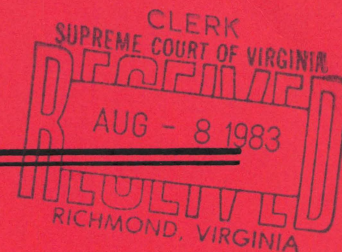


226 Va 427



IN THE
Supreme Court of Virginia
AT RICHMOND

WATSON & LEE
LAW LIBRARY

RECORD NO. 830581

JAN 31 1984

JAMES EDWARD COOK,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPENDIX

EDWARD D. BARNES
GREGORY L. RUPE
Suite 723, Heritage Building
1001 East Main Street
Richmond, Virginia 23219

Counsel for Appellant

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Counsel for Appellee

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**COMMONWEALTH OF
VIRGINIA**

Vs. } FELONY.

JAMES E. COOK

INDICTMENT FOR Arson of Personal
Property

Yes **A TRUE BILL**

Dwight P. Starnes Jr. **FOREMAN**
5/2/87 **DATE**

WITNESSES:

Lt. M. Wade

COMMONWEALTH OF VIRGINIA,
CITY OF VIRGINIA BEACH.

} TO-WIT:

In the Circuit Court of the City of Virginia Beach:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Virginia Beach
and now attending the said Court, upon their oaths, present that

James E. Cook

on or about the 27th day of December in the year 1981 in the said City of Virginia Beach,
Virginia,

did maliciously or with intent to defraud an insurance company or other
person, set fire to , burn, or cause to be burned, personal property of James E. Cook,
having a value of \$200.00 or more.

Va. Code Section 18.2-81; 18.2-10

GBA

2003

OR 5/3/82

**COMMONWEALTH OF
VIRGINIA**

Vs. } FELONY.

JAMES E. COOK

INDICTMENT FOR Obtaining Money
Under False Pretenses

Geo **A TRUE BILL**

Dwight C. Hunt **FOREMAN**
5-3-82 **DATE**

WITNESSES:

Lt. M. Wade

COMMONWEALTH OF VIRGINIA,
CITY OF VIRGINIA BEACH

} TO-WIT:

In the Circuit Court of the City of Virginia Beach:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Virginia Beach
and now attending the said Court, upon their oaths, present that

James E. Cook

on or about the 15th day of January in the year 1982 in the said City of Virginia Beach,
Virginia,

did obtain by false pretenses with intent to defraud money in the amount ^{of} ~~in excess~~
of \$200.00
~~Three thousand three hundred sixty eight dollars and nine cents (\$3,368.00)~~ from

Nationwide Insurance Company.

Va. Code Section 18.2-178

GBA
JMB

12/10/82
On Δ's motion to strike following
the conclusion of the Commonwealth's
evidence, I struck this charge.
J. L. Lam

OR 5/3/82

IN THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

ARSON

COMMONWEALTH OF VIRGINIA
v.) FELONY,

JAMES E. COOK

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Virginia Beach and now attending the said Court, upon their oaths, present that

JAMES E. COOK

on or about the 27th day of December, in the year 1981, in the said City of Virginia Beach, Virginia, did in the nighttime maliciously burn, in whole or in part, the dwelling house located at 6501 Atlantic Avenue, owned by Jack J. Osmond, while unoccupied.

Va. Code Section 18.2-77

Inv. B.O. Fulghum

Lt. M. Wade

Witness

☐ CGJ _____

☐ WPH _____

☒ OR

☐ GJ 12/6/82

☒ A TRUE BILL

☐ NOT A TRUE BILL

C. G. Sallwasser

Foreman

Dec. 10, 1982 Judge L

COMMONWEALTH OF VIRGINIA

vs.

JAMES E. COOK

)

D# 8506

) Upon an indictment for

Obtain money by false pretenses

)

(18.2-178)

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Melinda Crowling, a court reporter of Donn, Graham & Associates.

This day came again Gary Allison, the assistant attorney for the Commonwealth, and the accused, James E. Cook, and his attorneys, Edward Barnes and Gregory Rupe, and also came again the same jurors heretofore sworn, pursuant to adjournment on yesterday, and at the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the court to strike the evidence for reasons stated to the record, which motion was granted.

Thereupon, it is considered by the court that this defendant stands acquitted of the charge in the indictment of obtaining money by false pretenses.

Dec. 13, 1982 Judge Lam

COMMONWEALTH OF VIRGINIA

)

D# 8506

) Upon an indictment for
Arson (18.2-81)

)

vs.

JAMES E. COOK

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Melinda Crowling, a court reporter of Donn, Graham & Associates.

This day came again Gary Allison, the assistant attorney for the Commonwealth, and the accused, James E. Cook, and his attorneys, Edward Barnes and Gregory Rupe, and also came a jury heretofore sworn pursuant to their adjournment on Friday, Dec. 10, 1982, and after hearing all the evidence and argument of counsel, retired to their room to consider of a verdict, and after some time returned into court with the following verdict, to-wit: "We the jury, find the accused guilty of arson of personal property and fix his punishment at 2 years in the State Penitentiary".

Whereupon, the defendant by counsel, moved the court to set aside the verdict of the jury for reasons stated to the record, which motion the court doth overrule.

Whereupon, on motion of the accused by counsel, doth refer this case to the Probation Officer of this court for a pre-sentence report, said report to be heard on Jan. 13, 1983.

And the defendant is remanded to the Sheriff

Dec. 13, 1982 Judge Lam

COMMONWEALTH OF VIRGINIA

vs.

JAMES E. COOK

)

D# 9110

) Upon an indictment for
Arson (18.2-77)

)

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Melinda Crowling, a court reporter of Donn, Graham & Associates.

This day came again Gary Allison, the assistant attorney for the Commonwealth, and the accused, James E. Cook, and his attorneys, Edward Barnes and Gregory Rupe, and also came a jury heretofore sworn pursuant to their adjournment on Friday, Dec. 10, 1982, and after hearing all the evidence and argument of counsel, retired to their room to consider of a verdict, and after some time returned into court with the following verdict, to-wit: "We the jury, find the accused guilty of arson of of a dwelling house and fix his punishment at 5 years in the State Penitentiary

Whereupon, the defendant by counsel, moved the court to set aside the verdict of the jury for reasons stated to the record, which motion the court doth overrule.

Whereupon, on motion of the accused by counsel, doth refer this case to the Probation Officer of this court for a pre-sentence report, said report to be heard on Jan. 13, 1983.

Whereupon, the defendant by counsel, moved the court to release the defendant on his same bond, which the court doth deny.

Whereupon, the court with the concurrence of the assistant attorney of the Commonwealth, doth fix bond at \$10,000. \$5,000 of said bond to be personal recognizance and \$5,000 with approved surety.

And the accused is remanded to the custody of the Sheriff.

This amount of bond also covers file #8506.

Jan. 13, 1983 Judge Lam

COMMONWEALTH OF VIRGINIA

)

D 8506

vs.

)

Upon conviction for

Arson of personal property.

JAMES E. COOK .

)

18.2-81 and 18.2-10

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Marjorie Ingram , a court reporter of Donn, Graham & Associates.

Whereupon, came Gary Allison , Assistant Attorney for the Commonwealth, and the accused, James E. Cook , who was on the 13th day of Dec. , 19 82, found guilty of arson of personal property and his case referred to the Probation Officer of this court for a report, again appeared in court pursuant to his recognizance heretofore entered into, and also came Edward Barnes & Gregory Rupe , attorneys for the accused, said attorneys being of the accused own choosing, and the accused having advised the court that he has previously received and reviewed a copy of the Probation Officer's report, waived presentment of the report by the Probation Officer in open court, which report was ordered filed as part of the record in this case, and after considering said report, and it being demanded of the accused if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is adjudged, ordered and decreed by this court that the said James E. Cook, age 35, (5-17-47) be and hereby is

sentenced to confinement in the penitentiary of this Commonwealth for the term of 2 years, said sentence to run concurrently with a previous term of 5 years in the penitentiary, this day rendered against the accused, and mentioned in the preceding judgment of this court.

And it is ordered that the Clerk of this Court forthwith transmit to the Director of the Division of Corrections and to the Sheriff of this City, a copy of this judgment; And the said James E. Cook shall be kept imprisoned and treated in the manner directed by law. And that he pay the costs incident to his prosecution and conviction after his release from confinement.

"And the court doth order that the defendant be given credit for all time actually spent by such person in any mental institution for examination purposes or treatment prior to trial or in jail or the penitentiary awaiting trial".

Whereupon, the defendant by counsel, advised the court of the defendants intention to apply to the Supreme Court of Virginia for a writ of error and supersedas thereto. And it appearing to the court that the defendant is without funds to perfect said appeal, the court doth appoint Edward Barnes and Gregory Rupe, attorneys to perfect said appeal, and doth set bond in the amount of \$20,000.00 with approved surety.

And the prisoner is remanded to the custody of the Sheriff of this City.

Jan. 13, 1983 Judge Lam

COMMONWEALTH OF VIRGINIA

vs.

JAMES E. COOK

)

D 9110

)

Upon conviction for

Arson 18.2-77

)

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Marjorie Ingram, a court reporter of Donn, Graham & Associates.

Whereupon, came Gary Allison, Assistant Attorney for the Commonwealth, and the accused, James E. Cook, who was on the 13th day of Dec., 1982, found guilty of arson and his case referred to the Probation Officer of this court for a report, again appeared in court pursuant to his recognizance heretofore entered into and also came Edward Barnes & Gregory Rupe, attorneys for the accused, said attorneys being of the accused own choosing, and the accused having advised the court that he has previously received and reviewed a copy of the Probation Officer's report, waived presentment of the report by the Probation Officer in open court, which report was ordered filed as part of the record in this case, and after considering said report, and it being demanded of the accused if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is adjudged, ordered and decreed by this court that the said James E. Cook, age 35, (5-17-47) be and hereby is sentenced to confinement in the penitentiary of this Commonwealth for the term of 5 years.

And it is ordered that the Clerk of this Court forthwith transmit to the Director of the Division of Corrections and to the Sheriff of this City, a copy of this judgment; And the said James E. Cook shall be kept imprisoned and treated in the manner directed by law. And that he pay the costs incident to his prosecution and conviction after his release from confinement.

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And the prisoner is remanded to the custody of the Sheriff of this City.

ASSIGNMENTS OF ERROR

1. Whether the evidence was insufficient as a matter of law to convict the defendant of the charges.

* * *

Deleted is page one of the
transcript which includes the
style, caption, etc.

* * *

* * *

Pages 1 - 58 of the trial transcript is not included. It covers jury selection, opening statements and preliminary matters.

* * *

1 MR. BARNES: We won't double team. If he takes
2 a witness, he'll take it all the way.

3 THE COURT: I didn't want to seem rude by
4 not calling on him.

5 (The trial recessed at 1:00 p.m. At 2:00 p.m.
6 the trial continued as follows:)

7 THE COURT: Mr. Allison, who would you have
8 first, please?

9 MR. ALLISON: Mr. Osmond.

10
11
12 -----oOo-----
13

14 JACK J. OSMOND, called as a witness on behalf of the
15 Commonwealth, having been first duly sworn, was examined and
16 testified as follows:
17

18 DIRECT EXAMINATION

19
20 BY MR. ALLISON:

21 Q Would you state your name for the record,
22 please.

23 A My name is Jack J. Osmond.

24 Q All right. And where do you reside,
25 Mr. Osmond?

1 A I live at 1345 Carolyn Drive in Virginia Beach.

2 Q All right. Are you familiar with 6501
3 Atlantic Avenue?

4 A Yes, I am.

5 Q And how do you know this particular place?

6 A Well, my wife and I own that duplex. It's a
7 two-story duplex on the corner of 65th and Atlantic.

8 Q What's it utilized for?

9 A Used as a duplex apartment. Each apartment is
10 rented.

11 Q Okay. Now, I'd like to direct your attention
12 back to August and September of 1981. Did you have occasion
13 to rent out the downstairs unit?

14 A Yes, we did.

15 Q All right. And to whom did you rent that unit?

16 A We rented that unit to a James E. Cook and
17 a -- another gentleman.

18 Q All right.

19 A I can't -- I have a copy of it.

20 Q Do you have a copy of the lease in that
21 particular matter?

22 A Yes. Michael Mazza, M-a-z-z-a.
23 I believe you have the copy that has the signatures and all on
24 it.

25 Q All right.

1 (Shown to Mr. Barnes)

2 MR. BARNES: Okay.

3 MR. ALLISON: Your Honor, the Commonwealth
4 would introduce this lease into evidence.

5 THE COURT: Be marked as Commonwealth's
6 Exhibit 1.

7 (Marked by the Court as Plaintiff's Exhibit
8 Number 1)

9
10 BY MR. ALLISON:

11 Q Now, is the individual named James Cook in the
12 courtroom today?

13 A Yes, he is.

14 Q Would you point him out, please.

15 A This is Mr. Cook over there.

16 Q Let the record indicate that he has indicated
17 the defendant in this matter.

18 All right. This lease was to begin in --
19 during the August/September area; is that correct?

20 A Yes. Uh-huh.

21 Q And what were the arrangements as far as the
22 lease provided for payment of rent?

23 A Well, it was due the first of each month.

24 Q All right. And would you relate to the Court
25 what occurred as far as the rent payments.

1 A Well, as I recall they didn't -- Going back to
2 my memory, they didn't have the total amount of the deposit,
3 and we allowed them to pay part of that and then part of it
4 at another time. When they moved in, they didn't have all the
5 deposit and all the rent. So we allowed that; and then
6 subsequent months after that why, I would have to call for the
7 rent or try to get the rent, and then one month why, I
8 received a check that was no good.

9 Q Who did you receive that from?

10 A And pursuant -- I received that from Mr. Cook.

11 Q All right.

12 A And I had to pursue him to try to make that good,
13 and it was written on a closed account.

14 Q All right. Now, let's get to the month of
15 December. What occurred during that month, if anything?

16 A Well, there again the first of December why,
17 we tried to collect the rent, and I couldn't, and I would
18 keep going up there knocking on the door, leaving messages
19 and whatnot; and oh, sometime I guess about the second week
20 in December I knocked on the door, and I think his name is
21 Claes --

22 Q Claes Tholand?

23 A -- Claes Tholand answered the door, and I told
24 him I was looking for James Cook, and he said he didn't --

25 MR. BARNES: Object to what Mr. Tholand said.

1 THE COURT: Sustained.

2

3 BY MR. ALLISON:

4 Q Don't tell what anybody said. What did you
5 observe?

6 A Okay. Anyway, Mr. Cook was not there.

7 Q All right.

8 A And I pushed by, and I went on into the house,
9 and I saw a -- boxes all over with pots and pans, and carpet
10 was rolled up. In other words, it was an indication to me
11 they were getting ready to skip out.

12 MR. BARNES: Objection to that conclusion,
13 Your Honor.

14

15 BY MR. ALLISON:

16 Q What did you do at that time?

17 MR. BARNES: I object to that conclusion.
18 He can say he observed things being packed, but
19 not the other conclusion.

20 THE COURT: Ladies and gentlemen of the jury,
21 the objection is well taken.

22 Mr. Osmond, try to state what you saw. Leave
23 the conclusion for the jury, please.

24 MR. ALLISON: All right.

25 THE COURT: Just disregard his conclusion.

1 BY MR. ALLISON:

2 Q As a result of what you observed in that
3 apartment, what did you do next?

4 A Okay. When I saw boxes packed, pictures off
5 the wall and carpet rolled up, little throw carpets rolled
6 up, I immediately went down to get a distress warrant to keep
7 them from moving anything out of the house to try to secure
8 my rent that was due.

9 Q All right. And did you have occasion to go
10 down to the High Constable's Office?

11 A Yes, I did.

12 Q All right. Now, did you have occasion to obtain
13 that distress warrant?

14 A Yes, I did; and I met the server up there.

15 Q All right. And what did you observe and what
16 did you do when you went up there?

17 A Okay. I had a key to the unit, and my lease
18 says I can go in and inspect it anytime I feel is necessary,
19 and so I met the servicer up there and we went in and he saw
20 exactly what I had seen, and he said, "You do have grounds
21 for this"; and at that time he made a list of the furnishings
22 that were in the living room, and he said there was enough
23 in the living room, including what furniture was there to
24 justify the judgment that I had, so we went no further as
25 far as listing bedroom, as far as bedroom furniture or

1 anything other than that. We stayed in the living room area.

2 Q All right. Now, approximately what date was
3 this that you obtained that distress warrant?

4 A Somewhere around the 17th I would say.

5 Q 17th of December?

6 A Of December, yes.

7 Q All right.

8 A Middle of the month.

9 Q All right. And that was in the year again 1981?

10 A 1981.

11 Q And where is this 6501 Atlantic Avenue located?

12 A It's on the corner of Atlantic Avenue and
13 65th Street on the north end of Virginia Beach. It's on the
14 northeast corner.

15 Q Okay. And it's located in the City of Virginia
16 Beach?

17 A City of Virginia Beach.

18 Q Okay.

19 All right. Now, after you obtained this
20 warrant on the 17th, did you have occasion to come -- did
21 anything unusual occur to this building during the rest of
22 the month?

23 A Yes. On the 27th my wife and I had been out
24 to dinner, and we just returned to the house, and the phone
25 rang; and --

1 Q Don't say what anybody told you, but as a result
2 of that call what did you do?

3 A Okay. The phone rang and -- Can I say I was
4 informed that my house was on fire?

5 Q Okay. As a result of that call what --

6 A As a result of that call I rushed out to my
7 car and drove up to 65th Street where the house was on fire.

8 Q All right. When you got there, what did you
9 observe about --

10 A Well, the firemen were there. The police were
11 there directing traffic, and there was smoke coming out of the
12 building; and they would not let me go in.

13 Q Okay. All right. Did you have occasion that
14 evening of the fire to --

15 A Yes. In other words, I waited around there.
16 until the Fire Department and the inspectors and whatever took
17 whatever pictures were necessary, and then at that point they
18 let me walk into the living room, and they were still in there,
19 still hosing things down and what have you.

20 Q I'd like to show you this photograph and ask
21 you if you can identify it.

22 A Yes. Uh-huh. This is the window where the
23 glass all blew out from the heat. That's on the north side
24 of the house.

25 Q All right.

1 MR. BARNES: Excuse me, Your Honor. I'm going
2 to object to any further conclusions about what
3 occurred that he did not see or know the cause of.
4 He can state what he saw.

5 THE COURT: I concur.

6 MR. BARNES: I'd ask the jury not to --

7 THE COURT: It may be a matter of small
8 consequence, but unless you saw the window blow out
9 or all you know is the window was broken --

10 THE WITNESS: All the glass was laying on the
11 ground outside.

12 THE COURT: You're permitted to say that.

13

14 BY MR. ALLISON:

15 Q What building is depicted in this photograph,
16 Mr. Osmond?

17 A This is the duplex. This shows the first floor
18 of the duplex at 6501 Atlantic Avenue.

19 Q Fine. Thank you.

20 Commonwealth would introduce -- have this
21 marked Commonwealth's Exhibit 2.

22 THE COURT: This will be Commonwealth's Exhibit
23 2.

24 (Marked by the Court as Commonwealth's Exhibit
25 Number 2)

1 BY MR. ALLISON:

2 Q Now, Mr. Osmond, you stated that you had
3 occasion to walk into this residence --

4 A Yes.

5 Q -- that night. What did you observe about the
6 building itself? Just your observation. No conclusion.
7 Just your observation.

8 A It was all burnt. The carpet was burned, and
9 melted, and the refrigerator, the door was hanging open,
10 and even the interior was all melted. The plastic in the
11 refrigerator was melted, and the fire had just gutted the
12 living room and down the hall and into the kitchen.

13 Q All right. You of your own knowledge have no
14 idea how that fire started, do you?

15 A Oh, no. In fact, when I got there the firemen --

16 Q Don't state what they said.

17 A I'm saying they were all there. Everyone was
18 there when I got there.

19 Q All right. Fine.

20 Now, you had stated previously, as I understand,
21 there were items in this apartment?

22 A Yes, sir. The --The furniture was in there.
23 There was a stove, as I remember, a few chairs, an oak coffee
24 table, and in the corner there was an antique -- some kind
25 of like a desk, an antique desk. Reason it brings it to mind

1 is the process server said this one piece of furniture would
2 be --

3 Q Don't say what he said.

4 A Well, anyway, it was there.

5 Q All right.

6 A It was gone when I put my head in the --
7 When I looked in the living room it was gone.

8 Q All right. The distress warrant was for what
9 now? When you went to get the distress warrant --

10 A It was for the rent for the month of December.
11 It was also for damages that had been incurred while the
12 tenants lived there.

