnight. Likewise the other signs reading "15¢ Till Midnite" and "50¢ extra for locked cars," in their substance and manner of display, are not well calculated to give any actual notice to potential bailors of facts material here. There is no evidence tending to show that Lejeune [the driver] saw any of the signs referred

23. See DASHIELL, FUNDAMENTALS OF OBJECTIVE PSYCHOLOGY 374–75 (1928).
24. *Id.* at 287–93.
25. ETTENBERG, TYPE FOR BOOKS AND ADVERTISING 121 (1947).
26. 28 Cal. App.2d 782, 71 P.2d 354 (App. Dep't Superior Ct. L.A. 1937).

> to and he testified positively that he did not see them. We do not find, in the circumstances disclosed by the record in this case, that defendant has sustained the burden assumed by it of establishing as a term of the bailment contract the substance of any closing sign posted on the parking lot.[27]

(The sad conclusion of this case is discussed at a later point.)[28]

A similar approach was disapproved in *McQueen v. Tyler*,[29] involving a trucker's "freight bill" purporting to limit liability. The court described the document as follows:

> It consists of a paper about a foot square, the middle one-third portion of which is made out in the form of a workman's time sheet to be filled in by the employee, and down in the lower third portion is a space wherein was written a general description of the goods to be transported. The upper third of the document contains the names and addresses of the consignor and consignee; and immediately below the name of the consignor, *in extremely small print*, is a provision [limiting liability to 10¢ per pound]. [Emphasis added.][30]

Mr. McQueen testified that he signed the paper literally in the dark, did not read it, and relied on the driver's statement that it was "an authorization to take the goods." The court upheld a jury's finding that the limitation was not a part of the contract of shipment within the meaning of the California Code definition.[31]

The same drop-in-the-bucket technique proved ineffectual in *Wilson v. Crown Transfer & Storage Co.*[32] The receipt had printed "at the top of the page, certain matter in very small type (which, by the way, fills two pages of the reporter's transcript). A part of this matter is a clause purporting to limit the defendant and appellant's liability to $25 for each package delivered."[33]

May Hosiery Mills v. G. C. Hall & Son,[34] holding that printed

27. *Id.* at 786, 71 P.2d at 356–57.
28. See p. 427 *infra*.
29. 61 Cal. App.2d 263, 142 P.2d 466 (1st Dist. 1943).
30. *Id.* at 265, 146 P.2d at 468.
31. CAL. CIV. CODE § 2176 (Deering, 1949): "[Effect of written contract.] A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same."
32. 201 Cal. 701, 258 Pac. 596 (1927).
33. *Id.* at 711–12, 258 Pac. at 601.
34. 77 Cal. App. 291, 246 Pac. 332 (1st Dist. 1926).

provisions (limiting period of claim) in the upper left-hand corner of a business letter did not bind the addressee, goes so far as to declare:

> The rule seems to be firmly established that printed conditions on letter or billheads, or order blanks of the proposer not specially referred to or called to the attention of the other party to the contract, will not be regarded as a part thereof.[35]

The opinion cites no California precedents.

Examination of other cases would indicate that this statement (salutary as it may be) cannot be relied upon as gospel. Printed conditions at the bottom of delivery slips[36] and at the top of a "work order,"[37] have been held to bind the complaining party. In such cases the courts find that the clauses have been "plainly printed," "in clear type," and so on.

4. *Get It Out of Sight*

On the sound premise that "if they can't see it, they can't read it," numerous contractual provisions are entirely removed from the printed page or the line of sight. Devices to hide the body are varied. There is, for example, the customary practice of innkeepers to post their finely printed notice of limitation of liability[38] on the inside of a closet door, preferably underneath a coathook. A printed statement in the unnoticed and unsigned front page of a passbook, absolving the bank from liability on forged indorsements unless objection is made by the depositor within 10 days after the canceled checks are returned, does not work.[39] But the out-of-sight formula approved, 4-3, in *George v. Bekins Van & Storage Co.*,[40] holds considerable promise: Mrs. George wired from Oregon asking if defendant would store her "five rooms of valuable furniture" and received "an affirmative reply." The goods were shipped and received. Defendant then mailed plaintiffs for signature an "identification card" and a document labeled "Warehouse Receipt and Contract," this latter not for signature. Plaintiffs signed and returned the "identification card" which was a brief acceptance of

