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-

cording to the weight of authority, although it is provided in the policy that he is the agent of the insured. *Pacific Employers' Ins. Co.* v. *Arenbrust, Farahan and Loran*, 85 Cal. App. 263, 259 P. 121 (1927); *Sternaman* v. *Metropolitan Life Ins. Co.* 170 N.Y. 13, 62 N.E. 763, 88 Am. St. Rep. 625, 57 L.R.A. 318 (1902); Vance, "Law of Insurance" (2nd ed. 1930), pp. 414, 439-443, 447. This is so whether the agent be the soliciting agent, *Brady Mut. Life Ins. Ass'n* v. *Smith*, 76 S.W. (2d.) 231 (Texas 1934); *Webber* v. *Mass. Bonding and Ins. Co.*, 81 Mont. 351, 263 P. 101 (1928); *Inter-Ocean Casualty Co.* v. *Brown*, 31 S.W. (2d) 333 (Texas, 1930), or the medical examiner. *Lindstrom* v. *Nat. Life Ins. Co. of U. S.* 84 Or. 588, 165 P. 675 (1917); *Weisguth* v. *Supreme Tribe of Ben Hur*, 194 Ill. App. 17 (1915), affirmed, 272 Ill. 541, 112 N.E. 350 (1916). In Ohio, G.C. Sec. 9407 specifically provides that in all controversies between an insurance company and the insured the soliciting agent is the agent of the company. Therefore, where the soliciting agent or the medical examiner, having true knowledge of the facts, sends in a false answer, the knowledge of the agent is that of the company. *Roth* v. *Employers' Fire Ins. Co., supra; Van Ross* v. *Metropolitan Life Ins. Co., supra; Brady Mutual Life Ins. Ass'n* v. *Smith, supra.*

If there has been collusion between the insured and the agent, in the absence of statute, the uniform holding is that the knowledge of the agent cannot be imputed to the insurer, as the utmost good faith is required. *First National Life Ins. Co. of America* v. *Ford*, 141 So. 719 (Ala. 1932); *Peoria Life Ins. Co.* v. *Haenelt*, 46 Fed, (2d.) 173 (D.C., Tex., 1930); *Adler* v. *New York Life Ins. Co.*, 33 Fed. (2d) 827 (C.C.A., Ark., 1929); *Ayers* v. *Business Men's Ins. Co.*, 148 S.C. 355, 146 S.E. 147 (1928); *Commonwealth Life Ins. Co.* v. *Spears*, 219 Ky. 681, 294 S.W. 138 (1927).

Ohio, by express statutory provision, G.C. Sec. 9391, has repudiated the common law rule and it has been held that even though there be collusion between the insured and the agent to defraud the company, the insured may recover. *Prudential Ins. Co.* v. *Kilbane*, 15 C.C. 62, 8 C.D. 790 (1897). The statute provides that no answer in an interrogatory shall bar the right to recover, or be used in evidence in any suit, upon the policy issued thereon unless the answer be proved to be wilfully false, fradulently made, that it is material, that it induced the company to issue the policy *and also that the agent or company have no knowledge of the falsity or fraud of such statement.* This statute has been held to apply to answers to interrogatories in the application, but not to apply to conditions in the policy itself. *Insurance Co.* v. *Howle*, 62 O.S. 204, 56 N.E. 908, 43 W.L.B. 320 (1900).

In the principal case the general holding is in accord with the weight of authority. The dictum in the case to the effect that had there been collusion between the insured and the agent, the former could not recover, can be reconciled with the above statute, although the court makes no mention of it, as the age provision in this case was probably such a condition as to take the case out of the statute.

CARL R. BULLOCK

## SUIT BY MORTGAGEE, AFTER FORECLOSURE, ON A POLICY WITH THE USUAL MORTGAGE CLAUSE

The plaintiff was a mortgagee of real property which was insured by the mortgagor under a fire insurance policy which contained the New York standard mortgage clause stating that in case of loss payment was to be made to the mortgagee as its interest might appear and that this interest should not be invalidated by any act of foreclosure or other proceedings or notice of sale relating to the property. The house burned down and thereafter the plaintiff foreclosed and became the purchaser of the property under the mortgage. Subsequently, the plaintiff brought an action against the insurance company. Held: The mortgagee had no cause of action on the fire insurance policy. *Aetna Ins. Co.* v. *Baldwin County Building & Loan Ass'n.*, 163 So. 604 (Ala. 1935).

This case was tried on an agreed statement of facts and there was no showing that the plaintiff either had notice of the loss at the time it occurred, or at the time of the foreclosure sale. The attitude of the Alabama Court was that the plaintiff was not injured and that it had already received, through foreclosure, all that could ordinarily be expected from the mortgage transaction. However, if the value of the property in its present depreciated state is not equal to the amount of the mortgage debt plus the interest due thereon, the plaintiff is bound to suffer a loss. Such an injury is the very loss against which the defendant Insurance Company agreed to insure the mortgagee. *Perretta* v. *St. Paul F. & M. Ins. Co.*, 177 N.Y. Supp. 923, 188 A.D. 998 (1919); *Seccombe* v. *Glenn Falls Ins. Co.*, 45 Cal. App. 611, 188 Pac. 305 (1920). See, also, Couch on Insurance, Vol. 5, P. 4405.

A contract of insurance has been defined as, "A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils." This is the definition set forth in *State ex rel. Sheets* v. *Pittsburgh, Cinn., Chicago, and St. Louis Ry.*, 68 Ohio St. 9, 67 N.E. 93 (1903); *Ohio Farmers Ins. Co.* v. *Cochran*, 104 Ohio St. 427, 135 N.E. 37 (1922); and is substan-