13 MR. ALLISON: Okay. I would have nothing
14 further of this witness at this point.

15

16 CROSS-EXAMINATION

17

18 BY MR. BARNES:

19 Q Thank you.

20 Mr. Osmond, you said your wife and you had been
21 out to dinner that night?

22 A Uh-huh.

23 Q Prior to receiving the phone call?

24 A Yes.

25 Q Do you recall what time you received the phone

1 call?

2 A About -- Somewhere around I guess 8:30, 9:00.
3 Sometime in there.

4 Q Somewhere around 8:30 or 9:00 you received the
5 call?

6 A I don't know when the phone call came in.
7 I just jumped in the car and raced up there.

8 Q Do you recall the time, or are you just
9 guessing?

10 A I don't -- I couldn't tell you the exact time.
11 It was evening, and we had been out to dinner, and we had
12 just gotten back. It was dark.

13 Q Is it a fair statement you don't know exactly
14 what time?

15 A It was dark. Yes.

16 Q Okay. Mr. Mazza and Mr. Cook signed the lease.
17 Did you actually negotiate the lease with them or did your
18 wife?

19 A My wife did. She handles our rental property.
20 As I recall, though, I was there.

21 Q Present?

22 A Uh-huh.

23 Q Did both Mr. Cook and Mr. Mazza -- Of your
24 own knowledge did they both move into the apartment after the
25 lease?

1 A Yes.

2 Q Okay. Did you see them both there?

3 A Yes.

4 Q Did you ever see any other people living there?

5 A Yes.

6 Q How many over this period?

7 A They would have another party in. In other
8 words, I would see a third party there.

9 Q Third male?

10 A Third male, and then in the early part of
11 December when I went up there to try and collect the rent
12 is when I ran across the two others living there at the time,
13 and can I say the name? The only name I know is Claes.

14 Q Mr. Tholand?

15 A Tholand was there.

16 Q So you know Mr. Tholand lived there for a
17 period during the lease, Mr. Mazza --

18 A Evidently. He was there when I went there,
19 so --

20 Q And Mr. Mazza lived there, Mr. Cook lived
21 there, and a couple of other males may have lived there?

22 A Uh-huh. Possibly.

23 Q Okay. Was the rent paid through November of
24 1981? Even though you had difficulty collecting it, did you
25 get it?

1 A Yes. As I remember, I did.

2 Q So the -- At the time December rolled around
3 the only thing due you was the December rent at that time?

4 A December rent and damages to the building that
5 had been caused prior to that.

6 Q This was something prior to any fire or
7 anything?

8 A This is prior to the fire.

9 Q Okay. So you had inspected the property and
10 found they had done some damage?

11 A The rear door was all kicked in. It was
12 obvious.

13 Q Okay. And you were claiming a hundred dollars
14 for repairs for that damage; is that correct?

15 A Yes. In other words, one reason I let it go
16 on is because they said they would take care of the repairs
17 themselves, and they never did.

18 Q They acknowledged they were responsible for
19 that?

20 A Yes.

21 Q All right. And the rent was \$470 for December?

22 A \$450 I think.

23 Q \$20 late charge or something?

24 A Possibly, yes.

25 Q It was -- Would it be accurate you made a claim

1 of \$470 rent and \$100 repairs in the civil procedure that
2 you mentioned to the jury?

3 A Right.

4 Q You went to see someone at the Clerk's Office
5 to take out a civil distress warrant; is that correct?

6 A Yes. Justice of the Peace.

7 Q That's the same thing as the warrant you
8 mentioned?

9 A Yes.

10 Q You did not mean a criminal warrant, did you?

11 A No. The --

12 Q All right, sir. How long did -- were you and
13 the process server present at the apartment the day you went
14 in there with the papers?

15 A I guess a half hour.

16 Q Was there anyone else present at that time?

17 A While we were there Claes Tholand --

18 Q Mr. Tholand?

19 A -- Tholand came in, and the process server
20 asked him -- Okay. He was there.

21 Q I did not ask you that. I asked you if there
22 was anyone else there. Mr. Tholand was there? That's your
23 answer?

24 A Right.

25 Q After you served -- He --

1 A He wasn't there. He walked in while we were
2 there.

3 Q All right, sir. You said that the gentleman
4 with you was a process server.

5 A Right.

6 Q Did he serve those papers on anyone to your
7 knowledge?

8 A He was what they call I guess papering the
9 furniture or whatever. Anyway, he wrote up this list which
10 he put on this furniture, and he turned to Mr. Tholand, and
11 he said, "Do you understand what I'm doing?" He said, "Yes,
12 I think so." He said, "Well, let me tell you this furniture"
13 --

14 Q Excuse me. I don't mean to cut you off.
15 My question is did he serve anyone to your knowledge?

16 A No. He put it on the furniture.

17 Q Then your answer is he didn't give it to any
18 person?

19 A No.

20 MR. ALLISON: Judge, I object. He said he was
21 just discussing it with Mr. Tholand.

22 MR. BARNES: I asked for --

23 MR. ALLISON: When he serves something --

24 THE COURT: Wait. He's on cross-examination,
25 and what you're doing is not objecting to the form

1 of the question, you're trying to explain the evidence.

2 MR. ALLISON: No, sir, Judge.

3 THE COURT: I'll overrule you.

4 MR. ALLISON: Okay. Fine.

5

6 BY MR. BARNES:

7 Q I'll rephrase the question for clarity.

8 Did you see him hand any papers to anyone?

9 A No, I didn't see him hand any papers --

10 Q Did you ever see him hand any papers to

11 Mr. Cook?

12 A No. I never saw Mr. Cook.

13 Q All right, sir. You mentioned a desk that
14 you saw, a particular piece that caught your eye.

15 A Yes.

16 Q Do you of your own knowledge know who owned
17 that desk?

18 A No, I don't know who owned any of the furniture.

19 Q So you couldn't take any piece of furniture
20 and state which of the people named or unnamed owned the
21 furniture?

22 A No, I could not.

23 Q Did you receive any money from the insurance
24 company as a result of the fire?

25 A For the fire damage.

1 Q To your knowledge --

2 A Yes -- I didn't receive it, no. It went right
3 to the contractor who did the repairs.

4 Q I see. Did you eventually settle with anyone
5 concerning the monies owed for December?

6 A Yes. The day that the case was to be heard
7 on the delinquent rent, I was in court and the -- James
8 Cook was there with Tholand and their attorney at the time,
9 and they asked me would I postpone long enough for them to
10 get the money together, and would I be satisfied with the
11 money that was owed me, and would I drop the case against
12 them; and I said yes. What I'm interested in is getting the
13 money owed me, and that's what we did.

14 Q So on the civil case they did come to court and
15 they did --

16 A Yes, they came to court. It was postponed
17 until they could get the money.

18 Q And they paid you what you were owed?

19 A Yes.

20 MR. BARNES: Okay. That's all I have. Thank
21 you.

22 MR. ALLISON: I have nothing further, Judge.

23 THE COURT: May the witness be released?

24 MR. BARNES: We'd like to reserve judgment on
25 that at this time. I would say no.

1 THE COURT: If you will step down and return
2 to the corridor and stay there until you are either
3 recalled or released.

4 MR. ALLISON: Commonwealth would call the
5 individual here from VEPCO.

6 THE BAILIFF: He hasn't been sworn yet, has he?

7 MR. ALLISON: No. He hasn't been sworn.

8 THE BAILIFF: Your Honor, this is Mr. Gregory
9 Williamson. He has not been sworn in. He is from
10 VEPCO.

11 (The witness was duly sworn)

12

13 -----oOo-----

14

15 GREGORY WILLIAMSON, called as a witness on behalf of
16 the Commonwealth, having been first duly sworn, was examined
17 and testified as follows:

18

19

DIRECT EXAMINATION

20

21 BY MR. ALLISON:

22 Q Would you state your name for the record,
23 please?

24 A Gregory Williamson. I'm Supervisor for VEPCO.

25 Q Okay.

1 MR. BARNES: Excuse me. I'm sorry. I didn't --

2 THE WITNESS: Gregory Williamson. I'm Business
3 Office Supervisor with VEPCO.

4
5 BY MR. ALLISON:

6 Q Okay. And as part of your duties with VEPCO,
7 are they to maintain the records of the customers?

8 A Yes, sir. My responsibility is to the --
9 Our District Office covers the City of Virginia Beach, and
10 we're required to maintain records of connects, disconnects,
11 things of that nature.

12 Q Okay. And do you have those records with you
13 today?

14 A I have the information pertaining to --

15 Q Okay. And where did you get this information
16 from?

17 A Well, basically all our information is kept on
18 computers and then transposed to microfiche, and I took the
19 information from the microfiche we keep in our office.

20 Q All right. And I'd like to refer you to
21 6501 Atlantic Avenue. Do you have specific information as to
22 that particular address?

23 MR. BARNES: Excuse me. I'm going to object.
24 The records would be the best evidence in this
25 particular matter. He's laid a foundation for being

1 keeper of the records --

2 THE COURT: Obviously it would be the best
3 evidence. Let's hear a little bit more about the
4 records before we turn to the alternative.

5
6 BY MR. ALLISON:

7 Q Okay. Who was the electricity registered to?

8 THE COURT: That -- I think that's going to the
9 point. I'm interested by reason of the objection
10 raised as to -- in other words, why he doesn't have
11 records here.

12
13 BY MR. ALLISON:

14 Q Why don't you have records here as to the
15 microfiche?

16 A All right. The records that we maintain are
17 on microfiche. We require a viewer to provide the
18 information you might request in terms of who was at that
19 address on a particular date other than the current year.
20 We maintain those records on a particular address for about
21 six months on our computer, and then they're transposed.

22 MR. ALLISON: All right. Is that satisfactory
23 at this point?

24 THE COURT: Well, what I want to know is that
25 the only record you maintain, Mr. Williamson?

1 THE WITNESS: Yes, sir. We don't -- As far
2 as you're talking about in terms of having it on
3 paper?

4 THE COURT: Yes. That's what we are asking.
5 Do you have anything on paper for the time that he --
6 counsel is asking in question?

7 THE WITNESS: No, sir. Strictly --

8 THE COURT: And why don't you?

9 THE WITNESS: Okay. For one reason, the files
10 maintained of this nature, it's more I guess easily
11 retained -- because we retain them as far back as
12 1973 -- by keeping them on microfiche. We can keep
13 them in a much smaller area, because a particular
14 address may change hands any number of times in the
15 course of a year or several years. So that's the
16 reason. I can get a statement of account picked up
17 from those microfiche.

18 THE COURT: Are you saying microfiche?

19 MR. ALLISON: That's different from micro --

20 THE COURT: F-i-s-h?

21 THE WITNESS: F-i-c-h-e.

22 THE COURT: I guess --

23 MR. BARNES: Sounds like a very small animal
24 that lives in the sea.

25 THE COURT: Okay. Let me proceed.

1 If you were to bring anything in writing it
2 would just be something you would copy off the
3 microfiche; is that correct?

4 THE WITNESS: That's correct.

5 THE COURT: And so mentally you have in your
6 mind what that shows?

7 THE WITNESS: That's correct.

8 THE COURT: All right. I'm satisfied that this
9 is the proper way of showing the evidence of what's
10 on the microfiche.

11 MR. BARNES: May I just -- May I ask him just
12 a couple questions concerning the foundation?

13 MR. ALLISON: Certainly. I have no objection.

14 MR. BARNES: Do you use a viewer to pull up
15 information on your microfiche? Is that correct?

16 THE WITNESS: That's correct.

17 MR. BARNES: Do you have any type of equipment
18 that operates in connection with that to make
19 photocopies of what shows on the viewer?

20 THE WITNESS: No, sir, I do not.

21 MR. BARNES: Is it your testimony that it is
22 impossible and that you all do not do it? Make
23 copies of any records that have been transferred to
24 microfiche?

25 THE WITNESS: Only manually. We take the

1 information from the microfiche, transpose it to a
2 statement of account, and submit that. Not to my
3 knowledge do we have anything other than that, as far
4 as mechanical.

5 MR. BARNES: Are you familiar with the microfiche
6 system that most banks use?

7 THE WITNESS: No, I'm not.

8 THE COURT: I'm missing something.

9 MR. BARNES: Banks, savings and loans. You're
10 not familiar with that?

11 THE WITNESS: No, sir.

12 MR. BARNES: All right, sir. I take it your
13 testimony is that it would be impossible for you to
14 get a hard copy of any information from your system?

15 THE WITNESS: To my knowledge it would be.

16 MR. BARNES: Who in your organization would
17 know that?

18 THE WITNESS: It would probably have to come
19 from the General Accounting Department out of Richmond.

20 MR. BARNES: All right.

21 THE COURT: Based on what the witness has said,
22 I would now overrule your objection and have him
23 testify to his knowledge.

24 MR. BARNES: Please note our exception, Your
25 Honor.

1 BY MR. ALLISON:

2 Q All right. And would you state whose name the
3 electricity was in during the month of December of 1981.

4 A Service at 6501 Atlantic Avenue, Apartment A,
5 was in the name of James E. Cook through December 22.

6 Q When you say through December 22nd, what
7 happened on that date?

8 A Service was asked to be disconnected,
9 terminated.

10 MR. BARNES: I doubt his records indicate that,
11 and that would be hearsay.

12 THE COURT: Well, okay. We've gone through --
13 and I'll instruct him -- After your cross-examination --
14 At this time I'm overruling his objection, and let me
15 just suggest to you, don't state conclusions that you
16 may find. State what the record shows.

17 THE WITNESS: Yes, sir.

18
19 BY MR. ALLISON:

20 Q I think that's exactly what he did, Judge.

21 A I stated our records indicate service was turned
22 off December 22nd. It was not turned off by our company at
23 our intent, but from someone else requesting that service be
24 turned off.

25 Q Fine. Now, you say 6501 A.

1 A Yes, sir. Downstairs.

2 MR. ALLISON: Okay. I would have nothing
3 further at this point.

4 THE COURT: Counsel?

5
6 BY MR. BARNES:

7 Q Did you look at the viewer for the information
8 prior to coming here?

9 A Yes, sir.

10 Q You personally did?

11 A Yes, sir.

12 Q And what do those records show from the
13 standpoint of when that service started?

14 A My records indicate service was started
15 September 1, 1981.

16 Q And do your records show that you no longer
17 bill for service on -- after December 22?

18 A We send -- Our records would indicate, and
19 what we do afterwards, was sent notices for outstanding
20 bills after deposit had been applied to the final bill, and
21 this carried on into 1982 and was paid at some point. I
22 didn't check to see when.

23 Q So your records indicate, if I understand
24 correctly --

25 A Yes, sir.

1 Q -- that on December 22 you ceased billing --

2 A We ceased --

3 Q -- applied the deposit to any amount owing,
4 and sent a bill for the balance?

5 A We ceased service and applied the deposit to the
6 outstanding bill, and from that point on we would send a
7 notice or bill for whatever was remaining.

8 Q Okay. What do your records show with respect
9 to the exact time or date that service was terminated?
10 From the point there was no electricity in the apartment?

11 A As far as what time of the day it was
12 terminated?

13 Q Or what --

14 A I couldn't tell you that. In fact, the orders
15 that we keep on file in our office would give the day and the
16 person who actually did the work.

17 Q Who was that?

18 A A serviceman from our operations department.

19 Q Who?

20 A I don't know. I'd have to pull the records
21 as far as what person or persons were involved as far as --

22 Q Do you have anything to verify it was actually
23 done that day?

24 A Not other than what is -- appears on our
25 microfiche. I can pull that order. That order -- We keep

1 that order, yes.

2 Q What I'm trying to get at is what do you look
3 at on the viewer?

4 A We have a code.

5 Q I know, but to show it was actually done?

6 A Other than the reading and the date that it was
7 disconnected and the codes we use that show that it was
8 disconnected, that's all I can tell you other than having
9 pulled the order which the serviceman works, giving his
10 initials and the reading he turned the service off with.

11 Q Is there any record or way to confirm it was
12 actually disconnected though?

13 A Yes.

14 Q What record is that?

15 A That is an order generated for a turn off of
16 service.

17 Q That it was turned off?

18 A It goes to the field. A serviceman takes it,
19 writes the reading on the record, returns it back and it's
20 keypunched into our system rendering a final bill.

21 Q What was the date you received the information
22 back on the final reading?

23 A That was the 22nd.

24 Q That shows on the record?

25 A Yes.

1 Q Did you take any notes on what you looked at?

2 A Yes, sir.

3 Q Do you have them with you?

4 May I approach the witness, Your Honor?

5 THE COURT: What basically -- Excuse me. I'm
6 sorry.

7 MR. BARNES: He'll just look at it, and I'll
8 question him.

9 THE WITNESS: The notes I handed you are
10 which dates -- the date we turned the service on, the
11 date it was disconnected per the request. Mr. Cook,
12 I believe, was the one that requested it.

13 MR. ALLISON: Uh-huh. Thank you.

14 THE WITNESS: That's just what --

15

16 BY MR. BARNES:

17 Q Is the terminology you have on the note the
18 same terminology that's on the screen?

19 A Yes, sir.

20 Q It's the slash O-F-F?

21 A Uh-huh.

22 MR. ALLISON: Per Mr. Cook.

23

24 BY MR. BARNES:

25 Q What is that? What I'm trying to get at, was

1 it ordered cut off that day or somebody actually went out and
2 cut it off?

3 A Yes, sir. The request generates a turn off
4 order. That order is then sent to our operations department
5 at which time it goes to the field, a serviceman would work
6 the service, turn the service off. He puts little boots or
7 plastic inserts over the meter and puts it back in place,
8 cutting the service off, renders a reading, turns that order
9 back into us, and then it's keypunched the next day into the
10 computer system rendering a final bill to that address.

11 Q That's the way it's normally supposed to work?

12 A That's the way it works.

13 Q And you pulled up the screen and did this?

14 (Indicating) Did it say this? (Indicating)

15 A It said turned the service off on the 22nd
16 and the amount of kilowatts and the number of days in this
17 billing period.

18 Q In programming for the purpose of getting
19 that information to come up in English on some code, easily
20 interpretable, what piece of information does someone punch
21 in to get it into that machine?

22 A You need an account number or address or meter
23 number or a name in order to pull up that particular address
24 or find that account.

25 Q Okay.

1 A And then once you've done that you can enter
2 into it whatever information, change of address, name change,
3 any number of different things you can do. When we get a
4 request for a turn off of service, we pull up the address,
5 place a date in there for service to be disconnected. If
6 there's a forwarding address we place that in there at the
7 same time, and that order is generated or initiated from the
8 computer printout, our copy.

9 Q What date was the order generated in this
10 particular matter?

11 A The order generated would have been the 21st
12 to go out in the field for disconnection on the 22nd. It
13 could be the same day too. I couldn't tell you without having
14 the hard copy.

15 Q Can you tell from your records what date
16 somebody went out to that apartment and actually physically
17 turned off the service?

18 A December 22nd.

19 Q And you know that from your records?

20 A Yes, sir.

21 Q Because that's the way it's normally done?

22 A That's the way it's done.

23 Q That's not what your records said?

24 MR. ALLISON: I object to him being argumentative
25 with the witness.

1 MR. BARNES: That's all right.

2 THE COURT: I think the last statement was
3 not a question. I sustain your objection to that.

4 MR. BARNES: I withdraw it.

5 THE COURT: All right. Are we finished with
6 Mr. Williamson?

7 MR. ALLISON: Yes, sir, Your Honor.

8 THE COURT: Mr. Williamson, you may stand down
9 and you may go.

10 MR. ALLISON: Mr. Hugh Barnes.

11 THE BAILIFF: Mr. Barnes has been sworn in
12 previously, Your Honor.

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25

J. HUGH BARNES, called as a witness on behalf of the
Commonwealth, having been first duly sworn, was examined and
testified as follows:

DIRECT EXAMINATION

BY MR. ALLISON:

Q State your name for the record.

Donn, Graham & Associates

REGISTERED PROFESSIONAL REPORTERS
VIRGINIA BEACH AND ACCOMAC, VIRGINIA
ELIZABETH CITY, NORTH CAROLINA

1 A J. Hugh Barnes.

2 Q And your occupation?

3 A Nationwide Insurance agent.

4 Q And how long have you been so employed?

5 A Oh, I've been selling insurance forty years.

6 Q All right. I'd like to direct your attention
7 back to December 22nd of 1981. Did you have occasion to see
8 the defendant, Mr. Cook on that date?

9 A Yes, sir.

10 Q All right. And where was that?

11 A In my home at dinner, having dinner with us.

12 Q Okay. And who else was there at that time?

13 A Well, my wife and a teacher that works with
14 her who was escorted by Mr. Cook.

15 Q All right. Did you and Mr. Cook discuss
16 anything that evening about insurance?

17 A Well, as the night drew on he found out I was
18 in the insurance business, and he said he needed a renter's
19 policy, which I told him I'd be happy to oblige him and I
20 put it under a binder that day and sent him a letter to that
21 effect.