35. *Id.* at 295, 246 Pac. at 333.
36. Constantian v. Mercedes-Benz Co., 5 Cal.2d 631, 55 P.2d 841 (1936).
37. Page v. Ace Van & Storage Co., 87 Cal. App.2d 294, 196 P.2d 816 (4th Dist. 1948).
38. CAL. CIV. CODE § 1860 (Deering, 1949).
39. Los Angeles Investment Co. v. Home Savings Bank of Los Angeles, 180 Cal. 601, 182 Pac. 293 (1919). See also Frankini v. Bank of America, 12 Cal. App.2d 298, 55 P.2d 232 (3d Dist. 1936).
40. 33 Cal.2d 834, 205 P.2d 1037 (1949).

the warehouse receipt and contract. They did not read the receipt, which on its face had one short paragraph (among other things advising that rates were based on the depositor's declared value of $10.00 per 100 lbs.), and which referred to provisions on the *reverse* side. On the back were 12 printed paragraphs fixing the procedure for excess valuation. Plaintiffs' judgment for over $3,000 for loss of goods by fire was reduced to $501.40 on the basis of the receipt limitations.

A majority of the court was satisfied that even though the two-document deal (sign one; the other one binds) was made after the original telegraphic agreement to store, the typography of the receipt was such as to invite attention. The court said:

> It was clearly labelled "Warehouse Receipt and Contract." The reference to declared value was in bold-face type on its face followed immediately by reference in bold-face type to the terms on the reverse side. The paragraphs on the reverse side were short and headed by large upper-case bold-face titles indicating their content.[41]

The system of the *George* case is closely related to that beloved refuge of weary or wary legal draftsmen—incorporation by reference. Until five years ago, it was generally felt that the only limitations on incorporation by reference were the natural limitations of the mortal imagination. A document might provide that "it is expressly agreed that this contract contains and embodies all the terms and conditions to be performed," but let it also provide that one party accepts subject to the rules and regulations of the other, and the range was wide open. Under such a set of facts in *Forest Lawn Memorial Park Ass'n v. De Jarnette*,[42] plaintiff was permitted to rescind a burial contract when defendant attempted to bury a Negro, contrary to the cemetery rules.

In *The Home Insurance Co. of N. Y. v. Los Angeles Warehouse Co.*,[43] there was a twin "subject to." The warehouse receipt was made "subject to all the terms and conditions contained herein and on the reverse hereof," and on the back appeared: "These goods are stored and handled subject to the rules, regulations, rates and charges as published in our warehouse schedules, on file with the Railroad Commission of California and in our office, and such

41. *Id.* at 848, 205 P.2d at 1046. See also The Home Insurance Co. of N.Y. v. Los Angeles Warehouse Co., 16 Cal. App.2d 737, 61 P.2d 510 (2d Dist. 1936).
42. 79 Cal. App. 601, 250 Pac. 581 (3d Dist. 1926).
43. 16 Cal. App.2d 737, 61 P.2d 510 (2d Dist. 1936).

amendments thereto as may hereafter be filed."[44] One of the regulations provided for written notice of claim of loss within 30 days. Judgment of nonsuit was affirmed.

But *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*[45] strikes a body blow at the incorporators-by-reference. Plaintiff was given a "hand receipt" for the storage of his pears, the paper bearing the printed legend: "Customer in accepting this receipt agrees to rules of our standard warehouse receipt and is bound thereby." The standard warehouse receipt limiting liability was not delivered to plaintiff, and he was not familiar with its contents. In affirming judgment for plaintiff, the court stated:

> For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.[46]

5. *Tag, You're "It"*

The fine-print artist is at his best when he succeeds in planting a contract *in the pocket* of his completely unsuspecting victim. Neither Houdini nor the light-fingered Dr. Giovanni ever accomplished so much, so quickly, with so little effort.

