supra; McMakin v. *McMakin*, 68 Mo. App. 57 (1896); *In re Floyd Kinsolving*, 135 Mo. App. 631, 116 S.W. 1068 (1909); *Francis* v. *Francis*, 192 Mo. App. 710, 179 S.W. 975 (1915).

In summary, the majority of the courts of the country permit attachment for contempt upon default regardless of the type of alimony awarded. They invoke the following theories: (1) disobedience of a legal duty, (2) disobedience of a final equitable decree, (3) disobedience of an order of the court. Missouri courts are *contra*. Indiana is *contra* as to payment of gross alimony in lump sum upon the theory of legislative intent. Ohio is in accord with the majority as to all types of alimony except alimony in lump sum. This type has not yet been the subject of a supreme court decision. In considering this problem the court has a choice between the alternatives, (1) alimony in lump sum is a final judgment over which the court has lost jurisdiction, therefore it has no power to punish the defaulter in contempt proceedings, (2) assuming alimony in lump sum is a final judgment, the court will look behind the judgment, see the duty, take jurisdiction and enforce by imprisonment.

LOWELL M. GOERLICH

EVIDENCE

JUDICIAL NOTICE OF A CITY ORDINANCE — STATUS IN REVIEWING COURT

In the original action, a suit to replevy an automobile, the Municipal Court of Cincinnati took judicial notice of Section 74-136 of the ordinances of Cincinnati. On petition in error, the Court of Appeals for Hamilton County, in affirming the judgment of the Court of Common Pleas, stated that the original trial being in the Municipal Court, the city ordinances were matters of which that court and all succeeding courts considering the case must take judicial notice. *Jackson* v. *Copelan*, 50 Ohio App. 414, 198 N.E. 596, 3 Ohio Op. 223, 19 Abs. 663 (1935).

One group of jurisdictions in the United States has held that a reviewing court which would not in an original action take judicial notice of a municipal ordinance, will not take judicial notice of the ordinance on reviewing a judgment of a court which did take judicial notice thereof, unless authorized by statute to do so. Otherwise, the ordinance can be made known to the court only by being made a part of the record. *State* v. *Egli*, 41 Idaho 422, 238 P. 514 (1925);

Karchmer v. *State*, 61 Tex. Cr. Rep. 211, 134 S.W. 700 (1911); *Stutsman* v. *City of Cheyenne*, 18 Wyo. 491, 113 P. 321 (1911); *Lucker* v. *Commonwealth*, 4 Bush 440 (Ky. 1868); *State* v. *Soragan*, 40 Vt. 450 (1868); *Strickland* v. *State*, 68 Ark. 483 (1900); *Hill* v. *City of Atlanta*, 125 Ga. 697, 54 S.E. 354 (1906); *City of Tarkio* v. *Loyd*, 179 Mo. 600, 78 S.W. 797 (1904); *People* v. *Averill*, 124 Misc. Rep. 383, 208 N.Y.S. 774 (1925).

Another line of American jurisdiction supports the opposing view. *City of Olympia* v. *Nickert*, 118 Wash. 407, 203 P. 946 (1922); *City of Spokane* v. *Knight*, 96 Wash. 403, 165 P. 105 (1917); *Galen Hall Co.* v. *Atlantic City*, 76 N.J.L. 20, 68 A. 1092 (1908); *Downing* v. *City of Miltonvale*, 36 Kan. 740, 14 P. 281 (1887); *Town of Moundsville* v. *Velton*, 35 W. Va. 217, 13 S.E. 373 (1891). Some jurisdictions have reached this result by statute. *Village of Minneota* v. *Martin*, 124 Minn. 498, 145 N.W. 383, 51 L.R.A. (N.S.) 40 (1914), see section 1265 G.S. 1913; *Incorporated Town of Scranton* v. *Danenbaum*, 109 Ia. 95, 80 N.W. 221 (1899), see section 692 G. C. Cahill's Stat. 1929 c. 51, sec. 58 (Ill.) overruling *City of Chicago* v. *Lost*, 289 Ill. 605, 124 N.E. 580 (1919).