22 Q Where did he tell you he was living at that
23 time?

24 A I believe it was 6501 Atlantic Avenue.

25 Q And that was the 22nd; is that correct?

1 A That's correct.

2 Q All right. Now, did you have any further
3 discussion at that time?

4 A Well, other than he claimed he had an oriental
5 rug, and I told him I would be unable to bind that unless he
6 got an appraisal of it, and so I was waiting for the
7 appraisal of that to write the policy.

8 Q Okay. All right. Now, you said you had issued
9 a binder. Would you explain to the jury what a binder is.

10 A Any agent that -- if he tells you you're covered,
11 you're covered; and I confirmed this with a letter to
12 Mr. Cook for the amount he was covered for.

13 Q What were you covering him for at that time?

14 A Well, it would be his personal effects in the
15 dwelling that he was occupying.

16 Q All right. Now, that would be his contents,
17 period?

18 A Your furniture, hi-fi or anything else that he
19 would --

20 Q Where he lived or somewhere else?

21 A Well, at that address is all I know, that he
22 lived at, 6501 Atlantic Avenue.

23 Q Okay. Do you issue binders where people live
24 somewhere else and have property somewhere else?

25 A No. I could not do that.

1 Q Had he mentioned to you at that point that he
2 was moving out or had moved out?

3 A Not at that time.

4 Q All right. When did you next hear from
5 Mr. Cook after that?

6 A I believe when he brought me a check by for the
7 policy.

8 Q All right. And when was that?

9 A That was two or three days later I believe.

10 Q When in relation to that did you see him next?

11 A When he brought me a loss -- list of the loss
12 he had.

13 Q All right. And that was the day after the first?

14 A I believe it was.

15 Q All right. And what did he tell you at that
16 time where he was living?

17 A Well, he said he was in the process of moving.
18 He didn't tell me.

19 Q Did he say why he was moving at this point?

20 A He was having some misunderstanding with his
21 landlord.

22 Q Okay. What did you do when he presented this
23 list to you?

24 A Well, I reported it to my company, and told
25 them the situation, that I had issued a binder and sent them

1 a copy of it; and at that time I had not issued a policy. So
2 that we could pay his claim, I had to issue a policy, so that
3 the Claims Department would have a number to make the charge
4 against; and I think we -- the Claims Department paid him.

5 Q Had the policy even been issued yet?

6 A Not at that time.

7 Q Did you have occasion to take this information
8 that was given to you by Mr. Cook and do anything with it?

9 A Well, all I did was turn it over to the Claims
10 Department, and they handled it from then on.

11 Q All right.

12 (A side-bar conference was held by the Court
13 with counsel for both sides out of the hearing of the
14 jury and the court reporter.)
15

16 BY MR. ALLISON:

17 Q All right. I'd like to show you this document
18 and ask you if you can identify it.

19 A This is a copy of what he brought me, yeah.

20 Q And what are those items depicted on this as
21 far as your knowledge of what he claimed to you?

22 A Well, I asked no explanation other than turned
23 it over to the Claims Department for settlement.

24 Q All right. And what is indicated on this list?

25 A His --

1 MR. BARNES: I believe it would speak for
2 itself.

3 MR. ALLISON: All right. That's fine.
4 I would have no further questions on that.
5 Commonwealth would introduce this into evidence.

6 THE COURT: This will be marked as the third
7 exhibit for the Commonwealth.

8 (Marked by the Court as Commonwealth's Exhibit
9 Number 3)

10

11 BY MR. ALLISON:

12 Q Did you have any further contact with Mr. Cook
13 after he presented that list to you on the day after the fire?

14 A Not -- I can't remember any more. I think the
15 Claims Department took from that, and I believe pretty shortly
16 after that they settled -- wrote a check to him for his loss.

17 Q And that would have been issued from whom?

18 A From the Claims Department.

19 Q All right. And what company?

20 A Nationwide Insurance Company.

21 Q All right. And you yourself have no knowledge
22 of the particular date that that was issued?

23 A No, I do not.

24 MR. ALLISON: Okay. I would have no further
25 questions of this witness at this point, Judge.

1 THE COURT: Counsel?

2
3 CROSS-EXAMINATION
4

5 BY MR. BARNES:

6 Q Mr. Barnes, where is your office located?

7 A 1766 Independence Boulevard, Robbins Corner,
8 Virginia Beach, Virginia.

9 Q All right, sir. How many times had Mr. Cook
10 been to your home for dinner or any other social occasion?

11 A That was the first time and the last.

12 Q Think he had only been there one time?

13 A Yes.

14 Q The young lady he was escorting --

15 A I don't remember.

16 Q -- was it Tracy Fair?

17 A Yeah. Tracy somebody.

18 Q She worked with your wife?

19 A Yes.

20 Q She's a school teacher?

21 A (Nodded head affirmatively)

22 Q Tracy is a school teacher?

23 A Right.

24 Q Was Mr. Cook invited to your home or Miss Fair?

25 A She was invited.

1 Q And she --

2 A And he escorted her.

3 Q Okay. Mr. Cook never came to your office
4 looking for insurance, did he?

5 A No, he did not.

6 Q Never called you on the phone looking for
7 insurance?

8 A Did not.

9 Q Okay. Was a dinner guest at your house and
10 later on that evening it was brought up you were an insurance
11 agent?

12 A Yes.

13 Q Do you remember if you brought it up or he
14 brought it up?

15 A Well, being a salesman, I imagine I brought it
16 up. I do like to let people know I sell.

17 Q Gets to be a habit over forty years?

18 A What?

19 Q Gets to be habit over forty years?

20 A Right.

21 Q All right, sir. Did he tell you he was renting
22 an apartment?

23 A That's correct.

24 Q Okay. How much was the amount that he was
25 insured for that you gave him?

1 A I believe it was \$8,000 that the binder covered.

2 Q He indicated to you he had an oriental rug he
3 wanted insured too?

4 A Yes.

5 Q Did he ever get around to getting you an
6 appraisal?

7 A No.

8 Q Never made a claim for it either, did he?

9 A No.

10 Q Was -- You issued him an oral binder that night,
11 didn't you?

12 A That's correct.

13 Q In your business, if you're sitting at the
14 dinner table and give him an oral binder at 10:00 and he suffers
15 a loss at 11:00, he's covered?

16 A Yes.

17 Q Even though no money has passed hands and no
18 formal policy has been issued?

19 A Correct.

20 Q Okay. Your word is good enough to make the
21 insurance company responsible.

22 A Correct.

23 Q Subsequent to that, sir, did he -- Did you tell
24 him how much the premium was?

25 A No, I didn't. I don't believe I did. I think

1 I called him at his office and told him, and he brought a
2 check by for the amount.

3 Q Do you know the date that he brought the check
4 by to you?

5 A No, I do not.

6 Q Do you have any records in your office that
7 might indicate that?

8 A Yeah. I'm sure I do. I have a remittance report
9 that I would have sent it off, the check off.

10 Q Okay.

11 May I approach the witness, Your Honor?

12 THE COURT: Yes.
13

14 BY MR. BARNES:

15 Q I show you a document stapled together. There
16 are two pages. One purports to be the front of a check, and
17 the other is the back of that check. Can you identify that,
18 sir?

19 A It's made out to Hugh Barnes, Nationwide
20 Insurance, \$56 for renter's insurance policy.

21 Q Did you endorse the back of that check?

22 A Well, I'd say my secretary did.

23 Q Does that look like her handwriting?

24 A Uh-huh.

25 Q Is that her handwriting?

1 A I believe so.

2 Q Do you see a date stamped on the back showing
3 deposit date of that check?

4 A I don't see -- It cleared Central Fidelity
5 -- See, when they made it out to me I endorsed it and made it
6 payable to Nationwide Insurance Company and sent it to
7 Lynchburg, Virginia, and they endorsed it at Central Fidelity
8 on January 12th.

9 Q January 12, 1982?

10 A That's when it cleared the bank.

11 Q All right. On the front of the check do you
12 see a date?

13 A 1/2.

14 Q 1/2?

15 A Got '81 here.

16 Q Okay. Is there a stamped date on it?

17 A Got January 2, 1982.

18 Q Do you stamp checks received in your office?

19 A (Shook head negatively)

20 Q Do you have any idea how that got in there?

21 A Comes from the home office.

22 Q Home office?

23 A Lynchburg.

24 MR. BARNES: All right, sir.

25 Your Honor, I'd like --

1 A Oh, that's the date they received it.

2 MR. BARNES: Like to introduce that as
3 Defendant's Exhibit 1.

4 THE COURT: All right, sir.
5
6

7 BY MR. BARNES:

8 Q Had the company already been notified of the
9 loss when they accepted this check?

10 A Well, I'll say this: that the minute Mr. Cook
11 gave me the notice of loss I notified them.

12 Q And there wasn't anything unusual about your
13 accepting the premium after the loss?

14 A (Shook head negatively)

15 Q Answer is no?

16 A No, sir.

17 Q Okay. Did you tell Mr. Cook on the night of
18 the dinner party that you would need the check in order to
19 issue the policy?

20 A I told him I would need the check, but he'd
21 have coverage and I would call them and tell them the amount.

22 Q Would you have given him the policy itself,
23 though, unless he gave you the check?

24 A No. I wouldn't have issued the policy until
25 I got the check.

1 Q Okay. So until he paid you he'd have a binder,
2 but no policy of insurance?

3 A Okay. The binder is good for ten days, and I
4 would have to cancel the binder or either issue the policy.

5 Q I see. Now, on the sheet of paper Mr. Allison
6 showed you, did you receive that piece of paper from Mr. Cook
7 personally?

8 A He delivered it to me personally.

9 Q Your Honor, I believe I'm referring to
10 Commonwealth's Exhibit 3.

11 At the bottom of that document, it states that
12 in addition to the items that are listed, 1 through 14 --
13 at the bottom there's a sentence or so -- "missing are two
14 rifles, a twenty-two gauge rifle and case, and one twelve-
15 gauge Remington Pump." Now, those are listed as missing.
16 Did he say anything to you about that?

17 A If it's on that paper, he mentioned it.

18 Q You don't recall any other discussion other
19 than the paper?

20 A I told him I would turn it over to the Claims
21 Department and they would contact him, which they contacted
22 him and paid him.

23 Q Okay. Do you have a copy of the letter that
24 you sent to Mr. Cook confirming the binder?

25 A I have it in my office.

1 Q You didn't bring it here today?

2 A (Shook head negatively)

3 MR. BARNES: That's all I have, Your Honor.

4 THE COURT: All right. The photostat of the
5 check as offered by the defendant I have marked as
6 Defendant's Exhibit A.

7 (Marked by the Court as Defendant's Exhibit A)

8 THE COURT: All right, Mr. Barnes.

9 MR. ALLISON: I have a couple more questions,
10 Judge.

11
12 REDIRECT EXAMINATION
13

14 BY MR. ALLISON:

15 Q Mr. Barnes, did you have any problem with
16 this particular -- collecting this particular check from
17 Mr. Cook?

18 A No. I don't -- I can't recall. Seems like
19 to me he mailed me one, and if I remember the first check
20 was lost in the mail, and then he personally brought that
21 check by. I believe that's correct.

22 Q That's what he told you; is that right?

23 A Right.

24 Q Okay. And that's why he delivered this one?

25 A Yes.

1 Q On January 2nd after the fire had already
2 occurred?

3 A Well, if he hadn't brought a check it would
4 have been covered.

5 Q Because you at that point bound him?

6 A Right.

7 Q Now, if he was living at the Ramada Inn, you
8 couldn't bind items at 6501 --

9 A I'm not aware he lived at the Ramada.

10 Q But if he was, you could not bind him at that
11 time?

12 A I would not have.

13 MR. ALLISON: I would have nothing further.
14

15 RECROSS EXAMINATION
16

17 BY MR. BARNES:

18 Q But if his residence was 6501 Atlantic Avenue
19 and he was temporarily staying somewhere else you could bind
20 him?

21 A As long as he was living at 6501.

22 Q You don't lose your insurance because you
23 check into a motel for a while, do you?

24 A No.
25

REDIRECT EXAMINATION

BY MR. ALLISON:

Q If there is a distress warrant already issued, for that particular residence, what would be your position as to that?

A Well, I think you're reaching for my decision right now. I -- You know, I --

Q Would you have bound him?

A If I had known any kind of warrant was issued I wouldn't write any individual a policy.

Q On December 22nd?

A Right.

MR. ALLISON: Nothing further.

RECROSS EXAMINATION

BY MR. BARNES:

Q Did you ask him if he was aware of any distress warrants?

A No, sir.

Q Not the kind of thing that comes up, is it?

A But I was not aware of it.

Q But you didn't ask him about it?

A Didn't ask him.

1 Q He didn't tell you there wasn't?

2 A No.

3 Q Did you have any knowledge that he even knew
4 there was one at that time?

5 A I had no knowledge of any warrant.

6 Q In your business, if you're going to pay on a
7 claim and there is a lien or levy against the property,
8 doesn't the insurance company have to discharge the lien and
9 then pay the balance to the policyholder?

10 A Well, I -- That's handled by the Claims
11 Department.

12 MR. ALLISON: I have somebody to establish that.
13

14 BY MR. BARNES:

15 Q That's not your area?

16 A No, sir.

17 MR. BARNES: Thank you very much.

18 THE COURT: You may step down and be released,
19 sir.

20 MR. BARNES: Your Honor, as far as releasing
21 him, we would like to preserve judgment until the end
22 of the case.

23 MR. ALLISON: Well, Your Honor, it's 3:00.

24 THE COURT: Just a second. Let me do something.

25 (A side-bar conference was held by the Court

1 with counsel for both sides out of the hearing of
2 the jury and the court reporter.)

3 THE COURT: Gary, while he's doing that, who
4 would you have next?

5 MR. ALLISON: Lieutenant Fahrig.

6 THE BAILIFF: Your Honor, Lieutenant Fahrig
7 was sworn in earlier.

8
9 -----oOo-----

10
11 FRANK FAHRIG, called as a witness on behalf of the
12 Commonwealth, having been first duly sworn, was examined and
13 testified as follows:
14

15 DIRECT EXAMINATION

16
17 BY MR. ALLISON:

18 Q Would you state your name for the record.

19 A Lieutenant Frank Fahrig. Virginia Beach Fire
20 Department.

21 Q All right. And how long have you been so
22 employed?

23 A Ten and a half years.

24 Q All right. I'd like to direct your attention
25 back to December 27th of 1981. Did you have occasion to

1 respond to a fire call that evening?

2 A Yes, sir, I did.

3 Q All right. Where was that located?

4 A 6501 Atlantic Avenue.

5 Q All right. Approximately what time was that
6 that you responded?

7 A Shortly after 9:00.

8 Q All right. You responded yourself personally;
9 is that correct?

10 A Yes, sir. That's correct.

11 Q All right. And what did you observe when you
12 arrived?

13 A We arrived on the scene of a two-story
14 apartment building with smoke coming out of the downstairs
15 windows and light smoke coming out of the upstairs windows.
16 We gained entry through the front door of the building and
17 searched the downstairs floor extinguishing a fire in a
18 sofa in the living room portion of the downstairs apartment.
19 We had smoke damage and heat damage to the top apartment too.

20 Q All right. I'd like to show you this photograph
21 and ask you if you can identify it.

22 A Yes, sir. That's the sofa that was on fire.

23 MR. ALLISON: All right. Commonwealth would
24 introduce this photograph into evidence.

25 THE COURT: All right. This will be marked as

1 Commonwealth's Exhibit 4.

2 (Marked by the Court as Commonwealth's Exhibit
3 Number 4)

4
5 BY MR. ALLISON:

6 Q Did you observe any occupants in the building
7 at that time?

8 A No, sir. We searched the downstairs floor and
9 upstairs floor and found no occupants.

10 Q All right. Did you have occasion to proceed
11 through the entire apartment?

12 A Yes, sir, I did.

13 Q And what did you observe about the different
14 rooms, if anything?

15 A There was some -- There was a mattress in the
16 hallway and a sofa at the south end of the hallway that had
17 a lot of heat damage through the building on the first floor.

18 Q All right. And you were the first unit to
19 respond; is that correct?

20 A We were the first arriving unit on the scene.

21 Q All right. And you were able to extinguish
22 the fire?

23 A Yes, sir.

24 MR. ALLISON: I would have nothing further.
25

CROSS-EXAMINATION

BY MR. BARNES:

Q Approximately how long did it take to extinguish the fire?

A From the beginning to the end?

Q Yes, sir.

A A little over an hour.

Q Do you have any photographs of the --
You say heat damage.

MR. ALLISON: We've got all of these here.

MR. BARNES: May I take a look?

MR. ALLISON: These are the ones you've already
seen.

BY MR. BARNES:

Q The photo you were just shown that showed the sofa or frame, how much of the apartment had damage like that?

A That was the only portion of it. It had some heat damage from where the mattress that was in the hallway leaning up against the wall had melted. Of course, the wall, you can see behind that sofa it had some damage to the plasterboard that was on the wall.

Q Did you notice anything peculiar about the front door?

1 A There was a key on the inside of the door in
2 the deadlock.

3 Q It was on the inside or the outside?

4 A I remember there was a key in the door. Can't
5 remember exactly which way it was.

6 Q All right, sir. Are there stairs leading up
7 to that door?

8 A No, sir.

9 Q There are no stairs?

10 A Maybe a stoop coming from the outside. Not
11 any number of stairs.

12 Q There's a stoop you have to step up on to get
13 to the door?

14 A Right.

15 Q Was there anything other than heat damage to
16 the floor above?

17 A Smoke damage.

18 Q Smoke?

19 A A little bit of heat up there. A lot of smoke
20 in the upstairs, because of the stairwell where it went up.

21 MR. BARNES: That's all I have. Thank you.

22 THE COURT: All right.

23 MR. ALLISON: I would have nothing further of
24 this witness, Your Honor.

25 THE COURT: All right. You may step down, and

1 you may go.

2 I think, Gary, you know --

3 MR. ALLISON: I'm looking at my witnesses, and
4 I'm trying to gauge the time, and that's exactly what
5 I'm trying to do at this point. Let me call a short
6 witness. It's going to be a little out of order, but
7 let me call Elke Berry at this point. Elke Berry.

8 THE BAILIFF: Miss Elke Berry has been sworn
9 in earlier, Your Honor.

10
11 -----oOo-----

12
13 ELKE BERRY, called as a witness on behalf of the
14 Commonwealth, having been first duly sworn, was examined and
15 testified as follows:

16
17 DIRECT EXAMINATION

18
19 BY MR. ALLISON:

20 Q Would you state your name for the record, please.

21 A Elke Berry.

22 Q All right. And you reside in Richmond; is
23 that correct?

24 A Now.

25 Q I want to direct your attention back to

1 December of 1981. Where were you residing at that time?

2 A In Virginia Beach.

3 Q All right. And what was the address at the
4 location where you resided?

5 A 6501 Atlantic Avenue.

6 Q All right. Did you live in the upstairs or
7 downstairs?

8 A Upstairs.

9 Q All right. And who lived downstairs?

10 A James Cook; Claes Tholand, I think his last name
11 was; and Michael Mazza.

12 Q All right. Is James Cook in the courtroom
13 today?

14 A Yes, he is.

15 Q All right. Would you point him out?

16 A He's right there.

17 Q All right. Let the record indicate she's
18 indicated the defendant.

19 I'd like to show you a photograph and ask you
20 if you can identify it.

21 Would you state what that depicts.

22 A This is my sofa, the one that James borrowed.

23 Q All right. And who owned it?

24 A Well, it was my sofa.

25 MR. ALLISON: All right. Commonwealth would

1 introduce this document into evidence.

2 THE COURT: All right, sir. It will be the
3 Commonwealth's Exhibit Number 5.

4 (Marked by the Court as Commonwealth's Exhibit
5 Number 5)

6
7 BY MR. ALLISON:

8 Q Did Mr. Cook ever pay you for this sofa?

9 A No.

10 Q All right. At this point have you been
11 compensated whatsoever for it?

12 A I haven't seen him since before the fire.

13 Q All right. Where were you during the fire?

14 A Key West.

15 Q You were in Florida at that time?

16 A Uh-huh.

17 Q Your apartment was unoccupied at that time?

18 A Yes, sir.

19 Q All right. Did you authorize Mr. Cook to keep
20 this money he received from Nationwide as to this particular
21 couch?