For example, take the case of *Cunningham v. International Committee of Y.M.C.A.'s.*[47] Four days after the Armistice ending World War I, Frank Cunningham—enlisted man in the Navy—walked into the Army & Navy Branch of the YMCA on the water front in San Francisco. He lugged with him a suitcase containing all his worldly goods collected "during several years of his foreign travels with the U.S. Navy." He parked the grip with the YMCA, was handed a baggage check, and walked out. At that moment—although he did not then realize it—Sailor Frank Cunningham had been torpedoed squarely amidships by a snorkel-type contract. What sailor on the San Francisco Embarcadero makes *contracts* with the Young Men's Christian Association, especially on November 15, 1918? Yet on the check Cunningham received for his suitcases were printed the fatal words:

> The article checked on this check is left with the Association at owner's

44. See *id.* at 738–39, 61 P.2d at 511.
45. 81 Cal. App.2d 437, 184 P.2d 183 (1st Dist. 1947).
46. *Id.* at 447, 184 P.2d at 189.
47. 51 Cal. App. 487, 197 Pac. 140 (1st Dist. 1921).

> risk subject to storage rates and rules, and may be disposed of when storage is due six months.[48]

When called for (apparently before six months had elapsed), the suitcase was missing. A jury gave him a verdict. The District Court of Appeal reversed, asserting that a motion for directed verdict should have been granted, on the strength of wording on the baggage check. The charitable character of the defendant is expressly ruled out as a technical basis for decision. The opinion reads in part:

> A great number of contracts are made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, regardless of whether he reads the document, or otherwise informs himself of its contents. There is no testimony that plaintiff did not read this receipt and have actual knowledge of its contents. He testified that he "accepted the check and then went out of the building." If he did not read it, he was under the necessity of satisfactorily explaining his failure to do what the law required him to do.[49]

What happened to Frank Cunningham in a YMCA happened to Hubert Lejeune in an auto park. Hubert left a car in a lighted parking lot at 11:45 P.M. and returned at 12:25 A.M. to find the lot dark and the car gone. *U Drive & Tour, Ltd. v. System Auto Parks, Ltd.*,[50] held that plaintiff was not concluded by an inconspicuous closing sign on the lot[51] but was lost in the print on the parking check:

"743 So. Spring St.	[red ink]
We Close	[black ink]
12 PM	[red ink]
NOT RESPONSIBLE FOR	
CARS AFTER CLOSING TIME"	[black ink]

The opinion remarks:

> The trial court impliedly found that the circumstances disclosed afforded him a reasonable opportunity to read the printed matter thereon and

48. See *id.* at 488, 197 Pac. at 140.
49. *Id.* at 490–91, 197 Pac. at 141.
50. 28 Cal. App.2d 782, 71 P.2d 354 (App. Dep't Superior Ct. L.A. 1937).
51. See discussion p. 422 *supra*.

> accordingly that he became bound by it as a part of the bailment contract.[52]

The casual character of the "contracts" involved in this type of case should make for the greatest of liberality in disapproving exculpatory provisions. In the much more formal instance of insurance policies, our courts recognize the instruments as a commodity which the people take on faith, and follow a rule of liberal construction in favor of the insured.[53] They take notice of a common knowledge that most people do not read insurance policies.[54] But courts still refuse to recognize as a settled rule that no one but lawyers reads the fine print on the reverse side of such innocuous scraps of pasteboard as baggage checks and parking-lot tickets.

Legislation

The print that binds has received considerable attention from a succession of California legislatures.

The possibilities of overreaching inherent in printed contracts have long been recognized in the familiar rule that where printing and writing conflict, writing controls.[55] And the irreducible degree of fineness of fine print for legal notices is declared by statute to be not smaller than "nonpareil" (*i.e.*, 6-point type) with a boldface head.[56] But the daily mass of legal "notices" published is clearly notice only to the most curious. And even so, decided cases permit deviation even from that thin barrier to complete illegibility. One case refused to invalidate a bond issue where the title of the ordinance was not advertised in blackface type as required by the statute.[57] Another held there was substantial compliance with the statute where the advertised ordinance was printed in 5½-point type instead of 6-point type:[58]

> The difference in size between 5½ point type and 6 point type is exceedingly slight [1/144 of an inch]. In the instant case, however, a 5½ point slug was used [*i.e.*, white space the size of the type] which had

52. U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal. App.2d 782, 787, 71 P.2d 354, 357 (App. Dep't Superior Ct. L.A. 1937).