The Supreme Court of Ohio has never passed on the question and the lower courts of the state are in conflict. Some of the Ohio courts have followed the precedent of the jurisdictions that refuse to take judicial notice. *Nelson* v. *Berea*, 21 O.C.C. 781, 12 C.D. 329 (1901); *Esch* v. *Elyria*, 7 O.C.C. (N.S.) 9, 17 C.D. 446 (1905); *Gates* v. *Cleveland*, 18 O.C.C. (N.S.) 349, 33 C.D. 80 (1911); *Evans* v. *Wooster*, 28 O.C.A. 285 (1914); *State* v. *Lathschaltz*, 10 O.N.P. (N.S.) 257, 20 O.D. 390 (1910); *State* v. *McCoy*, 14 O.L.A. 363 (1933); *Euclid* v. *Bramley*, 20 O.C.C. (N.S.) 453, 31 C.D. 396, 15 O.D. 155 (1905). The opposing view was taken in *Strauss* v. *Conneaut*, 3 O.C.C. (N.S.) 445, 13 C.D. 320 (1902); *Keck* v. *Cincinnati*, 3 O.N.P. 253, 4 O.D. 324 (1896); *Akerman* v. *Lima*, 7 O.N.P. 92, 8 O.D. 430 (1898).

The reasoning against the taking of judicial notice is that it would be a hard rule that would compel the consideration by the court of the numerous enactments of the municipality which relate to the subject in controversy.

On the other hand, most of the cases in a trial court are not appealed. When cases are reversed on appeal it is usually because of some error in the trial court. It does not seem unreasonable for attorneys to assume that if there is no error in the trial court, there is no ground for reversal. This view receives support from the practice of the United

States Supreme Court, which, in reviewing cases from a state court, takes judicial notice of everything that a state court would notice. *Hanley* v. *Donoghue,* 116 U.S. 1, 6 S. Ct. 242, 29 Law Ed. 535 (1885). It must be admitted, however, that it may be a more difficult matter for a court to find an ordinance not contained in the record than it is for the Federal Court to ascertain the statutes of the various states.

It would seem that the view of the jurisdictions refusing to take judicial notice is based largely on an argument of convenience, the saving of time and labor of the court that would be required in a search for the ordinance. The contrary view has certain logical support in holding that a reviewing court will notice a municipal ordinance if the trial court was compelled to do so. It is submitted, that the principal case, in following the latter view, reached the more desirable result.

MAURICE A. YOUNG

INSURANCE

MISSTATEMENT OF AGENT IN APPLICATION WITHOUT KNOWLEDGE OF INSURED

The plaintiff was solicited by an agent of the defendant insurance company to take out a health, accident and life policy. The company wrote no such policies on persons over 49 years of age. There is no evidence that the insured knew of this. The plaintiff truthfully told the agent that he was between 58 and 62 years of age, but the agent fraudulently had the policy issued with the insured designated as being 49 years of age. The policy was delivered to the insured and contained the above statement. The insured was illiterate and could only read "a little." The company later cancelled the policy after having paid two sick benefits. The plaintiff seeks to recover all premiums paid less amounts paid as sick benefits. *Held:* That the plaintiff could not recover his premiums as the company had no power to avoid the policy; that the soliciting agent was the agent of the company by virtue both of G.C. Sec. 9407 and of the common law principle that it embodies. *McSwain* v. *Washington Fidelity Nat. Ins. Co.,* 49 O.A. 342, 3 O.O. 231, 197 N.E. 253 (1934).

It is well settled that a soliciting agent is the *agent of the insurer. Roth* v. *Employers' Fire Ins. Co.,* 123 Neb. 300, 242 N.W. 612 (1932); *Van Ross* v. *Metropolitan Life Ins. Co.,* 134 Kan. 478, 7 P (2d) 41 1932); *National Life and Accident Ins. Co. of Tenn.* v. *Sneed,* 40 Ga. App. 131, 149 S.E. 68 (1929); and this is true, ac-