22 A I didn't know anything about him receiving money
23 for it.

24 Q On your couch? Is that correct?

25 A Well, it is my sofa. It was.

1 Q I would have --

2 MR. BARNES: Objection at this time. It
3 hasn't been established what he received money for.

4 MR. ALLISON: I'm going to establish that.

5 THE COURT: As it comes now, I would overrule
6 it; and you've finished with this witness?

7 MR. ALLISON: Yes, sir.

8 THE COURT: Counsel?

9

10 CROSS-EXAMINATION

11

12 BY MR. BARNES:

13 Q Ms. Berry, how long had you lived upstairs in
14 that apartment? 6501?

15 A September.

16 Q Of 1981?

17 A 1981, yeah.

18 Q You testified earlier you loaned the sofa --

19 A Well, it was standing out in the rain, and he
20 said, "Can I use it"; and I said, "Yeah."

21 Q You weren't using it at all?

22 A I couldn't get it in my apartment.

23 Q So it was outside exposed to the elements?

24 A Yes.

25 Q And he asked you if he could use it?

1 A Yes, sir.

2 Q What plans did you have for it in the rain?

3 A I suppose I could have eventually moved it
4 back to Richmond or left it standing out there.

5 Q So you let him use it, and he had permission
6 to use it?

7 A Yes.

8 Q And it was in his apartment and that was okay
9 with you?

10 A Yes, sir.

11 Q Have you seen him since the fire?

12 A No, I haven't.

13 Q Did you ever check in your mailbox for anything
14 after the fire occurred or did you go back there?

15 A Yes. I lived there until September of this
16 year.

17 Q Okay. At 6501?

18 A Yes.

19 Q Until September of 1982?

20 A Right.

21 Q Have you actually had any contact with
22 Mr. Cook?

23 A No.

24 Q Okay. Did you ever receive any communication
25 from him that he wanted to talk to you about making

1 restitution on the sofa?

2 A I haven't seen anyone that's a friend of his.
3 Haven't had any contact with him.

4 Q Did you know where Mr. Cook was living?

5 A I heard he was living in Richmond. I heard
6 he was living at the beach.

7 Q Okay. Did you ever tell him where you were
8 living or anything of that nature?

9 A No.

10 MR. BARNES: That's all I have. Thank you.

11 MR. ALLISON: I would have nothing further of
12 this witness, Judge.

13 THE COURT: All right. May the witness be
14 released?

15 MR. ALLISON: Yes, sir.

16 THE COURT: You may stand down, ma'am, and
17 be released.

18 THE WITNESS: Thank you.

19 MR. ALLISON: Judge, I think that's my only
20 short witness of the day. The others are going to
21 require a little bit longer period of time, and then
22 there's going to be cross-examination on the part of
23 the defense.

24 THE COURT: All right. Judging from what
25 Mr. Allison has said then, I probably am going to use

1 this time to go on and recess the case.

2 Do you all have any objections?

3 MR. BARNES: No, sir. Not at all.

4 THE COURT: Now, ladies and gentlemen of the
5 jury, you recognize from what I've said earlier
6 that I have indicated because of some other function
7 that was going to be held in the courtroom that we
8 would try to recess around 3:30, and based on what has
9 just been said we will recess at this time.

10 Let me briefly reiterate my instructions to
11 you that you should not place yourself in a position
12 where you should hear anything concerning this case
13 other than what comes to you by way of the witness
14 stand, what is said and done here in the courtroom,
15 and rather than pick out each particular thing --
16 and I don't want you to do that if you know what
17 you aren't to listen to. Please adjust your schedule
18 so that you -- Now, I can't tell you I saw anyone in
19 the courtroom who appeared to be a reporter. I don't
20 know them that well, and if there was one I don't know
21 of it; but guard against any news media reports of
22 this particular event.

23 Now, gentlemen, is there any desire or request
24 or reason for us to start other than at 10:00 in the
25 morning?

1 MR. ALLISON: Whatever the Court desires, Your
2 Honor.

3 MR. BARNES: We're flexible.

4 THE COURT: All right, sir. Then we'll
5 presume to start again at 10:00.

6 Now, let me suggest what I want you to do.
7 When you arrive tomorrow, do not go into your jury
8 assembly room. I'm assuming that you know what that
9 is. I didn't tell you about it, but you have a place
10 back here where you were located this morning. Do
11 not go there. Come directly into the courtroom, and
12 as I instructed you, do not stay in the courtroom
13 proper, but go into your jury room until we start.

14 At this time I know of no reason why we
15 shouldn't be able to start promptly at 10:00.

16 Now, with respect to 6501 Atlantic Avenue, do
17 any of you live in the north end so that you have
18 to go by that particular intersection?

19 None of you do. Fine. Then don't out of
20 curiosity go by there. I was going to tell you not
21 to go that way if you do. So don't get curious and
22 go there. Don't go to the scene. Leave that to what
23 you hear in the courtroom.

24 I don't know of any other instructions other
25 than drive safely and return tomorrow.

1 Do you have any questions of the Court before
2 I release you for the evening?

3 All right. You might remember it is the
4 general consensus that we should finish by 5:00
5 tomorrow; and if we do not, in all probability your
6 case would carry over to Monday; and I cannot be
7 accurate when we're dealing with human beings. Of
8 course, counsel has given me their best estimates, but
9 until you find out differently, I would allocate time
10 so that you would expect to get out by 5:00. If the
11 case is turned over to you by then, then you can
12 deliberate. If not, then it will be carried over
13 until Monday. So please make your schedules available
14 for that date.

15 Mr. Bailiff.

16 (The jury was excluded from the courtroom)

17 THE COURT: All right. The jury has gone.
18 Stand in recess, and I would like to start promptly
19 at 10:00 if we can.

20 (The court adjourned at 3:35 p.m., December 9,
21 1982, until 10:00 a.m., December 10, 1982.)
22
23
24
25

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* * *

* * *

Pages 121-122 including
the Clerk and Reporter
Certificates are deleted.

* * *

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Deleted is Page 123 of the
transcript which includes
the style and caption.

* * *

1 THE COURT: Now, ladies and gentlemen of the
2 jury, I had told you I would like to start promptly
3 at 10:00. It's not promptly 10:00, but Friday is
4 normally a motion day on which we don't have jury
5 trial. We did not start them but continued them,
6 and there have been some cases that had been assigned
7 to other judges that I have to hear, so I've been
8 trying to do something with those while I'm supposed
9 to be doing something with you all. So maybe during
10 the course of this trial I'll take a break between
11 some of the witnesses or so and talk to the
12 gentlemen.

13 Now, we'll go ahead, but that's the reason we
14 didn't start promptly. Nice to see you all here again.

15 Now, Mr. Allison.

16 MR. ALLISON: Commonwealth would have
17 Mr. Tholand.

18 MR. BARNES: Just before I start, Your Honor,
19 I didn't see anything that anybody could see. I
20 don't think there was any report about this matter,
21 but I asked this court to ask the jury --

22 THE COURT: Oh.

23 MR. BARNES: If they heard anything about the
24 case.

25 THE COURT: I don't normally do that, but I'd

1 be glad to.

2 Did any of you see, read, hear -- This is what
3 you're --

4 MR. BARNES: Yes.

5 THE COURT: -- or gain any knowledge of the
6 case that we're trying since you left the court
7 yesterday?

8 All right.

9 THE BAILIFF: Your Honor, Mr. Tholand was
10 sworn in yesterday.

11 THE COURT: All right.

12 Mr. Tholand, the oath you took yesterday will
13 govern you in your testimony today.

14 THE WITNESS: Yes, sir.

15
16 -----oOo-----
17

18 CIAES GUNTHER THOLAND, called as a witness on behalf
19 of the Commonwealth, having been first duly sworn, was
20 examined and testified as follows:

21
22 DIRECT EXAMINATION
23

24 BY MR. ALLISON:

25 Q Would you state your name for the record,

1 A Claes Gunther Tholand.

2 Q And, Mr. Tholand, I'd like to direct your
3 attention back to November of 1981. Where were you residing
4 at that time?

5 A At 64th and Atlantic Streets in Virginia Beach.

6 Q All right. And who were you residing with at
7 that time?

8 A James Cook.

9 Q All right.

10 A And Michael Mazza.

11 Q All right. When did Mr. Mazza move out?

12 A I believe towards the end of November.

13 Q All right. Now, were you living there in
14 December?

15 A Yes, I was.

16 Q And did you have occasion to move out
17 approximately December 13th?

18 A I'm not exactly sure, but it was a couple of
19 weeks before Christmas, yes.

20 Q All right. I'd like to show you this check
21 and see if you can identify that.

22 A Well, it is a check by James Cook. You showed
23 it to me earlier, but really I can't identify it.

24 Q Are these the dates?

25 A Yes.

1 THE COURT: All right.

2 MR. ALLISON: I show this to counsel, Your
3 Honor.

4 (Shown to Mr. Barnes)

5 MR. BARNES: Your Honor, at this point the
6 defense will stipulate that the date they moved into
7 the Ramada Inn is December 13th of 1981.

8 THE COURT: All right. Members of the jury,
9 where there is a stipulation then other testimony by
10 witnesses is not necessary to prove that particular
11 fact. So it is stipulated by counsel that December 13,
12 1981, is the date -- that who moved where?

13 MR. ALLISON: That's the date that the defendant
14 and Mr. Tholand moved into the Ramada Inn.

15 THE COURT: All right.

16

17 BY MR. ALLISON:

18 Q Now, let's amplify on that a little bit more.

19 Did both of you move into the same room?

20 A At the Ramada Inn? Yes.

21 Q And what room number was that?

22 A 100.

23 Q All right. Did there come an occasion when
24 you, Mr. Tholand, had occasion to go back to where you were
25 residing before that with Mr. Cook on the 17th of December?

1 A I don't recall the 17th being a particular
2 date. We went back several times to gather our belongings.

3 Q Did you have occasion to see Mr. Osmond there
4 one of those days with a process server?

5 A Yes.

6 Q All right. Had you already moved out of this
7 place?

8 A We had moved out of the Atlantic Avenue
9 apartment, yes.

10 Q All right. What happened there while you were
11 there?

12 A On the day that Mr. Osmond's -- They were
13 listing certain items of our belongings because we were in
14 arrears on the rent. A lien was being put on some of our
15 belongings.

16 Q All right. When did you notify Mr. Cook that
17 this had happened?

18 A Later on that day.

19 Q That same day?

20 A I'm sure.

21 Q All right. Did Mr. Cook say anything to you
22 at that point?

23 A Well, no, but I think neither of us were
24 particularly surprised that this had happened.

25 Q All right. Were you in the process of taking

1 items out of there afterwards?

2 A Yes.

3 Q All right.

4 MR. BARNES: Excuse me, Your Honor. May we
5 approach the bench for just a moment?

6 THE COURT: Uh-huh.

7 (A side-bar conference was held by the
8 Court with counsel for both sides out of the hearing
9 of the jury and the court reporter.)
10

11 BY MR. ALLISON:

12 Q All right. Mr. Tholand, I want to direct
13 your attention to the night of December 27, 1981. Did
14 Mr. Cook leave your motel room that night?

15 A If we're talking about Sunday night, the night
16 of the fire, then yes.

17 Q All right. And approximately what time did he
18 leave?

19 A I can't be absolutely certain. I can say with
20 certainty that it was dark. Beyond that --

21 Q It was night time?

22 A It was night time.

23 Q Okay. And what time approximately was it that
24 you saw him leave?

25 MR. BARNES: Excuse me. I believe he's already

1 answered that.

2 MR. ALLISON: No, he hasn't.

3 THE COURT: Just a second. Let me hear the
4 objection.

5 MR. BARNES: He's been asked that question
6 once, and he said he couldn't be sure. He said it was
7 dark.

8 THE COURT: I believe that was his answer.

9 MR. ALLISON: All right.

10
11 BY MR. ALLISON:

12 Q Approximately what time was it?

13 I'm asking him an approximate time.

14 THE COURT: I thought he gave you an answer
15 that he had no idea of the time except it was dark.

16
17 BY MR. ALLISON:

18 Q What is your estimate of the time?

19 MR. BARNES: Same objection.

20 THE COURT: Do you have an estimate of the time?

21 THE WITNESS: I've thought about that question,
22 and I can honestly not say what time it was.

23 MR. ALLISON: Judge, may counsel approach the
24 bench?

25 (A side-bar conference was held by the Court

1 with counsel for both sides out of the hearing of the
2 jury and the court reporter.)

3 THE COURT: Mr. Bailiff, will you have the jury
4 step in the jury room.

5 Ladies and gentlemen, step in there while I go
6 over the matter.

7 (The jury was excused from the courtroom)

8 THE COURT: All right. Let the record show that
9 the jury is out of the courtroom.

10 Mr. Allison?

11 MR. BARNES: Your Honor, if it please the Court,
12 I'd like to put on the record what was the side-bar
13 conference, if I could.

14 It's my recollection that we approached the
15 Court, and out of the hearing of the jury, Mr. Allison
16 made the comment that he had questioned this witness
17 before and had gotten a time, and it was his feeling
18 the witness is being adverse based on just that.
19 It's our objection to the proceeding going on at the
20 present time. I do not feel it's sufficient to show
21 adversity just because a witness when under oath
22 doesn't give the answer the Commonwealth wants.

23 MR. ALLISON: Judge, the Commonwealth --

24 THE COURT: The reason for excluding the jurors
25 is for the purpose to ascertain whether this is or

1 is not adversity. So before we question him in front
2 of the jury --

3 MR. ALLISON: The Commonwealth's position is
4 that the defendant has been -- excuse me -- the
5 witness has been talked to twice by myself personally
6 and gave me a time of just after 8:00 on two separate
7 occasions. Yet now, he's up on the stand and is not
8 giving a time whatsoever.

9 THE COURT: Well, your purpose now is to find
10 out and see if you can refresh his memory or do what
11 you need to do.

12
13 BY MR. ALLISON:

14 Q All right. What is the time that you recall
15 the defendant, James Cook, leaving this apartment?

16 A It is precisely because I am under oath and
17 because this gentleman's life is in the balance that I made
18 the statement to you earlier that I did. We did on a couple
19 of occasions talk about times, and I think it's a different
20 matter when we're sitting informally in your office to discuss
21 and talk about a time. It is --

22 Q Didn't you also give that same time to the
23 fire investigator in this matter, Lieutenant Wade?

24 A I can't say honestly that I -- in an informal
25 discussion that someone might have said something to the

1 effect was it after the news, or I believe we were talking
2 about 60 Minutes. I'm just telling you that. I -- in all
3 honestly I can't remember what I had for lunch yesterday,
4 let alone exactly what time James went up to that apartment
5 a year ago; and that's the truth.

6 Q And approximately how long after he left did
7 he come back?

8 A I would say he was gone for forty-five minutes,
9 and that is again simply a -- I would hate to swear to that.
10 That's a guess.

11 Do you understand what I'm saying?

12 Q I understand fully, Mr. Tholand. Is it my
13 understanding you're not going to give any time as to when
14 he left?

15 MR. BARNES: I'm not sure that's a fair
16 question. I think the witness should be asked if he
17 has a recollection.

18 MR. ALLISON: I've asked him four times. I
19 don't know how many more times he wants me to ask.

20 THE COURT: Well, with the jury excluded I
21 don't see anything wrong with the question as asked.

22 A I cannot swear to a time. If I gave you a time
23 it would be a guess at best.

24

25

1 BY MR. ALLISON:

2 Q I have no problem with that. What is the time
3 you've guessed all the other times?

4 A Well, we had discussed that it was possibly
5 after 60 Minutes, a show which I regularly watch on Sundays.
6 Again, I can't swear to that.

7 Q Which would put it after 8:00?

8 A If that were the case it would put it after
9 8:00.

10 Q And that's the time you've consistently set,
11 after 8:00; isn't that true?

12 A I think you have -- you and I have discussed
13 it once, and Wade discussed it once.

14 Q We discussed it last time you were down here,
15 and this time you were down here? We discussed it twice?

16 A I don't wish to give a time. I -- We did
17 discuss that.

18 Q And that's the same time you gave consistently
19 each time, is it not?

20 A As a guess, informally, in a conversation, yes.

21 Q Isn't that a truth, or are you saying informally
22 it's not the truth?

23 A The truth is that now I'm under oath and I don't
24 wish to hazard a guess. That's the truth.

25 MR. ALLISON: That's the situation, Judge.

1 THE COURT: All right. I think that this is a
2 rational approach that the witness has taken to it
3 under the circumstances, and it may not be what you
4 want, but I think that's what you're stuck with at this
5 time.

6 MR. ALLISON: Yes, sir.

7 THE COURT: All right, Mr. Bailiff, bring the
8 jury out here.

9 (The jury was recalled to the courtroom, and
10 the following occurred in the presence of the jury:)

11
12 BY MR. ALLISON:

13 Q All right. Mr. Tholand, let me ask you one
14 more time. Approximately what time was it when Mr. Cook left
15 that evening?

16 A It was in the evening, and it had turned dark.

17 Q Okay. Approximately when did he return after
18 he left?

19 A After his departure I would guess that he
20 returned within forty-five minutes.

21 Q All right. Did you hear anything while he
22 was returning or just after he returned?

23 A After he had returned -- We lived right on
24 Atlantic Avenue, and I commented to James when several fire
25 trucks went by that there must be a fire up at the beach. It

1 was loud with sirens and so forth.

2 Q Okay. Did Mr. Cook own any guns?

3 A No.

4 Q Did not own any weapons?

5 A Not that I know of.

6 Q All right. Who of your roommates owned any?

7 A Michael Mazza, I believe had a handgun and a
8 shotgun.

9 Q All right. I'd like to show you Commonwealth's
10 Exhibit Number 5 and ask you if you can identify this item.

11 A This is a sofa that we had in our living room.
12 The sofa was given to us by Elke Berry because it wouldn't
13 fit in her apartment.

14 Q Who owned that sofa?

15 A Well, it was Elke Berry's sofa.

16 MR. ALLISON: Excuse me one moment, Your
17 Honor.

18

19 BY MR. ALLISON:

20 Q Had Mr. Cook's clothes been removed by the
21 27th, the night of the fire?

22 A In part.

23 Q All right. So he still had some items left?

24 A Both of us had items in the apartment.

25 Q All right. Mr. Doolin at that point had

1 already left; is that correct?

2 A Yes.

3 Q All right. And he left approximately when?

4 A I don't know the exact date. He would have
5 left after the electricity was turned off because it would
6 have been too cold.

7 Q And that would have been the 22nd of December?

8 A If that's when the electricity was turned off,
9 yes.

10 Q So the only people around at that point would
11 have been Mr. Cook and yourself; is that correct?

12 MR. BARNES: Excuse me. I'm going to object
13 to leading this witness any further.

14 THE COURT: I sustain the objection.
15

16 BY MR. ALLISON:

17 Q All right. Who else was left after Mr. Doolin
18 left?

19 A No one was living in the apartment after
20 Mr. Doolin left.

21 MR. ALLISON: I would have nothing further
22 of this witness at this point.
23
24
25

CROSS-EXAMINATION

BY MR. BARNES:

Q Mr. Tholand, where is your residence now?

A Richmond, Virginia.

Q And you were not a signer on the lease for 6501 Atlantic Avenue, were you?

A That's right.

Q Did you contribute anything towards the rent while you lived there?

A When I could, yes.

Q Okay. Who else lived in that apartment from September through December?

A Michael Mazza.

Q Did anyone else come to stay there at all during that period of time?

A Oftentimes we had visitors.

Q Do you know approximately how many or who they were?

A Well, people would come visiting from Richmond and stay at our apartment for over the weekend, that sort of thing. Numerous people. Too numerous to list.

Q Where was the key to the apartment kept?

A Under a mat on the -- in the hallway outside. Under a mat leading to the second floor apartment.

1 Q Did you let friends know where the key was?

2 A It was common knowledge among our friends that
3 that's where the key was, because the apartment was used
4 as a changing place, for showering after being on the beach
5 and so forth.

6 Q How far from 6501 Atlantic Avenue was the
7 Ramada Inn that you and Mr. Cook moved into?

8 A A ten-minute walk.

9 Q And can you estimate how much time by
10 automobile?

11 A Perhaps a minute or two.

12 Q You stated in response to the Commonwealth's
13 attorney's question that Mr. Cook on the evening of the 27th
14 had been gone for about forty-five minutes.

15 A That's my recollection.

16 Q How long had Mr. Cook -- I think you've already
17 answered that question. Please strike that.

18 Did you have any furniture that belonged to you
19 that was still in the apartment on the 27th?

20 A Yes.

21 Q Okay. There was some reference made to an
22 antique desk. Was there one in the apartment?

23 A That was mine, and I had removed it prior to
24 that.

25 Q Where were you keeping it?

1 A In our room at the Ramada Inn.

2 Q Okay. Did your apartment at 6501 take up the
3 whole first floor of that particular house?

4 A Yes.

5 Q How many bedrooms were in it?

6 A Three.

7 Q Can you describe for the ladies and gentlemen
8 of the jury the layout of that particular apartment?

9 A The entrance to the apartment building was in
10 the center of the building. Immediately upon entering the
11 building our apartment was on the left. The stairs were
12 straight ahead and upstairs to the second floor apartment.
13 Upon entering our apartment, one entered a living room, and
14 on the right was a hallway that ran the length of the building,
15 and the bedrooms were on the right-hand side of the building.
16 In the back of the building on the other side of the hallway
17 was the kitchen and the bathroom.