53. See, *e.g.*, Fritz v. Metropolitan Life Insurance Co., 50 Cal. App.2d 570, 577, 123 P.2d 622, 626 (2d Dist. 1942).

54. See, *e.g.*, Glickman v. New York Life Insurance Co., 16 Cal.2d 626, 107 P.2d 252 (1940).

55. Cal. Civ. Code § 1651 (Deering, 1949).

56. Cal. Gov't Code § 6043 (Deering, 1951).

57. Clark v. City of Los Angeles, 160 Cal. 30, 116 Pac. 722 (1911).

58. County Sanitation District v. Payne, 197 Cal. 448, 241 Pac. 264 (1925).

> the effect of making the resolution stand out quite as prominently and attractively as if 6 point had been used.[59]

The regulation of type size for legal printing has apparently been considered directory rather than mandatory.[60] But when the legislature wants to make certain that people can read what is printed, it knows how to do it. Since 1891, detailed statutes have spelled out precisely how ballots should be laid out and printed. The format of the ballot is specified,[61] type sizes in various portions of the ballot ranging from a minimum of 8-point [⅛ of an inch][62] to 48-point [⅔ of an inch][63] are required, the width of columns of type is regulated,[64] and in part the face of the type is controlled, *e.g.*, "heavy-faced gothic," "roman type (lower case),"[65] "black-faced capital,"[66] etc. And more importantly, the legislature has said:

> All of the provisions of this article relating to the form and size of ballot, including the size of the type thereon, are *mandatory*. Any officer whose duty it is to supply such ballots who fails to supply ballots in compliance with its provisions is guilty of a misdemeanor. [Emphasis added.][67]

A milder form of typographical regulation appears in other sections of our codified law. The Public Utilities Code calls for tariff schedules "plainly printed in large type"[68] and a notice in "bold type."[69] A *nonnegotiable* warehouse receipt must have that word printed "across its face in *red ink*, in bold, distinct letters." [Emphasis added.][70]

Considerable regulation of type in reference to contractual obligations appears in the Insurance Code. Type of the standard form fire policies must be not smaller than "small pica" [*i.e.*, 11-point], and subheads must be larger than "pica" [*i.e.*, 12-point or ⅙ of an inch].[71] Certain permissible nonstandard provisions may be added,

59. *Id.* at 454, 241 Pac. at 266.
60. See Derby v. Modesto, 104 Cal. 515, 38 Pac. 900 (1894), cited in both the *Clark* case, *supra* note 57 and the *County Sanitation* case, *supra* note 58, although certain language in the latter case warns against departures from the statutory requirements. See County Sanitation District v. Payne, 197 Cal. 448, 455, 241 Pac. 264, 266 (1925).
61. CAL. ELECTIONS CODE §§ 3830, 3946 (Deering, Supp. 1951).
62. *Id.*, § 3814 (Deering, 1949).
63. *Id.*, § 3921 (Deering, 1949).
64. *Id.*, § 3813 (Deering, 1949).
65. *Id.*, § 3814 (Deering, 1949).
66. *Id.*, § 3823 (Deering, 1951), and generally §§ 3813–3993.
67. *Id.*, § 3817 (Deering, 1949).
68. CAL. PUB. UTIL. CODE § 487 (Deering, 1951).
69. *Id.*, § 488.
70. CAL. CIV. CODE § 1858b (Deering, 1949).
71. CAL. INS. CODE §§ 2073, 6013 (Deering, 1950).

but only in red ink.[72] Disability policies require a minimum of 10-point type, and 14-point for a description of the policy.[73] Title insurance rate schedules must be printed in at least 10-point type.[74] Formerly, policies of workmen's compensation insurance which limited "compensation payable" were required to print notice of this limitation on the policy in 18-point [*i.e.*, ¼ inch] boldface.[75] This is now regulated directly by the Industrial Accident Commission.[76]

It is to be noted that except for the very detailed provisions of the Elections Code, statutory regulation is directed chiefly to the factor of type size. But investigators into the psychological factors of readability point out that large type sizes might in fact reduce readability, unless care is taken scientifically to plan the print with regard to amount of white space, length of line, and paragraphing.[77] The average policyholder needs no psychologist to tell him that the jumbled, irregular, unpleasing format of the printed policy is not an invitation to after-dinner reading.