18 Q Were you employed at the time this occurred?

19 A No.

20 Q What kind of work do you do?

21 A I design restaurants. I'm a consultant in the
22 food and beverage business. I was in Virginia Beach trying
23 to locate a restaurant for myself and obtain financing for
24 it, and I was unsuccessful in that.

25 Q Okay. Continued in that line of work though

1 and that's what you do now?

2 A That's what I do now.

3 Q How long did you and Mr. Cook stay at the
4 Ramada Inn?

5 A About a month.

6 Q Okay. And where did you go after that?

7 A Back to Richmond.

8 Q After Michael Mazza moved out in I believe you
9 said November, did he ever return to the apartment to your
10 knowledge?

11 A I don't recall. I don't think so.

12 Q Okay. When he moved out, did he take his
13 personal property with him?

14 A He really didn't have much down there to begin
15 with, but I believe he took most of his things, yes.

16 Q Mr. -- You mentioned too Mr. Doolin. Did he
17 live at the apartment?

18 A Yes, he did.

19 Q What was his full name?

20 A Gregory Doolin. I think D-o-o-l-i-n.

21 Q Was he still at the apartment when you and
22 Mr. Cook moved into the Ramada Inn?

23 A Yes.

24 Q Had ya'll asked him to leave?

25 A Yes.

1 Q Did he refuse to leave?

2 A More or less.

3 Q What kind of heat was in that apartment?

4 A Electric, I believe.

5 Q So if the electricity is cut off it gets cold
6 in there?

7 A Yes.

8 Q Did ya'll have the electricity cut off?

9 A Yes.

10 Q Did Mr. Doolin move out?

11 A Yes.

12 Q Is that the reason for cutting off the
13 electricity?

14 A Yes.

15 Q Did you have any direct obligation whatsoever
16 or any contract other than the lease itself between
17 Mr. and Mrs. Osmond and yourselves?

18 A I was not on the lease arrangement. I had no
19 obligation to Mr. Osmond at all.

20 Q Did Mr. Osmond ever bring any civil action
21 against you?

22 A No.

23 Q Did you appear in court to settle for the rent
24 in December with Mr. Cook?

25 A Yes.

1 Q And did you all pay Mr. Osmond what was due
2 to him for that payment?

3 A Yes. No. Not right away. I believe that I
4 signed a note. I believe I signed a note, and I believe that
5 James subsequently paid Mr. Osmond the full amount.

6 Q So at the civil proceeding you undertook the
7 obligation to pay in exchange for having the matter continued
8 so that no judgment would be obtained; is that correct?

9 A Yes, sir. I believe so. Yes, sir.

10 Q And then Mr. Cook is the one who paid off
11 Mr. Osmond?

12 A Yes. I think so.

13 Q You said that earlier -- I just want to go back
14 to this for a moment. You thought it was forty-five minutes
15 Mr. Cook had been gone that particular evening?

16 A I believe so.

17 Q Do you have any independent way of saying
18 whether that's totally accurate or not?

19 A No.

20 MR. BARNES: All right, sir. That's all I
21 have. Thank you.

22 MR. ALLISON: I have another couple of
23 questions, Mr. Tholand.
24
25

REDIRECT EXAMINATION

BY MR. ALLISON:

Q What kind of car was Mr. Cook driving at that time in December?

A He had a green Volvo stationwagon.

Q Okay. Now, you mentioned this amount being paid off that was due as far as the rent. Was that paid off in the end of January, February? Approximately when?

A End of January, I believe.

Q Okay. Going back to the 27th, what time did you go to bed that evening?

A I don't recall, but I generally go to bed before the news.

Q All right. Did you drive the defendant's car that evening?

A I don't believe so.

Q That green Volvo stationwagon?

A I don't believe so.

Q So if it would be before the news, what time approximately would that be? Before the 11:00 news? Is that the news you're talking about?

A Yes.

Q Okay. And that was you said a Sunday night?

A Yes.

1 Q Did the defendant, Mr. Cook, tell you where
2 he was going that night when he left?

3 A No, he didn't.

4 Q You had no idea?

5 A No.

6 MR. ALLISON: I have nothing further.

7 MR. BARNES: Just a couple more.
8
9

10 RE CROSS-EXAMINATION

11 BY MR. BARNES:

12 Q Did you ever borrow Mr. Cook's car?

13 A Occasionally.

14 Q And I believe your answer was you weren't
15 sure whether you drove it that night or not?

16 A Not to my recollection I didn't drive it.

17 Q In relationship to 6501 Atlantic Avenue and
18 the Ramada Inn, is the Ramada Inn south or north of that
19 location?

20 A South.

21 Q And what street is the Ramada Inn on?
22 Do you have any idea?

23 A 58th I think.

24 Q Are they both on the same side of the street
25 of Atlantic?

1 A Yes.

2 Q And Atlantic runs north and south down the
3 beach; is that right?

4 A Yes.

5 Q And it's the street closest to the oceanfront?

6 A That's correct.

7 MR. BARNES: That's all I have.

8 MR. ALLISON: I would have nothing further,
9 Judge.

10 THE COURT: May the witness be released?

11 MR. ALLISON: Yes, sir.

12 THE COURT: Mr. Tholand, you may step down.
13 You may be released.

14 THE WITNESS: May I remain in the courtroom?

15 THE COURT: If you wish.

16 Gary, let me see you all.

17 (A side-bar conference was held by the Court
18 with counsel for both sides out of the hearing of the
19 jury and the court reporter.)

20 THE COURT: Members of the jury, in discussing
21 with counsel, the next witness probably will be a
22 rather lengthy witness, and for that reason I'm going
23 to recess the proceedings momentarily so I may take
24 up this other matter with the other counsel involved.
25 So if you will step into your jury room, and we'll

1 call you back shortly.

2 (The jury was excluded from the courtroom)

3 (The trial recessed at 10:50 a.m. At 11:30 a.m.
4 the trial continued as follows:)

5 (The jury was recalled to the courtroom, and
6 and the following took place in the presence of the
7 jury:)

8 MR. BARNES: I had one more question of Mr.
9 Tholand before he is released.

10 MR. ALLISON: Commonwealth would not oppose
11 that Your Honor.

12 THE COURT: All right. Do you want the fire
13 inspector in the room with Mr. Tholand?

14 MR. ALLISON: I don't think so. I think the
15 question should be directed towards the defense,
16 Your Honor.

17 THE COURT: Mr. Barnes, the fire inspector is
18 in the room. Do you want him to remain while you ask
19 this question?

20 MR. ALLISON: He was going --

21 THE COURT: He was going to be the next
22 witness.

23 MR. ALLISON: Go ahead out.

24 (Lieutenant Wade was excluded from the
25 courtroom)

1 THE COURT: I didn't want that to be a problem.
2 All right.
3

4 RE CROSS EXAMINATION
5

6 BY MR. BARNES:

7 Q Mr. Tholand, you were previously sworn. You
8 understand you're still under oath?

9 A Right.

10 Q After Mr. Cook returned to the Ramada that night,
11 did he leave again to your knowledge?

12 A Not to my knowledge.

13 MR. BARNES: Okay. That's all I have.
14

15 REDIRECT EXAMINATION
16

17 BY MR. ALLISON:

18 Q You, in fact, don't know whether he left or not,
19 do you?

20 A No, I don't.

21 MR. ALLISON: I would have nothing further.
22
23
24
25

RECROSS EXAMINATION

BY MR. BARNES:

Q Just on that, were you there the rest of the night?

A Yes.

Q Would you have known if he had left?

A Not necessarily.

REDIRECT EXAMINATION

BY MR. ALLISON:

Q I think your testimony was you went to sleep before the news?

A That's right.

Q Before 11:00?

A That's right.

MR. ALLISON: I would have nothing further.

THE COURT: All right, Mr. Tholand, I think that's all they wanted. You may step down.

Now, Mr. Allison, who would you have next?

MR. ALLISON: Commonwealth would call Lieutenant Wade.

THE BAILIFF: Your Honor, Lieutenant Wade was sworn in yesterday.

1 THE COURT: All right, sir.

2 Lieutenant Wade, the oath you took yesterday
3 will govern you in your testimony before the Court
4 today.

5 THE WITNESS: Yes, sir.

6 THE COURT: All right, sir.

7 MR. ALLISON: Your Honor, it's going to be the
8 Commonwealth's position that we're going to establish
9 Mr. Wade as an expert, and I would like to begin that
10 examination for qualification at this point.

11 THE COURT: All right.

12 MR. BARNES: Okay.

13

14 -----000-----

15

16 MICHAEL W. WADE, called as a witness on behalf of the
17 Commonwealth, having been first duly sworn, was examined and
18 testified as follows:

19

20 DIRECT EXAMINATION

21

22 BY MR. ALLISON:

23 Q Would you state your name for the record, please.

24 A Michael W. Wade.

25 Q And your occupation?

1 A I'm a lieutenant with the Virginia Beach Fire
2 Department, assigned to the Fire Investigative Unit.

3 Q And how long have you been so employed by
4 the Fire Department itself?

5 A Ten years.

6 Q How many fires during that time period have
7 you responded to?

8 A In my career I would have to say hundreds.
9 To give you an exact figure would be impossible.

10 Q All right. And approximately how many have
11 you investigated?

12 A In my career of seven years of doing this job
13 it would be in the neighborhood of 500.

14 Q All right. What is your educational background?

15 A I have an Associates Degree in fire science
16 from Tidewater Community College.

17 Q All right. And what courses have you taken
18 to develop your expertise in fire investigation?

19 A I've attended several seminars in the
20 Commonwealth at William and Mary University, probably on five
21 occasions. I've attended seminars at the University of
22 Delaware. I've attended other schools put on by the
23 International Association of Arson Investigators; weekend
24 seminars as a refresher course; and things of that nature.

25 Q All right. Also have you had anything published?

1 A Several years ago I did a research project for
2 the Fire Chief as to qualifications for fire investigator for
3 our city, and subsequently portions of that document were
4 turned over to the Virginia Criminal Justice Association and
5 the Fire Services Training to help develop a fire investigative
6 curriculum which governs our job in the State of Virginia.

7 Q All right. Have you qualified as an expert in
8 the courtroom before?

9 A Yes, I have.

10 Q As a matter of fact, have you not qualified
11 in the Virginia Beach Circuit Court as an expert?

12 A Yes, sir.

13 MR. ALLISON: Judge, I would offer Lieutenant
14 Wade as an expert in fire investigation.

15 THE COURT: All right.

16 MR. ALLISON: Ask him to be so pronounced by
17 the Court.

18 THE COURT: All right.

19 Counsel?

20 MR. BARNES: Just a couple of questions, if I
21 may, Your Honor.

CROSS-EXAMINATION

BY MR. BARNES:

Q Lieutenant Wade, the seminars you attended at the College of William and Mary, what was the subject of those seminars?

A They were on fire investigations, bomb investigations, routine origin and cause, determination, how to do origin and cause, how to interview several subject matters. I have one of the -- You know, if you wanted to see that I have one of the curriculums.

Q I was just interested generally.
Are you a member of the International Association of Fire Investigators?

A Yes, I am. The National, International and State Chapter.

MR. BARNES: No further questions.

THE COURT: All right. Based on the information that has been given to the Court, the Court will declare that Lieutenant Wade qualifies as an expert in the field of fire investigation.

Members of the jury, again recognizing your appearance in court, there are generally two types of witnesses that will appear before you. Factual witnesses and expert witnesses. An expert witness --

1 I'll give you a good example, because they will appear
2 before you. Maybe a doctor of medicine. He may
3 perform an operation, and he would be factually
4 testifying as to the operation he performed, but
5 because his expertise is not known generally to the
6 public we allow him to state his opinions also with
7 respect to why the operation was necessary or what was
8 to be accomplished, things of that nature. So when
9 in the course of your jury service someone is qualified
10 as an expert, it means that he is entitled to give his
11 opinion on certain subjects.

12 The ultimate question still remains with the
13 jury to determine from all of the evidence. Those
14 things ultimately reside with you, and that is to
15 make the final determination of the issues.

16 Have I confused you or do I make it clear?

17 Well, let me illustrate it this way: You
18 could have two doctors, and one could say the cause
19 is appendicitis and the other says heart trouble, and
20 you have two different opinions differing, and it's
21 up to you to make the final determination as to what was
22 the cause. You see what I'm speaking of? The only
23 difference between you and me and others that are not
24 experts is that we can only testify as to facts, what
25 we see, hear and things of that nature. The experts

1 can go beyond that and give you opinions.

2 With that, that's the nature of the qualification,
3 and Mr. Allison, you may proceed from there.

4 MR. ALLISON: Thank you, Your Honor.

5
6 REDIRECT EXAMINATION

7
8 BY MR. ALLISON:

9 Q Lieutenant Wade, what types of fires are there?

10 A They are categorized in two categories.
11 Accidental and incendiary.

12 Q Would you define those.

13 A Accidental being a fire as a result of some
14 accidental means such as electrical malfunctions, and
15 equipment failures that subsequently ignite some combustibles,
16 or an accident on the part of the occupant or owner, some
17 accident such as leaving a pan of grease on the stove would
18 be considered an accidental fire.

19 Q All right. And would you define incendiary.

20 A That's defined as the willful and malicious
21 setting of a fire.

22 Q All right. Now, during the course of
23 investigation, what are you doing as a fire investigator?

24 A When we investigate a fire we normally start
25 from a point of the least amount of damage and progress back

1 towards the heaviest amount of damage which normally indicates
2 the point of origin of the fire.

3 Q All right. What else are you doing while you
4 perform that examination?

5 A We're looking for accidental causes of the
6 fire.

7 Q All right. As this would be the situation in
8 all fires that are investigated; is that correct?

9 A Yes. Yes, sir.

10 Q All right. Now, I want to refer you back to
11 December 27th of 1981. Did you have occasion to respond to
12 6501 Atlantic Avenue?

13 A Yes, I did.

14 Q All right. Approximately what time did you
15 arrive?

16 A I arrived at the address at approximately 9:55 p.m.

17 Q All right.

18 (Shown to Mr. Barnes)

19 Q I'd like to show you these photographs and ask
20 you if you can identify them.

21 A You want to go through them one at a time?

22 MR. BARNES: May I approach the witness while
23 he's doing that so I can see which ones he's looking
24 at?

25 MR. ALLISON: Sure.

1 A This photograph depicts the front of the
2 building showing the address 6501 which is the property that
3 I responded to on the night of the 27th.

4 MR. ALLISON: I don't know if you'd like
5 them marked as a composite.

6 THE COURT: Let me suggest -- Counsel has seen
7 the photographs. Why don't we have him go through
8 them and say you took them or whatever so they become
9 exhibits. Then I'll mark them.

10

11 BY MR. ALLISON:

12 Q Were all of these photographs taken at your
13 direction?

14 A Yes, they were.

15 MR. BARNES: Were you present when they were
16 taken?

17 THE WITNESS: Yes.

18

19 BY MR. ALLISON:

20 Q Was this -- This was --

21 A The same evening, right.

22 THE COURT: All right. Fine. Thank you,
23 counsel.

24 Let me see what the last one was.

25 Marked 6 through 27.

1 (Marked by the Court as Commonwealth's Exhibits
2 Numbers 6 through 27)

3
4 BY MR. ALLISON:

5 Q These may be out of the order in which you want
6 to take them, so go ahead and look through them and each
7 is marked with the appropriate numbering, and when you
8 testify as to them, please state the exhibit number.

9 You've already identified Plaintiff's Exhibit
10 Number 6; is that correct?

11 A Right.

12 Photograph marked Exhibit Number 7 shows a
13 chair and what appears to be an end table and a lamp that was
14 to the left of the -- directly in front of the front door
15 as you come into the apartment.

16 Photograph marked Number 8 shows a small
17 night stand that was located in the rear bedroom on the
18 right-hand side.

19 Photograph numbered 9 shows a closeup shot
20 of the electrical outlet that was directly behind the couch
21 in the living room.

22 Q How many couches did you see in the living
23 room?

24 A Two.

25 Q All right.

1 A Photograph marked 10 shows the inside of the
2 front door, just showing the charring to the door, indicating
3 the door was shut during the progression of the fire.

4 Photograph marked number 11 shows the front
5 door in the complete open position, showing that there was
6 no damage other than the heat and fire gases that had
7 escaped around the door jam itself.

8 Photograph numbered 12 shows the windows on the
9 front of the building, just showing the smoke buildup and
10 the fact that the windows had been -- were -- had come out
11 due to the heat of the fire, causing the glass to break.

12 Photograph marked number 13 shows the living
13 room area with an end table, a wing back type chair, a
14 coffee table and a couch. So this shows where the majority
15 of the fire was in this area.

16 Photograph numbered 14 shows -- This is a
17 picture of the foyer so to speak as you come into the apartment
18 just to -- We did that as a matter of routine to see if there
19 was any evidence of any burning at floor level.

20 Photograph numbered 15 shows the window in the
21 living room on the opposite side from the front door, and it
22 indicates that the burning or the heat level on that side of
23 the room was at ceiling level rather than down close to the
24 floor.

25 Q All right. Well, we'll get into that.

1 A Photograph marked Exhibit 16 is a picture of
2 -- standing in the rear of the hall looking back towards the
3 living room.

4 Photograph marked Number 17 shows the front
5 door of the apartment with the key in the dead bolt.

6 Photograph marked Number 18 shows a newspaper
7 that was found in the left rear bedroom on top of a sleeper
8 sofa that was located in that room.

9 Photograph numbered 19 is a photograph standing
10 at the living room area looking back down the hall towards
11 the bedrooms, and the two mattresses that were standing on
12 end in that area.

13 Photograph marked Number 20 shows the front
14 windows closest to the front door just indicating the heat
15 buildup in that area.

16 Photograph marked Number 21 shows the opposite
17 side of the room from the front door, just showing a level
18 of heat in the area, in that room.

19 Photograph marked Number 22 shows standing at
20 the rear of the hallway by the bedroom looking back towards
21 the living room showing the amount of smoke and heat
22 damage in that area.

23 Photograph marked Number 23 shows the wall
24 directly behind the couch located in the living room.

25 Photograph Number 24 shows looking from the

1 living room back towards the bedrooms down the hallway showing
2 the level of heat.

3 Photograph Number 25 shows pictures of a
4 dresser and some contents that were located in the bedroom,
5 the first bedroom on the right as you come down the hall.

6 Photograph Number 26 just shows the level of
7 heat in the hallway between the two bedrooms, and Photograph
8 Number 27 again shows the burning on the inside of the door.

9 Q I'd like to refer you to Exhibit Number 4 and
10 ask you if you can identify that.

11 A This shows the couch located in the living
12 room as you come in the front door to the right.

13 Q All right. And I also would like to refer you
14 to Commonwealth's Exhibit 5.

15 A This was another couch located in the living
16 room to your right on the right-hand wall past the kitchen
17 door.

18 Q All right. Were these the only two couches
19 in there?

20 A In the living room, yes.

21 Q All right. Lieutenant Wade, I'm going to wait
22 until all of these are passed back.

23 These are the photographs of what was inside
24 when you -- What you observed; is that correct?

25 A Yes, sir.

1 Q I'd like to just wait one moment until they're
2 all passed around and then I'm going to have him go through
3 it in an orderly fashion as to what he did.

4 Lieutenant Wade, how does a fire burn?

5 A A fire burns in an upward and outward
6 progression.

7 Q Would you demonstrate?

8 A For example, say if a fire originated in this
9 corner of this room over here, the natural progression of
10 the fire and heat is going up. As the fire burns up it
11 spreads out into what is called a V pattern. We call it a
12 V pattern, of course, until it hits the ceiling area at which
13 time it's going to go across the ceiling until it hits
14 something else, say the other end of the room, and the heat
15 or fire is going to start coming down on that side.

16 Q All right. Now, where would you start in your
17 investigation at 6501? What is the normal progression of
18 where you start?

19 A We start in the areas with the least amount of
20 burning, which in this instance was in the rear of the
21 building by the bedrooms, and worked our way back towards
22 the most amount of burning or the most severe amount of
23 charring.

24 Q What would that indicate?

25 A It would indicate that the fire originated

1 in the area where there was the most amount of burning.

2 Q - All right. Would you continue with what you
3 did at that point in this investigation.

4 A When I got into the back of the house we had
5 a high level of heat. High up at the ceiling where the
6 heat normally would be, and we worked our way back, worked
7 my way back towards the living room. The -- Might be able to
8 explain it better --

9 Q That's what I'd like you to do, and just show
10 the jury and mention the exhibit you're speaking about.

11 A Okay. Photograph marked Exhibit 16, this shows
12 standing in the back of the hallway by the bedroom looking
13 back towards the living room. There's extensive amount of
14 heat damage at the ceiling level in this area, but as you
15 see the closer you get to the floor the less damage you have,
16 which indicates the level of the heat in the building; and as
17 you see the level of heat is going back down towards floor
18 level the closer you get to the living room. So all you're
19 doing is following a path back to where the fire originated.

20 So standing in the hallway looking that way, it
21 was very obvious that the fire had come from the living room
22 area towards the rear of the building towards the bedrooms.

23 Q All right.

24 A As you got back just on the other side of those
25 two mattresses, of course, was a door to a closet, and then,

1 of course, the corner and then you had the living room. Just
2 around the corner of the hallway -- I'm sorry. That was
3 Exhibit 19.

4 As you got back into the living room area,
5 Exhibit Number 23 shows an extreme amount of heat damage to
6 the sheetrock or to the building in that area. Directly
7 below that area --

8 Q What was the cause of that damage?

9 A The -- You had apparently the combustible
10 in that area. There the fire was most intense, and the
11 further away you got from that area, the less damage.

12 As you come down, Photograph Exhibit Number 4,
13 it shows a couch that was located on that wall.

14 Q Would you show them so they can see that.

15 A The -- What you have is this couch was damaged
16 extensively to the point where this was the most extensive
17 amount of burning throughout the structure, which would lead
18 one -- lead me to believe that the fire had originated in
19 this area.

20 MR. BARNES: Excuse me, Your Honor. I would
21 object to that unless he puts that in the proper form
22 and he's asked a question with the proper foundation.
23 I ask that that be stricken.

24 THE COURT: I hate to inform you I averted my
25 attention to something else. What was the question?

1 MR. BARNES: Perhaps we should approach the
2 bench.

3 (A side-bar conference was held by the Court
4 with counsel for both sides out of the hearing of the
5 jury and the court reporter)
6

7 BY MR. ALLISON:

8 Q Where was the lowest point of burning in that
9 particular room? In the living room?

10 A At the -- At the seat area of the couch.

11 Q All right. Was there any water at all when
12 you arrived in the living room?

13 A Just a minute amount that the engine company
14 had used to extinguish the fire.

15 Q Where was that located?

16 A On the floor in the area of this couch.

17 Q All right. What did you do next?

18 A Once we come back to the area of severest
19 burning, then we start looking for a source of ignition,
20 what could have caused this couch to burn.

21 So at that point the most obvious thing that
22 we would do at that point is there was an electrical outlet
23 directly behind this couch, so I photographed -- had the
24 receptacle photographed to show it was present and it was
25 behind the couch, which is marked Exhibit Number 9.

1 Q All right. And would you again show us which
2 couch you're referring to.

3 A It is the couch next to the door as you come in.
4 on the right hand side.

5 Q And would you show the jury which particular
6 couch you're talking about.

7 A It's marked Exhibit 4. The couch with the
8 most severe damage.

9 Q All right.

10 A Once I photographed the receptacle -- At that
11 point it only showed some external heat damage as a result
12 of the fire, but at that point I removed the cover plate
13 and removed that receptacle from the wall and examined it;
14 and there was no indication of any internal heating that
15 could have resulted as that being the cause of the fire
16 or igniting that couch.

17 Q You at that point had no knowledge whether
18 there electricity on or not?

19 A No, sir.

20 Q This is just a routine examination as a fire
21 investigator?

22 A Right. Well, not only that. It's not
23 uncommon for me to come in and see the power turned off,
24 because the engine company to maintain their safety will
25 pull the meter on the house once they respond there.

1 Q Okay. What did you do after you checked out
2 that source of an accidental cause?

3 A Well, once I could eliminate the electrical
4 outlet as being -- causing -- having a malfunction that it
5 could have ignited the couch sitting next to it, then I would
6 have looked for anything that could have been plugged into
7 it of mechanical means, such as a lamp or portable heater.
8 There was nothing plugged into this outlet at all, so therefore
9 -- and there was no equipment that I could find sitting on the
10 couch or around the couch that would indicate there was
11 anything that would result as a heating source from some
12 mechanical source of heat.

13 Q All right. Did you -- What did you do next?

14 A Once you eliminate the electrical probabilities
15 and any external heat -- Also there was no heating -- or
16 vents from say the heating of the home that would indicate
17 that the direct blowing -- possibly the heat of that
18 outlet against the furniture could have caused it to ignite.
19 There was nothing in that area that would indicate that.
20 So we have to start looking for some action on the part of
21 the occupants such as I explained earlier, the pan of grease
22 on the stove. In this instance, people sit on the couch.
23 They have a tendency to watch TV or listen to the radio, and
24 people do smoke. So you -- I looked at the couch and based
25 on the burning of the couch it was apparent to me there was

1 not enough heat there to indicate a slow smouldering fire.

2 Q When you say slow smouldering fire, what
3 usually causes that?

4 A Normally someone accidentally drops a cigarette
5 into a sofa.

6 Q Why would that sofa not indicate that that
7 had occurred? Explain that to the jury, please.

8 A Exhibit Number 4 shows this couch, and if you
9 have -- In order to have a fire from a cigarette, that
10 cigarette has to be insulated against that material to
11 generate enough heat for it to continue to burn, and as the
12 cigarette burns it drops down further and further into
13 that piece of furniture, and as that -- It just sits there
14 and smoulders, and we're talking about anywhere from
15 an hour and a half to two hours to get something to literally
16 break open into an open flame from some smouldering type
17 fire. As it does this, it generates heat in the neighborhood
18 of approximately 1200 degrees, and when it does that, of
19 course, the springs in the couch have a tendency to lose
20 their tension because the heat is just so much they lose --
21 and there's no tension to the spring. That was not --

22 Q What did that couch indicate?

23 A That was not the case. The tension was still
24 in the springs in that area. Not only that, as the fire
25 burns, the particles of the burning debris have a tendency to

1 drop down onto the floor and subsequently it will literally
2 completely consume that area of the furniture where the fire
3 or the cigarette initially drops into. The frame of this
4 couch was still intact. It was still relatively strong
5 even though it did have some fire damage to it, but the
6 burn patterns from the top show the fire coming from the top
7 side of the couch, and there was no damage or very little
8 damage to the bottom side of the couch. The couch was just
9 in too good of shape to have any type of a slow smoldering
10 type fire.

11 Q All right. What was the weather like that
12 evening?

13 A It was clear and cold.

14 Q All right. What would that indicate to you
15 as far as those conditions?

16 A It would indicate that -- Normally we would have
17 to look for some act of God so to speak as a cause of a fire.

18 Q What would an example of that be?

19 A Lightning. There was no storms of that --
20 like that the night this occurred, so therefore that was ruled
21 out itself.

22 Q All right. What -- Let's say that somebody had
23 walked in and struck a lighter somewhere. Would that cause
24 that type of a fire?

25 MR. BARNES: Objection. I'm going to object

1 to speculation on what might have been.

2 THE COURT: I sustain the objection.

3 MR. ALLISON: Pardon?

4 THE COURT: I sustain the objection.

5 MR. ALLISON: May counsel approach the bench?

6 THE COURT: Certainly.

7 (A side-bar conference was held by the Court
8 with counsel for both sides out of the hearing of the
9 jury and the court reporter)
10

11 BY MR. ALLISON:

12 Q All right. Continue with what you did that
13 evening as far as your investigation.

14 A Well, when you stand and look at the living
15 room area -- and earlier I stated how a fire burns. It
16 burns up and out, and it leaves --

17 Q Where was it heading towards, if anything?

18 A I don't follow your question, Mr. Allison.

19 Q Where would a fire be moving towards?
20 What would it be moving towards?

21 A It would move towards a source of fresh air,
22 and the natural progression, of course, is going to take it
23 to other portions of the house just by natural convection
24 of the heat. When you look at the overall picture of the
25 living room area, the fire -- the lowest point was at the

1 couch, the cushion level, and fire burned up and out to the
2 front portion of the building to the windows and, of course,
3 the other side was going around the hall towards the bedrooms,
4 and the natural progression, you could see the fire coming
5 back down on both sides putting back to that couch.

6 Q All right. Could you show the jury how this
7 would be burning towards an oxygen source from these
8 photographs?

9 A Again we go back to Exhibit 4, and I know you
10 all probably can't see this from here, but if you'll notice
11 the charring on this end of the couch is much more so than
12 it is at the other end of the couch, and what is happening
13 there is the fire is moving up and away from that area.
14 So therefore the heat is not concentrated in that area as
15 much, and as the fire moved around the front door being at
16 that end of the couch (Indicating); and then Exhibit 20 is
17 just to the right of the front door going over towards --
18 these are the front windows of the residence. These windows
19 are what we call jalousie windows. They roll out with a hand
20 crank, and they don't have a tendency to seal themselves
21 very tightly. So subsequently the heat -- the fire and
22 everything was going to be pulling towards that source of air,
23 and as the fire gets on these windows the infringement of the
24 heat and flame, then they break out, and as they break out
25 then, of course, the fire is going to intensify because of the

1 fresh air it's getting, where as before it had a limited
2 amount.

3 Q All right. Lieutenant Wade, what is
4 spontaneous ignition?

5 A Spontaneous ignition is normally a process of
6 internal heating on certain mineral type items, and some
7 metal, some fine metals.

8 Q All right. Would that be applicable in this
9 type matter?

10 A No.

11 Q Why not?

12 A Because when you're talking about spontaneous
13 heating, you're talking normally about a fermentation process,
14 where say the -- probably the easiest example to give would
15 be fresh cut hay where a farmer cuts his hay and stores it in
16 the barn, and that hay has a tendency to have -- when it gets
17 moisture in it, it has a tendency to start fermenting,
18 and it generates heat. It produces its own heat internally,
19 and it normally burns from the inside of that type of item
20 to the outside, and that was not the case here. There was
21 no -- This is a -- Most of the combustibles we deal with in
22 our home are man-made fabrics, although maybe the coverage
23 could be cotton, but the cushions are normally man-made
24 such as foam rubber or something like that, and these are not
25 susceptible to spontaneous combustion.

1 Q As an expert, how long did you establish
2 that this particular fire burned before it was put out?

3 MR. BARNES: Objection, Your Honor, unless
4 there's a foundation for that opinion.

5 MR. ALLISON: He's going to do that, Judge.

6 THE COURT: I'll overrule your objection.

7 Note your exception.

8 A Based on things that we have done over the
9 years as far as setting up classes to teach other people
10 how to determine origin and cause, we have buildings that
11 we actually set up and we burn certain things to see how
12 they react, and, of course, it's a teaching process for the
13 people that are trying to come in and determine the origin or
14 cause of a fire. So we do that on an ordinary basis, and
15 so you're talking about based on those experts over the years
16 I would say you're looking at twenty minutes. Fifteen to
17 twenty minutes.

18 Q All right. Now, you stated you arrived at
19 approximately what time?

20 A 9:55.

21 Q All right. Did you have occasion -- Let me
22 go back to this. Commonwealth's Exhibit Number 17. Is that
23 the way the door was when you had entered? With the key in
24 it?

25 A Yes.

1 Q Okay. Approximately how long did you stay
2 that night investigating?

3 A It would -- It's on the printout. I would --
4 I know I was there after midnight.

5 Q All right. Did there come a time when you saw
6 a vehicle outside that evening?

7 MR. BARNES: Your Honor, I'm going to object
8 to the leading questions on the stand.

9 THE COURT: The question is leading.

10 MR. ALLISON: That question is leading?

11 THE COURT: Very much so, yes, sir.

12 MR. ALLISON: All right, Judge.
13

14 BY MR. ALLISON:

15 Q Did you observe anything unusual that evening?

16 A After the engine company cleared up, myself
17 and Officer LaPorta of the second precinct were sitting in
18 his vehicle at the corner of 65th and Atlantic, which is
19 where this residence was.

20 Q Approximately what time was this?

21 A It was approximately ten minutes to 12:00.

22 Q All right.

23 A While we were sitting there a vehicle turned in
24 off of Atlantic onto 65th Street, went down about half way,
25 was going very slow, and turned and came back out and stopped

1 at the stop sign directly behind us.

2 Q Did you see an individual in the vehicle?

3 A I can't identify who was driving the vehicle,
4 no.

5 Q Did you have occasion to run the license plates
6 on it?

7 A Yes. The police cars are equipped with a
8 mobile data terminal tied directly into the computer with
9 DMV, and we ran the license number, 82 Virginia 3-124. It
10 came back --

11 MR. BARNES: Objection to hearsay, Your
12 Honor.

13
14 BY MR. ALLISON:

15 Q All right. We won't get into that.
16 What type of vehicle was it?

17 A It was a Volvo stationwagon.

18 Q All right. And approximately what time was
19 that again?

20 A About ten minutes to midnight. Ten minutes to
21 12:00.

22 Q And that was the same night of the fire?

23 A Yes.

24 Q When you were inside, did you observe any
25 weapons?

1 A Yes. As I went through the building I noticed
2 in the kitchen area there was a cardboard box on the table
3 with articles put in it, and in that cardboard box was a
4 pistol.

5 Q All right. Did you notice anything else inside?

6 A On the kitchen counter was a box with some
7 car stereo speakers.

8 Q Had they been opened?

9 A The box had been opened, but they were --
10 You know, the lid itself was closed. Somebody had opened it
11 up as if they had received it. They were laying on the kitchen
12 counter, and there were other items in the kitchen, personal
13 items. I can't remember exactly what they were.

14 Q All right. Did you have occasion to go back the
15 next day?

16 A Yes, sir. I went back the next morning. I
17 would say approximately 10:00.

18 Q Were these same items there?

19 A No, sir.

20 Q All right. When I say -- What are you
21 referring to as was not there?

22 A The pistol and the speakers.

23 Q All right.

24 A It appeared that someone had come in and
25 removed items from the building.

1 MR. BARNES: Objection to the conclusion.

2 THE COURT: I sustain.

3

4 BY MR. ALLISON:

5 Q They just were not there?

6 A They were not there.

7 Q As a result of your investigation were there
8 any other accidental probabilities that could not be
9 eliminated?

10 MR. BARNES: I object to that. That's leading;
11 and also there's no hypothetical question, and that's
12 the form to ask an expert, and I thought we covered
13 that point about excluding those things. As a matter
14 of fact, we had covered that point.

15 THE COURT: He is privileged to tell what he
16 did.

17 MR. BARNES: That wasn't the question that was
18 asked.

19 THE COURT: I know that, but I was going to say
20 the question -- I was going to sustain the objection.

21 MR. BARNES: All right. Thank you.

22 MR. ALLISON: All right. Was that your total --

23 THE COURT: What he did, what he saw, what he
24 found.

25 MR. ALLISON: Judge, he's an expert. That's

1 why I qualified him, for an opinion.

2 THE COURT: But there are certain areas of
3 expertise that we leave to the jury to make the final
4 determination.

5 MR. ALLISON: All right, Judge.

6 THE COURT: According to their particular
7 province.

8
9 BY MR. ALLISON:

10 Q All right. Did you have occasion to see the
11 defendant, James Cook, the next day after the fire?

12 A Yes, sir, I did.

13 Q All right. And where was that?

14 A I met Mr. Cook at the Fire Station at 19th
15 and Arctic. It was a mutual meeting place, convenient to
16 himself and myself at that particular time.

17 Q All right. And did you have occasion to
18 discuss the matter of the fire with him?

19 A Yes, sir. I had a previous engagement, so our
20 conversation was very short. I asked Mr. Cook when was the
21 last time he was in the building, and he had stated that he
22 had been in there the night of the fire. Sunday night. This
23 was Monday morning, approximately between 8:00 and 8:15. As
24 a matter of routine -- When we file our reports we indicate
25 whether the property was insured by the owner and the occupant.

1 I asked Mr. Cook at that time if he had insurance on his
2 property. He stated no.

3 Q All right.

4 A He also stated -- I asked him who had keys to
5 the property, because of the fact that the key was found in
6 the door. He stated that there was a key kept under the
7 tread of the second or third step going up to the second floor
8 apartment, and that's where the key was normally kept, and
9 that his roommate and himself normally used that key.

10 Q All right. Did he mention anything else about
11 the electricity?

12 A Yes. Mr. Cook indicated that he had the
13 electricity turned off on the 22nd of December, and that he
14 was currently residing at the Ramada Inn at 55th Street.

15 Q Did you have a discussion with him as to his
16 rental status?

17 MR. BARNES: Your Honor, again this is leading
18 the witness, and I object to it.

19 MR. ALLISON: All right. Continue with that.

20 THE COURT: Sustain the objection.

21

22 BY MR. ALLISON:

23 Q Just trying to get the pertinent parts rather
24 than going through everything.

25 Go ahead.

1 A He stated that he had moved into the Ramada Inn.
2 He didn't state when. I was pressed for time, so I really
3 wasn't in a position to pursue any conversations other than
4 what I've already explained. It was a very brief interview.
5 Lasted only five or ten minutes. So that I could get up with
6 him I asked Mr. Cook if he would call me the next day at his
7 convenience and set up an appointment with me.

8 Q All right. Did you have occasion to see
9 Mr. Cook after that?

10 A No, sir.

11 Q I'd like to show you Commonwealth's Exhibit
12 Number 5 again.

13 MR. BARNES: May I approach the witness to see
14 these, Your Honor?

15 THE COURT: (Nodded head affirmatively)

16 MR. BARNES: Thank you.

17
18 BY MR. ALLISON:

19 Q All right. Commonwealth's Exhibit Number 4 is
20 the couch and Exhibit 5 is the couch. Which one was the
21 larger couch?

22 A The -- Exhibit Number 5 is an overstuffed couch
23 which based on the size just -- and by the frame appeared to
24 be the bigger of the two. This appeared to be a smaller type
25 couch, with a floral design and bamboo and whatever the

1 cushions were made out of. (Indicating) It was not as heavy
2 as the other couch.

3 MR. ALLISON: If I may have just one moment,
4 Your Honor.

5 May counsel approach the bench?

6 (A side-bar conference was held by the Court
7 with counsel for both sides out of the hearing of the
8 jury and the court reporter)
9

10 BY MR. ALLISON:

11 Q In your investigation you found no evidence of
12 an accelerant?

13 First of all, what is an accelerant?

14 A An accelerant is normally a flammable substance
15 that is used to accelerate the burning or accelerate the
16 fire itself.

17 Q All right. During your investigation did you
18 find anything of that nature?

19 A No. The fire appeared to be nothing but the
20 ordinary combustibles, the couch and the furnishings in the
21 room. There was nothing to indicate from the burn patterns
22 to indicate an accelerant had been used.

23 MR. ALLISON: I would have nothing further of
24 this witness, Your Honor.

25 THE COURT: All right. Now may I see counsel

1 for just a moment?

2 (A side-bar conference was held by the Court
3 with counsel for both sides out of the hearing of the
4 jury and the court reporter)

5 THE COURT: My conversation with counsel was
6 to ascertain Mr. -- Lieutenant Wade was called and
7 started his testimony at 11:30. So he has been on the
8 stand for an hour. I was trying to recess for the
9 jury's benefit as well as other parties. So we'll
10 take a ten-minute recess and then we'll start again
11 with the examination.

12 Now, Lieutenant Wade, during the recess do not
13 discuss the case with anyone. This would include the
14 Commonwealth's attorney.

15 Show the jury to the jury room, please, sir.

16 (The jury was excluded from the courtroom)

17 MR. BARNES: Your Honor, since we're in the
18 middle of this witness I believe it would be
19 appropriate if he not talk to anyone.

20 THE COURT: That's just what I told him.

21 MR. BARNES: Okay.

22 THE COURT: Ya'll weren't listening. I said
23 including the Commonwealth's attorney.

24 (The trial recessed at 12:30 p.m. At 12:50 p.m.
25 the trial continued as follows:)

1 (The jury was recalled to the courtroom, and
2 the following occurred in the presence of the jury:)

3 THE COURT: All right.

4
5 RECROSS-EXAMINATION

6
7 BY MR. BARNES:

8 Q Okay, Your Honor.

9 Lieutenant Wade, what time was the fire at
10 6501 Atlantic Avenue reported or was the call received at the
11 Fire Department?

12 A It was reported in communications at --
13 Their report would indicate 2118, and I believe that's in
14 -- 9:18.

15 Q 9:18 p.m.?

16 A Right.

17 Q And what time do the records show that the
18 Fire Department actually arrived at the scene?

19 A I'd have to look at the report.

20 Q I'd be glad to show it to him to refresh his
21 memory if that's all right.

22 (Handed to the witness)

23 A Their time of arrival would be 2122, or twenty-
24 two minutes after 9:00.

25 Q That would be four minutes after receiving the

1 call?