Conclusions

I

From the foregoing review, the following guides to practice may be developed:

1. Where printing is involved, it will be a question of fact whether or not a reasonable person under all the circumstances—including the size and prominence of type, opportunity to read, and conditions under which he received the document—would know that the paper contained printed terms "which he must read at his peril, and regard as part of the proposed agreement."[78]

2. If a reasonable person would recognize such peril, it is immaterial that one has or has not read the printed matter.[79] (It

72. Cal. Ins. Code § 2077 (Deering, 1950).
73. *Id.*, § 10310.
74. *Id.*, § 12403.
75. Cal. Stat. 1917, c. 586, § 31(a). See Zurich General Accident & Liab. Ins. Co. v. Stadelman, 208 Cal. 151, 280 Pac. 687 (1929); Ocean Accident & Guarantee Corp. v. Industrial Accident Comm'n, 208 Cal. 157, 280 Pac. 690 (1929).
76. Cal. Ins. Code §§ 11658–60 (Deering, 1950).
77. Paterson and Tinker, How to Make Type Readable 58, 59, 80, 106–7, 148 (1940).
78. See 1 Williston, Contracts 274 (Rev. ed. 1936), where the quoted statement appears under the narrow heading, "Printed notices on letterheads, catalogues, or tags." It seems that the California rule is of more general application.
79. See Nelson v. Nelson, 216 Cal. 10, 12 P.2d 950 (1932); Hawkins v. Hawkins, 50 Cal. 558 (1875) (holding an illiterate bound); Nichols v. Hitchcock Motor Co., 22 Cal. App.2d 151, 70 P.2d 654 (2d Dist. 1937).

would seem likely that such a rule discriminates severely against lawyers.)

3. Where the person has not read the printed matter, he should so testify, and this testimony will be received and affect the decision—*Taussig v. Bode & Haslett* to the contrary[80] notwithstanding.

4. The peril of fine print is one that may affect the author as well as the recipient of the printed document. The increasing recognition of the importance of type legibility in case and statutory law is a clear warning against the deliberate preparation of printed documents that will be "traps for the unwary."

5. The frequency with which persons are held bound where there is merely the opportunity to read makes it unsafe for the public to accept without protest scraps of paper and pasteboard which are casually passed their way.

II

It is likewise apparent that insufficient consideration has been given by the courts or legislature to the factors that affect the readability of type. Where an overwhelming public policy is recognized, *e.g.*, the importance of the franchise, the legislature has spoken clearly and forcibly: it is not sufficient that a ballot be printed, but it must be printed so that it will be read. In other cases, there is merely a colorable attempt to insure readability. The regulation of the typesetting of insurance policies is more apparent than real; the public interest in readable policies is recognized but not scientifically implemented. Little or no consideration has been given by the legislature to the necessity that contracts other than insurance policies, such as printed employment contracts, trust deeds, etc., be printed legibly. In the absence of legislative enactment, the courts have spelled out a loose body of rules giving a modicum of recognition to the facts of typographical life.

It is fundamental to our system of jurisprudence that at the very least people be permitted to read readily the documents which affect their lives and purses. It is an insufficient reply that people do not have to sign if they do not want to. As this discussion has made apparent, there are numerous instances where one is bound though he has not even been asked to sign. There are numerous

80. See p. 420–22 *supra*.

other instances where, in the pressure of modern life, one fails to overcome the inertia set up by fine print, on the comfortable and trusting assumption that if it were important it would be printed more clearly. It is this faith and habit upon which the unscrupulous thrive.

Conceivably, a disputable presumption could be created that one did not read (and accordingly is not bound by) print smaller than, for example, 9-point [⅛ of an inch], or not meeting other typographical standards. The burden of proof that the matter was called to the attention of the reader would be placed on the proponent of the print. With the co-operation of the State Printing Office, the universities, typographers, and the Bar, the California Legislature might well undertake a study of the problem. Such a study could result in recommendations that would mark a real advance in the typography of the law. At the very least, it would help to convince the public that lawyers are not reluctant to submit their contracts to scrutiny.