2 A Yes.

3 Q What does the term time cleared mean?

4 A Means when the last piece of equipment from that
5 station left that fire scene.

6 Q So they would have arrived at the fire scene at
7 9:22?

8 A Right.

9 Q And then at time cleared the fire is out and
10 all the equipment is gone?

11 A Right.

12 Q What time was that?

13 A 2239 or 10:39.

14 Q So the Fire Department was at the scene seventeen
15 minutes?

16 I'm sorry. Twenty-seven minutes?

17 A No, sir. An hour and fifteen minutes.

18 Q I'm sorry. Misreading that. 2239. So an
19 hour and seventeen minutes?

20 A Roughly, yes, sir.

21 Q All right. What time did you actually arrive
22 there?

23 A I arrived there at I believe it was -- I think
24 it was five minutes to 10:00. It's -- It would be on the
25 printout. There's a computer printout. I don't know if you

1 have that or not.

2 Q All right. And was the -- the fire was --
3 Was the fire extinguished at the time you got there?

4 A Yes.

5 Q It was already out?

6 A Yes.

7 Q There is a photograph you have there, and I
8 don't recall the number of the exhibit right off hand, but
9 it's a picture of a door with a key in it. Do you recall that
10 photograph?

11 A Right.

12 MR. ALLISON: I think it's 17.

13 A Here it is. It's Number 17.

14
15 BY MR. BARNES:

16 Q All right, sir. Is that key on the inside or
17 the outside of the door?

18 A The outside.

19 Q It's on the outside?

20 A Right.

21 Q All right, sir. And that is Exhibit Number
22 17?

23 A Right.

24 Q All right, sir. Now, are there any other
25 doors to that apartment that leads to the outside?

1 A The rear door in the kitchen.

2 Q All right. Did you notice anything about that
3 door?

4 A If I remember right, the -- If I remember, it
5 had a storm door on it, and I believe the storm door was
6 damaged, but as far as I know my examination did not reveal
7 any damage to the rear door that would preclude someone
8 coming in through that door.

9 Q It would not preclude their coming through the
10 door?

11 A With -- You know, without some means of forced
12 entry or with a key.

13 Q All right. Did you make an inventory of the
14 items that were at the scene in the apartment?

15 A No, sir, I did not.

16 Q Is it standard procedure to do that?

17 A No, sir.

18 Q Okay. Did you notice any rifles or a shotgun
19 inside the apartment?

20 A No, sir, I did not.

21 Q Now, you stated that later on that evening
22 at the intersection of 65th and Atlantic you saw a green
23 Volvo; is that correct?

24 A Yes, sir.

25 Q Were you able to determine whether the -- You

1 say you couldn't say who was in it?

2 A No, sir. I couldn't identify the driver.

3 Q Was there more than one person in it?

4 A No, sir.

5 Q Do you actually recall that?

6 A I don't remember seeing but the one person,
7 the driver.

8 Q Do you know if it was a male or female?

9 A I couldn't tell you.

10 Q That vehicle was not registered to Mr. Cook,
11 was it?

12 A No, sir.

13 Q All right, sir. Now, through your investigation
14 you learned that Mr. Cook was on the lease; is that correct?

15 A Yes, sir.

16 Q You learned that from Mr. Osmond?

17 A Right.

18 Q And did you -- You contacted Mr. Cook?

19 A Yes, sir. How I contacted Mr. Cook is I had
20 gone to Mr. Osmond's office that morning, the next morning,
21 a Monday, to contact him to get further information from him,
22 and while I was there Mr. Osmond was not in his office. They
23 called him at home, and while I was talking with him at home
24 Mr. Cook called him, and so Mr. Cook eventually called me
25 at Mr. Osmond's office where we made an arrangement to meet

1 at the Fire Station at 19th and Arctic.

2 Q Did you tell him you were investigating the
3 fire?

4 A Yes, sir.

5 Q Did you tell him you wanted to talk to him?

6 A Yes.

7 Q Because he was on the lease?

8 A It was a matter of routine, yes, sir.

9 Q And he voluntarily came to the Fire Department
10 to meet you for that purpose?

11 A Yes, sir.

12 Q Okay. And you stated that you asked him if
13 he had insurance that day; is that right?

14 A Yes, sir.

15 Q Did you ask him if he had insurance or asked
16 him if he had an insurance policy?

17 A No. I asked him if he had insurance on his
18 contents. The reason I -- and let me clarify that the
19 reason I do that is because I knew he was the person leasing
20 the property, so he would have no right or bearing to have
21 any insurance on the building itself. I knew who had that.

22 Q All right. You checked with Mr. Osmond
23 to see if he had insurance on the building?

24 A Yes, sir.

25 Q Did he?

1 A Yes, sir.

2 Q All right. And you said your conversation with
3 Mr. Cook lasted just ten minutes or so?

4 A Ten to fifteen max.

5 Q All right. And you had to go somewhere, and
6 that's why the interview stopped?

7 A Right. I had another appointment.

8 Q Was there any tape recording of your
9 conversation with Mr. Cook?

10 A No, sir.

11 Q Did you take any handwritten notes?

12 A Yes, sir.

13 Q Do you have those with you today?

14 A They're in my file, yes, sir.

15 Q Is your file in front of you?

16 A No, sir.

17 Q Did you write down the questions you asked
18 and the answers that were given in your handwritten notes?

19 A No. Just his answers.

20 Q Did Mr. Cook tell you about the key that was
21 left under the tread or whatever on the second or third
22 step?

23 A Yes, sir.

24 Q Did you ever go back to see if that key was
25 there?

1 A Yes, sir.

2 Q Was it there?

3 A No, sir.

4 Q There was a key in the door, wasn't it?

5 A Right.

6 Q Left in the deadbolt?

7 A Right.

8 Q And Mr. Cook told you he had gone there on

9 the night of the fire at between 8:00 and 8:15?

10 A Yes, sir.

11 Q And did he tell you why he went there?

12 A To get a bow tie for a New Year's Eve party.

13 Q Did he tell you where he was living at the

14 time?

15 A Yes, sir. He was staying at the Ramada Inn

16 at 55th Street.

17 Q Okay. What material was the sofa that you

18 referred to that was burned up so badly made of?

19 A I'm not a chemist, so as far as telling you

20 what the chemical composition or makeup of that couch is

21 -- You know, it had a wooden frame and apparently upholstered

22 with some fabric.

23 Q You do not know what the chemical makeup of

24 the fabric on the sofa was?

25 A No.

1 Q Did you take any samples of the fabric?

2 A No.

3 Q So I take it you did not have the fabric
4 tested for any analysis?

5 A No.

6 Q Did you take any samples of the fabric on the
7 stuffed one you referred to?

8 A No.

9 Q So you don't know what the chemical makeup
10 of that was?

11 A No.

12 Q Was there carpet on the floor in the apartment?

13 A I'm going to have to look at one of the
14 pictures.

15 Q You don't recall?

16 A I believe there was, but I can't -- Yes.
17 There was carpet on the floor.

18 Q Was the carpet burnt?

19 A It had some heat damage to it, yes. It was
20 not burned.

21 Q Is Exhibit Number 13 of the living room?

22 A Yes, sir, it is.

23 Q What's on the floor there?

24 A Debris, and let me explain. The debris that
25 you see next to this chair here, there were curtains hanging

1 on the window, of course, and as the fire rolled up and got
2 to the top of those curtains, of course, they have a tendency
3 to ignite and then they drop down.

4 Q What's underneath that debris? Is that --

5 A This is carpet in here. Right.

6 Q Did you take any samples from the apartment
7 for testing?

8 A No, sir.

9 Q Is that a normal routine?

10 A If there is nothing there to indicate an
11 accelerant was present, then, yes, sir.

12 Q And you found no evidence of any accelerants?

13 A No.

14 Q And that is something that is used to make
15 a fire go?

16 A Right.

17 Q A typical example of an accelerant would be
18 gasoline, oil?

19 A Something of that nature, yes, sir.

20 Q You indicated from your -- looking at the
21 apartment and from the photographs that have been introduced
22 that some windows were blown out.

23 A No, sir. Not blown out.

24 Q Broken?

25 A They were broken, yes, sir.

1 Q Okay. Do you of your own knowledge know how
2 they were broken?

3 A I know that the fire cracked -- or the heat
4 cracked the windows on the building, yes, sir.

5 Q Were the windows in an open position or a closed
6 position?

7 A Closed.

8 Q Closed? Would opening the windows in an area
9 where the fire is serve to make the fire burn more?

10 A Yes, sir, because you have a free draft.
11 It's -- Of course. You have more air.

12 Q Mr. Cook is the one that told you he had the
13 VEPCO service cut off?

14 A Yes, sir.

15 Q Do you have any idea of the age -- from looking
16 at the two sofas -- the age of the sofas?

17 A No, sir.

18 Q Or what their condition would have been in --
19 prior to their being burned?

20 A No, sir.

21 Q Were you advised at any time by Mr. Cook that
22 there were any items of personal property missing from the
23 apartment?

24 A No, sir.

25 Q Did -- Excuse me just a moment, Your Honor.

1 After you made up your handwritten notes, did
2 you put up --

3 MR. ALLISON: Why don't you show him what
4 you're referring to. I have no problem.

5
6 BY MR. BARNES:

7 Q Did you type up something from your handwritten
8 notes?

9 A Yes, sir.

10 Q Except for my hen scratch on it, is that what
11 you typed up? (Indicating).

12 A Yes, sir. That's a copy of it.

13 Q And were your handwritten notes something you
14 were taking down verbatim or just the gist of what was said?

15 A Just the gist of what was said.
16 The important points.

17 Q Okay. And did -- Are you the one that
18 personally typed this?

19 A No. My secretary did.

20 Q Did you look it over afterwards?

21 A Yes.

22 Q For accuracy?

23 A Yes.

24 Q Was it accurate as far as you could tell?

25 A As far as I could tell, yes, sir.

1 Q All right. What's the date you show of your
2 interview with Mr. Cook?

3 A 12/27 -- Well -- 12/27.

4 Q At what time?

5 A 1100 hours.

6 Q Which would be --

7 A 11:00 in the morning.

8 Q That would be the morning before the fire; is
9 that correct?

10 A Yes, sir.

11 Q That's all I have.

12 Excuse me. I'm sorry. It was not the morning
13 before the fire you interviewed him, was it?

14 A No.

15 Q It was afterwards?

16 A Yes.

17 Q That was just an error?

18 A Yes.

19

20

REDIRECT EXAMINATION

21

22 BY MR. ALLISON:

23 Q You actually interviewed him on the 28th;
24 isn't that correct?

25 A Yes, I did.

1 Q Now, let's clarify one matter. You stated
2 under cross-examination that the defendant, Mr. Cook, was
3 not the registered owner of this vehicle that you had taken --
4 had seen the night before; is that correct?

5 A Yes.

6 Q Did you take down the license plate the night
7 before?

8 A Yes.

9 Q Did you have occasion to see this same vehicle
10 the next day?

11 A Yes, sir, I did.

12 Q What was the license plate on it?

13 A 3-128. 82 Virginia.

14 Q Where did you see that?

15 A In the parking lot of the Fire Station.

16 Q Who got into that vehicle?

17 A Mr. Cook.

18 Q Mr. Cook drove that vehicle to come see you
19 for an interview regarding the fire; is that correct?

20 A Yes, sir. I assume so.

21 Q Do you know that the person the car was registered
22 to was a young lady he knew?

23 A That's who the car was registered to, was a
24 woman. That's all I could tell you.

25 MR. ALLISON: I would have nothing further, Judge.

1 THE COURT: All right.

2 MR. BARNES: Excuse me just one moment if I may.

3
4 RECROSS-EXAMINATION

5
6 BY MR. BARNES:

7 Q What was the license number you said?

8 A 3-128. 82 Virginia.

9 Q Isn't the number 3-124, sir?

10 MR. ALLISON: Refer to your notes.

11 A 124 -- very well could have been 124. I've
12 got it written down.

13
14 BY MR. BARNES:

15 Q Well, this is important.

16 A I can show you the printout.

17 You're right. 124.

18 Q What was the license number you saw the night
19 after the fire?

20 A 3-124.

21 Q But your testimony a while ago was 3-128.

22 A I stand corrected.

23 MR. BARNES: That's all I have.
24
25

REDIRECT EXAMINATION

BY MR. ALLISON:

Q Is there any doubts that it was the same license plate on that vehicle?

A No, sir.

Q The night before and the next morning?

A No, sir.

Q Is there any doubt in your mind who got into that vehicle the next day?

A No, sir.

Q I would have nothing -- Excuse me. What type of vehicle was it?

A A green Volvo stationwagon.

MR. ALLISON: I would have nothing further.

THE COURT: All right. Counsel finished with the witness?

MR. BARNES: Yes, sir.

MR. ALLISON: Yes, sir.

THE COURT: May he be released?

MR. ALLISON: As far as the Commonwealth is concerned.

MR. BARNES: I'd like to reserve judgment on that at this point, Your Honor.

THE COURT: Suppose I do this: I'm going to

1 suggest we release him, but I'll put him under
2 instructions not to discuss the case with anyone
3 except the counsel involved and be subject for recall.

4 MR. BARNES: We don't want to inconvenience
5 him. If he wants to do something -- As long as he
6 remains available.

7 THE COURT: Lieutenant Wade, because you might
8 be recalled back do not discuss this case, that is,
9 your testimony of what your knowledge is except to the
10 attorneys involved in the case, until you get further
11 information.

12 THE WITNESS: Yes, sir.

13 THE COURT: And if you will make yourself
14 available for recall by leaving some information either
15 with Mr. Allison or somewhere about where you'll be.

16 THE WITNESS: Yes, sir.

17 THE COURT: Other than that, you may stand
18 down and you may be released.

19 Now, ladies and gentlemen of the jury, it's
20 ten after 1:00, and this is the normal time we would
21 recess for your lunch. We will do so at this time.

22 We have been over the instructions so many times
23 I know your memory is as good as mine. So pursuant to
24 the same instructions I released you yesterday, I'll
25 release you today. So please return at 2:10 and we'll

1 start again.

2 (The jury was excluded from the courtroom)

3 (The trial recessed for lunch at 1:10 p.m.

4 At 2:10 p.m. the trial continued as follows:)

5 (The jury was recalled to the courtroom, and
6 the following occurred in the presence of the jury:)

7 MR. ALLISON: Mr. Orendorf.

8 THE BAILIFF: Your Honor, Mr. Orendorf was
9 sworn in yesterday.

10 THE COURT: Mr. Orendorf, you were here
11 yesterday?

12 THE WITNESS: Yes, sir.

13 THE COURT: All right. The oath that you took
14 yesterday will govern you in your testimony today.

15 THE WITNESS: Okay.

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1 Q Would you indicate him.

2 A Mr. Cook.

3 Q Let the record reflect he has indicated the
4 defendant.

5 Has this check been cashed?

6 A It's been negotiated, yes, sir, it has.

7 MR. ALLISON: Your Honor, the Commonwealth
8 would introduce this document into evidence.

9 THE COURT: All right. This will be
10 Commonwealth's Exhibit Number 28.

11 (Marked by the Court as Commonwealth's Exhibit
12 Number 28)

13
14 BY MR. ALLISON:

15 Q When did you have occasion to give this check
16 to the defendant, Mr. Cook?

17 A This was issued on 1/15/82, and it was
18 issued at the Norfolk Claims Office which is Number 14
19 Koger Executive Center, Norfolk, Virginia.

20 Q All right. And is that within a one-mile limit
21 of the City of Virginia Beach?

22 A Yes, it is.

23 MR. ALLISON: I would ask the Court to take
24 judicial notice of this statute that gives this Court
25 jurisdiction within a one-mile limit.

1 MR. BARNES: There's no question about that,
2 Your Honor.

3
4 BY MR. ALLISON:

5 Q I would also like to show you this two-page
6 document and ask you if you can identify it.

7 A This is the contents inventory given to
8 Mr. Cook on 1/14 of '82, and this is the list of contents
9 of damage by the fire.

10 Q Did he fill it out?

11 A He filled out the items 1 through 5, and I
12 filled out 6 through 8.

13 MR. ALLISON: All right. Thank you.

14 Your Honor, the Commonwealth would introduce
15 this two-page document into evidence. It can be
16 stapled.

17 THE COURT: This will be marked as Commonwealth's
18 Exhibit Number 29.

19 (Marked by the Court as Commonwealth's Exhibit
20 Number 29.)

21 MR. ALLISON: Thank you, Your Honor.

22
23 BY MR. ALLISON:

24 Q How many sofas were listed on this claim?

25 A There were two.

1 Q All right. And also there was a separate
2 sleeper sofa? That was a third item?

3 A I believe there's only two listed on the list.
4 Let me double check.

5 No. There's three.

6 Q Okay. And one of them was a sleeper; is that
7 correct?

8 A Yes.

9 Q Did you have occasion to go out to the scene
10 of the fire, 6501 Atlantic Avenue?

11 A I inspected the scene of the fire on 1 --
12 1/14. The repairs were processed to the structure.

13 Q January 14th?

14 A January 14 of '82.

15 Q You took some pictures at that point; is that
16 correct?

17 A Yes.

18 Q And you took some pictures of sofas, or a
19 sofa; is that correct?

20 A Yes.

21 Q Is this the one that was the sleeper sofa?
22 (Indicating)

23 A I couldn't identify it by the scortched nature
24 of it.

25 Q Okay. I would like to show you this other

1 document and ask you if you can recognize this.

2 A This is the sworn statement of proof of loss.

3 Q All right. Who filled that out?

4 A I filled it out.

5 Q Who was present when you filled it out?

6 A Mr. Cook.

7 Q Did Mr. Cook have an opportunity to read
8 everything that was there?

9 A I handed it to him for signature.

10 Q And what did he signify by his signature on
11 this?

12 MR. BARNES: Excuse me. I object to the form
13 of the question. I think the document speaks for
14 itself. What does the document say?

15 MR. ALLISON: That's what I wanted to have him
16 do, but the jury can do that themselves. That's fine.

17

18 BY MR. ALLISON:

19 Q Did he sign this in your presence?

20 A Yes, he did.

21 MR. ALLISON: Commonwealth would introduce
22 this sworn statement of proof of loss in evidence,
23 Your Honor.

24 MR. BARNES: Excuse me, Your Honor.

25 THE COURT: I'm going to --

1 MR. BARNES: Objection to it as characterized.
2 I think that's the title at the top, but the part
3 subscribed to is not filled out, so it's not a sworn
4 statement.

5 THE COURT: Yes, we're getting -- It's
6 introduced as a statement involved with reference to
7 the testimony of a witness.

8 MR. BARNES: No question about that.

9 THE COURT: And it will be marked --

10 MR. ALLISON: That's just the title of that
11 that I stated, Judge.

12 (Marked by the Court as Commonwealth's Exhibit
13 Number 30)
14

15 BY MR. ALLISON:

16 Q Now, would you describe to the jury what order
17 these things would have been presented in order that you might
18 disburse a check to the defendant, Mr. Cook.

19 A The contents inventory was given to him at the
20 scene when I made the inspection on I believe 1/14 of '82.
21 He brought this back into the Norfolk Claims Office back on
22 1/15; and at that time I issued a check, and the sworn
23 statement was taken at the time before I issued the check.

24 Q All right. Did he mention at any time that
25 anybody else owned any of these items?

1 A No.

2 MR. BARNES: Objection. Leading question again,
3 Your Honor.

4 THE COURT: The question is leading.

5

6 BY MR. ALLISON:

7 Q What, if anything, did Mr. Cook state about
8 ownership of these items that were being claimed?

9 A Item Number 3 on the -- on this statement is
10 a title of interest, and it has two sections to be filled in.

11 Q Why does it have two sections?

12 A That's to notify if there is any other parties
13 interested in the matter. We do this to protect ourselves
14 and the person that may own property in the matter.

15 Q For what purpose?

16 A For check issuance.

17 Q All right. And what would you do if there was
18 another person that owned the property?

19 A Under normal circumstances we would issue in
20 their name to make sure their interest --

21 Q No question about they were covered?

22 A That's correct.

23 Q What did he state as to this particular matter?

24 A That there was no other interest in the matter.

25 MR. ALLISON: I would have nothing further of

1 this witness at this point.

2
3 CROSS-EXAMINATION

4
5 BY MR. BARNES:

6 Q You said that irrespective of actual title to
7 the property, that is, who owned the property --

8 A That's correct.

9 Q -- if it was on his premises it would be
10 covered?

11 A That's correct.

12 Q So the insurance company would pay out for
13 let's say a ten-dollar -- I don't know what would cost \$10
14 any more. A ten-dollar picture, if it was in his apartment,
15 even if a friend loaned it to him, you would write a check
16 for \$10 for that picture?

17 A In most circumstances we would know someone
18 else has an interest in the matter, and we would include
19 their name on the check.

20 Q In not all instances though?

21 A Not all instances.

22 Q It doesn't make any difference to Nationwide
23 then with respect to how much money you might check for who
24 owns it?

25 A There's no set amount on that.

1 Q Okay. But if property is in the place and
2 let's say person A owns everything in there and the value is
3 \$5,000 you would write a check for \$5,000 to them, right?

4 A Based on the value of the property, yes.

5 Q If there's \$5,000 worth of furniture in their
6 dwelling, and \$200 worth of it belongs to another person,
7 you would still expend \$5,000, wouldn't you?

8 A That's correct.

9 Q So it doesn't make any difference on the
10 dollar amount?

11 A No.

12 Q So Nationwide, irrespective of the ownership
13 of a sofa or anything else in there is not out any dollars?

14 A That's correct.

15 Q Okay. Now, the purpose of determining if
16 there is any other interests such as a possessor interest
17 or I think on the claim form it says encumbrance, then you
18 put the other person's name on the check also; is that
19 correct?

20 A That's correct.

21 Q So you would have put Mr. Cook's name on there,
22 and if someone else had an interest in a piece of property
23 you would have written a separate check for that piece with
24 their name on it also?

25 A That's correct.

1 Q That's to protect Nationwide in the event
2 there's any liability?

3 A That's correct.

4 Q Okay. Did Nationwide insure the building that
5 caught fire?

6 A Not that I know of, no, sir.

7 Q Do you have any information in your file to
8 show who the insurance company was?

9 A No, sir.

10 Q No claim was made to you for it?

11 A No, sir.

12 Q All right. How long was Mr. Cook in your
13 office when these forms were filled out?

14 A Probably a half hour, forty-five minutes.

15 Q Was there anyone else present when they were
16 filled out?

17 A No, sir.

18 Q And you inspected the scene on the 14th of
19 January?

20 A That's correct.

21 Q About seventeen or eighteen days after the fire?

22 A That's correct.

23 Q Did you actually go inside the first floor
24 apartment?

25 A No. It was under repairs at the time I was

1 there.

2 Q Was there any -- Were there any furnishings
3 outside?

4 A There was some furniture, I guess equipment,
5 outside in the yard, and there was some in the storage area.
6 There was some furniture in the storage area.

7 Q All right. Did you take any photographs of
8 what was outside?

9 A Yes, I did.

10 Q Okay. Did you inventory what was outside?

11 A No, sir, I didn't. I gave that to Mr. Cook.

12 Q On the document that you said had the title
13 Sworn Statement at the top, did -- You said you filled out the
14 front portion?

15 A Yes, I filled out the front.

16 Q It's your handwriting?

17 A Right.

18 Q Do you recall explaining to Mr. Cook what
19 other interests means?

20 A No, I didn't.

21 Q Did you define encumbrance for him?

22 A No.

23 Q Was it discussed?

24 A No.

25 Q Did you take photographs that included all the

1 furniture that was outside at 6501?

2 A The furniture that was outside, the ones I
3 could see, I took pictures of.

4 Q Do you know of your own knowledge whether
5 there was still furniture inside?

6 A Not that I know of. I couldn't testify if
7 there was any furniture in there.

8 Q I'm trying to get clear on your answer. Is it
9 you don't know?

10 A I don't know if there was any furniture inside
11 the apartment.

12 Q Wasn't clear on whether you didn't think
13 there was or didn't know.

14 A I don't know one way or the other.

15 Q All right, sir. Do you know of your own
16 knowledge how many sofas were in the apartment?

17 A You mean prior to the loss?

18 Q Either that or the day you were there.

19 A No.

20 Q Has anyone made a claim to Nationwide that
21 they had an interest in any of the property in that
22 apartment?

23 A Besides Mr. Cook?

24 Q Yes, sir.

25 A No.

1 Q Have you closed your file?

2 A Yes.

3 MR. BARNES: That's all I have. Thank you.

4 THE COURT: May the witness be released?

5 MR. ALLISON: No. I have a couple more
6 questions, Judge.

7

8 REDIRECT EXAMINATION

9

10 BY MR. ALLISON:

11 Q You said you filled it out and gave it to him;
12 is that correct?

13 A That's correct.

14 Q And did he read it?

15 A I assume he did.

16 Q And he signed it in front of you; is that
17 correct?

18 A Yes.

19 Q All right. He was there for approximately
20 how long?

21 A Half hour, forty-five minutes.

22 Q Did you see him come or leave?

23 A I saw him come into the office, yes, sir.

24 Q All right. Did you see the type of car he
25 was driving?

1 A Not coming into the office, no, sir.

2 Q What about on the way out?

3 A No.

4 MR. ALLISON: All right. I would have nothing
5 further.

6 THE COURT: All right.

7 MR. BARNES: Excuse me. What was your answer
8 to the question that he read it? That you assumed
9 he did?

10 THE WITNESS: Yes.

11 MR. BARNES: That's all I have.

12 THE COURT: You may step down and be released.

13 MR. ALLISON: Commonwealth would call
14 Mr. Southerland.

15 THE BAILIFF: Mr. Southerland has been sworn.

16 THE COURT: All right. The oath you took
17 yesterday will govern you today in your testimony.

18 THE WITNESS: Yes, sir.

19 MR. ALLISON: Your Honor, may counsel approach
20 the bench?

21 (A side-bar conference was held by the Court
22 with counsel for both sides out of the hearing of the
23 jury and the court reporter)
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1 over the telephone.

2 Q Over the telephone? Okay. Did you have
3 occasion to discuss with him about the fire itself that
4 occurred at 6501 Atlantic Avenue?

5 A Yes, I did.

6 Q All right. When did he tell you he had been
7 at that address, 6501 Atlantic Avenue?

8 A He told me he was there the night the fire
9 occurred.

10 Q All right. And when did he say he was there?

11 A He said he was there after 60 Minutes had gone
12 off.

13 Q Okay.

14 A Or about that time. After 8:00.
15 8:00 or after.

16 Q Okay. Did he tell you what he went there for?

17 A He went to -- He told me he went there to
18 pick up two bow ties.

19 Q Okay. Did he mention anything about the
20 electricity in your conversation with him?

21 A Yes. He said the electricity had been cut off.

22 Q Okay. How did he say he got into the
23 apartment itself?

24 A He said it was a key under the mat and he
25 removed that key and opened the door.

1 Q Okay. Did he state whether or not anybody was
2 living there at the time?

3 A No one was living there at the time.

4 Q Okay. When he got inside, what did he state
5 that he did?

6 A He said he went in the door and he struck his
7 lighter and went back to the --

8 Q Excuse me. Would you -- When he got inside the
9 door what?

10 A He went in the door and struck his lighter,
11 and went -- proceeded back to the bedroom on the right, and
12 got two bow ties out of his chest of drawers and then
13 proceeded to leave.

14 Q Did he tell you what he did with the key at
15 that time?

16 A Said he put it back under the mat.

17 Q Did you ask him whether or not he was smoking
18 at that time?

19 A Yes, I did.

20 Q What did he say?

21 A He said no.

22 Q All right. Did he state whether he saw any
23 smoke or fire at that time?

24 A He said he didn't see any smoke or fire.

25 Q All right. Where did he say he went to after

1 he left the apartment?

2 A I believe he said he went back to the Ramada
3 Inn or wherever he was prior to that.

4 Q Did you ask him how did he have occasion to
5 take this particular insurance policy out?

6 A Yes. He stated on the recorded interview
7 he called his agent, Hugh Barnes, shortly after Thanksgiving.

8 Q Okay. After Thanksgiving? Go ahead.

9 A That's how he happened to take it out.

10 Q Okay. Stated that he called him?

11 A Yes.

12 Q Okay. Did you ask him whether or not he had
13 paid the premium?

14 A Yes, I asked him that.

15 Q And what was his response to that?

16 A He said he had.

17 Q Did he mention whether or not he had any
18 items left in there or not?

19 A In the apartment?

20 Q When he went back there.

21 A Yes. He had some items.

22 Q Did he make mention of any type of rifle or gun?

23 A Yes. He made some mention of two rifles.

24 Q Okay. Had you asked him specifically about any
25 weapons?

1 A. No, I did not ask him about that. I asked him
2 if any other property belonged to someone else in the
3 apartment or house.

4 Q What did he say about these particular weapons?

5 A He said they were there prior to the fire but
6 then when he went back at a later date they were not there.

7 Q Okay. Did you ask him whether or not he knew
8 how the fire started?

9 A Yes, I did.

10 Q What was his response?

11 A He said he did not know.

12 MR. ALLISON: I would have nothing further.

13

14 CROSS-EXAMINATION

15

16 BY MR. BARNES:

17 Q At the time you made the telephone call to
18 Mr. Cook, did you reach him right away or leave a number
19 for him to return your call?

20 A I believe I called his business. I think I
21 left a number.

22 Q Did you identify who you were at the time?
23 Leave a message?

24 A I imagine so, but I can't remember that.

25 Q And Mr. Cook returned your call?

1 A I believe so.

2 Q And prior to taking any statement from him you
3 told him that you were going to record this on tape?

4 A That is correct.

5 Q And he consented to do that?

6 A Yes.

7 Q Then you asked him questions and he gave you
8 answers?

9 A That is correct.

10 Q All right. The -- Were you aware at that time
11 the claim had already been paid?

12 A Yes, I was.

13 Q And that the premium had been paid?

14 A I can't say I was aware of that.

15 Q But you know the premium had been paid?

16 A No, I didn't say I was aware of that.

17 Q That's not part of your filing?

18 A I was aware there was coverage on the things.

19 Q All right, sir. Did he specifically tell you
20 that there were items of property in the apartment that he
21 didn't own, that somebody else owned?

22 A Yes.

23 Q Told you that on the tape?

24 A Yes, he did.

25 Q Did you ask for a list of what they were?

1 A Not specifically.

2 Q But you were aware there were items in there
3 that --

4 A He mentioned some items that belonged to I
5 think a roommate of his.

6 Q Did you go into detail about what any other
7 items might have been?

8 A No, we didn't, because the contents list had
9 been filed.

10 Q Okay. Now, did you ask him -- He told you
11 he had the electricity cut off?

12 A Yes, he did.

13 Q All right. And that's why he said he had to
14 strike a lighter?

15 A I would imagine he said that because that was
16 the only explanation as to whether he could see in there or
17 not.

18 Q Okay. And did you -- You asked him if he was
19 smoking or not that night?

20 A Yes.

21 Q Cigarettes?

22 A I asked him if he was smoking.

23 Q Did he tell you he did smoke?

24 A Yes.

25 Q He is a smoker?

1 A Yes.

2 Q And what was his response as to whether he was
3 smoking that night? Did he say no, or did he say he didn't
4 think so?

5 A At first he said no, and then I asked him again
6 at some other point and he said, "No, I don't believe so."

7 Q Okay. Did he make the statement to you he
8 couldn't swear to it one way or the other?

9 A May have.

10 Q All right. And he told you he had gone there
11 after 60 Minutes was off on the night of the fire?

12 A That's correct.

13 Q And he told you that it was shortly after
14 Thanksgiving he had a conversation with Mr. Barnes regarding
15 insurance, is that correct?

16 A He said some point after Thanksgiving.

17 Q And the two rifles he mentioned he said they
18 were missing; is that correct?

19 A There was no claim that they had been damaged
20 in the fire or anything. Not that I know of.

21 Q Under a renter's policy, I think that's what he
22 had; is that right?

23 A I think that's what he had, although I don't
24 know for sure, but probably would have had HO-4, tenant
25 home owner policy.

1 Q But you don't know specifically what particular
2 type of insurance policy he had with Nationwide?

3 A No, I don't.

4 Q Do you know whether his coverage covered theft?

5 A If he had any type of home owner's policy it
6 would have covered theft.

7 Q Would it have covered personal injury for
8 somebody falling down or hurting themselves on his property?

9 A Yes. Yes.

10 Q Would it have paid -- Would it have had a
11 provision for say major medical bills for somebody who was
12 hurt?

13 A Yes.

14 Q So there are a lot of other coverages in these?
15 Not just fire?

16 A That's correct.

17 Q Have you closed your file? Have you closed
18 your file on this particular matter?

19 A Yes.

20 Q Has there been any demand made to Mr. Cook
21 by Nationwide to return the money ya'll paid him?

22 A No.

23 MR. ALLISON: Judge --

24 MR. BARNES: That's all I have.

25 MR. ALLISON: Counsel knows what type of

1 question that is.

2 THE COURT: All right. Did you have any
3 further questions?

4 MR. ALLISON: No, sir, Your Honor.

5 THE COURT: All right, Mr. Southerland, you
6 may step down and you may go.

7 MR. ALLISON: May counsel approach the bench
8 for a moment?

9 (A side-bar conference was held by the Court
10 with counsel for both sides out of the hearing of the
11 jury and the court reporter)

12 THE COURT: To avoid bringing back a witness
13 to respond to a question, counsel has stipulated to
14 the response they'd get to that question.

15 State what you have agreed to.

16 MR. ALLISON: Your Honor, we have agreed that
17 the sleeper sofa that's listed was in the back bedroom
18 as opposed to the two that were in the living room.

19 THE COURT: And I guess further you've got
20 pictures of the two, and the pictures are not of the
21 sleeper; is that correct?

22 MR. ALLISON: That's correct, Your Honor.

23 Your Honor, at this point the Commonwealth would
24 rest.

25 THE COURT: All right. This is a good time to

1 take a break in the proceedings anyway.

2 Members of the jury, would you step into your
3 jury room for a few minutes.

4 (The jury was excused from the courtroom and
5 the following occurred out of the presence of the
6 jury:)

7 THE COURT: Now, before we go any further,
8 is the Court correct in assuming that there may be
9 some motions at this time?

10 MR. BARNES: Very definitely, Your Honor.

11 Also we have briefs on our motions that I'd
12 like to file this morning.

13 THE COURT: Have you all -- And I think it comes
14 under your right to public trial. Do you have any
15 objections to stepping into my chambers and arguing
16 the motions so that I can -- and bring the court
17 reporter in, obviously? Do you have any objections
18 to that?

19 MR. BARNES: No, sir. Not at all.

20 THE COURT: Do you have any objections?

21 MR. ALLISON: No, sir.

22 THE COURT: Suppose we do that then.

23 MR. BARNES: Your Honor, if we're going to
24 put this on the record, I would like to -- I think
25 Mr. Cook should be present.

1 THE COURT: Oh, yes.

2 (The judge, counsel for both sides, the
3 defendant and the court reporter retired to chambers
4 where the following occurred:)

5 THE COURT: I wanted to stand up some. That's
6 why.

7 All right. I think probably the -- trying to
8 think. One of the charges is the -- is that of
9 common law statutory arson.

10 MR. BARNES: 18.2-77.

11 THE COURT: The other is burning of the personal
12 property to defraud --

13 MR. BARNES: Yes, sir.

14 THE COURT: And the third I have been -- The
15 third is --

16 MR. ALLISON: Obtaining money under false
17 pretenses; and the Commonwealth has a couple of theories
18 on that, the fact that -- Well, unless you want to wait
19 to hear argument on that. I'm going to wait until they
20 argue.

21 MR. BARNES: Your Honor, with respect to the two
22 cases regarding the arson, and that would be the burning
23 of the house or the burning of any personal property,
24 the gravamen of the offense is equal on both regardless
25 of what the property destroyed is. So I argue this

1 will go to both of those indictments, and we move to
2 strike the Commonwealth's evidence on the grounds it's
3 not sufficient to show number one that even the crime
4 of arson has occurred here. There has been no
5 testimony whatsoever with respect to what started that
6 fire. There has been no testimony whatsoever that
7 anybody as we've seen in some of the cases we've
8 cited in our brief that there were any admissions
9 made by anybody, that there were any accelerants seen,
10 that there was anybody seen leaving the scene at the
11 time of the fire. The best evidence here giving the
12 Commonwealth all the inferences in the light most
13 favorable to them is that there was a fire, and that
14 it probably started in the sofa; but what started it
15 is still a question in this case.

16 Secondly, some of the things that are hallmarks
17 of arson, like the accelerant I mentioned not present,
18 the investigator or Lieutenant Wade testified that the
19 windows were closed, so the windows weren't left open
20 to ventilate and allow the fire to burn.

21 There is some testimony that some items are
22 missing from the property which does not exclude the
23 hypothesis of burglary and burning. There are people
24 mentioned in this case that if motive even came into
25 it -- and I have not heard one except for collecting

1 some insurance money; but motive is not sufficient; but
2 Mr. Cook and Mr. Tholand in order to get an unwanted
3 individual out on December 22nd cut off the electricity,
4 making it cold, so he was forced out.

5 Then on the 27th the back door is broken. The --
6 Some guns are missing. The key -- Somebody took a key
7 from under the mat it appears and used it to gain
8 entry. Knowledge of the whereabouts of that key
9 according to the testimony here was known by many
10 people. Quite a few people had sort of lived in and
11 out of there transiently. Mr. Doolin -- I don't know
12 his situation. He was forced out because of the cold.
13 Mr. Mazza whose two rifles were still there certainly
14 would have known the key was under the front door. He
15 may have come back to get his rifles and burnt the
16 place. That's certainly a reasonable hypothesis the
17 way the evidence sits.

18 On the other hand, the witnesses have come
19 forward that indicate that during the investigation
20 Mr. Cook was called by the fire investigator and was
21 told he wanted to talk to him. Voluntarily he went
22 to the Fire Department and gave a brief statement to
23 the investigator, which the investigator said he was
24 in a hurry and left. Mr. Cook was called by the
25 insurance company, told they were going to tape a

1 statement. He gave them a statement. They asked him
2 questions and he answered it. The insurance company
3 has been to the scene, looked at it. They have
4 closed their files. They have not asked for the money
5 back. They've paid the claim. There are just so
6 many things left open to speculation with respect to
7 whether there was even a claim.

8 There is a presumption in the law which we've
9 cited that fires are accidental. In addition, there
10 is the presumption that Mr. Cook carries as far as
11 being the alleged criminal agent, that he's presumed
12 innocent. I have not heard any evidence in the two
13 days we've been here that overcomes either of those
14 presumptions with respect to the corpus delicti or
15 criminal agent.

16 Now, Mr. Cook candidly told the -- everybody who
17 he talked to that he went there after 60 Minutes, about
18 8:00, 8:15 to pick up bow ties. Made no inconsistent
19 statements about that. If he had something to hide
20 I dare say -- Human nature would indicate that he
21 might not want to say he had been there the night of
22 the fire, but he did. It's an indication of not
23 having anything to hide. He told the investigator from
24 Nationwide that he struck his lighter. He's not sure
25 whether he smoked while he was in there. He does not

1 think he did. Went in, got his bow ties, came back
2 out, put the keys under the mat again. That's the
3 Commonwealth's evidence in this case, but we know when
4 the fire people arrived the key wasn't under the mat.
5 It was in the door.

6 Now, there's no chemical test. We don't even
7 know what the fabric was on the sofa where the fire
8 allegedly started. I've looked through this evidence,
9 and I thought and I have come down to this question,
10 and it's crucial to the question of corpus delicti.
11 How did that fire start? I don't think there's
12 evidence to prove beyond a reasonable doubt even giving
13 the Commonwealth the evidence in the light most
14 favorable to it, because the facts basically are
15 undisputed here. We don't have any disputed facts.
16 Those are the facts, and what those facts leave you
17 with is you don't know what happened.

18 Now, with respect to whether if the Court does
19 believe a crime was committed, was Mr. Cook the
20 criminal agent. Well, the cases we've cited in our
21 brief, many, many of them are much stronger
22 circumstantial cases that would point the guilty finger
23 towards the defendant in those cases, and in each and
24 every one of those cases the Supreme Court of Virginia
25 held the evidence was not sufficient because suspicion.

1 guesswork and that sort of thing is not sufficient.

2 I think one of the cases in there, the language
3 from the Court is that it was not the quality of
4 evidence that we as a free people will let stand
5 between a man and his liberty. Also our liberty rests
6 on a slender reed indeed, and I would suggest to the
7 Court what we've heard in the last two days is a
8 slender reed indeed.

9 Now, with respect to the fraud on the
10 insurance company, I believe the Commonwealth's case
11 is fatally defective. They have not proved what the
12 contractual obligations were between Mr. Cook and
13 the insurance agent. The policy was not introduced.
14 The last man said he didn't even know what kind of
15 policy he had. No one has taken the stand and
16 indicated that there was any fraudulent intent. Even
17 if you believe there was a sofa on the claim that
18 belonged to someone else, because they would have paid
19 anyway; and he is not charged with defrauding Elke
20 Berry. He is charged with defrauding Nationwide.
21 Nationwide Insurance agents testified that they
22 issued him a policy. They took the premium. They've
23 investigated the case. They've paid him the money.
24 He told one of their agents that some of the items
25 were not his. The man didn't ask, you know, which

1 particular ones. Nobody has said which sofa on the list
2 was Miss Berry's sofa, if indeed one of them was.
3 Nationwide Insurance Company's agents testified that
4 regardless of ownership they would have written a
5 check for the same amount. They've not asked for their
6 money back. Their files are closed. What are they out?
7 How have they been defrauded? Even if you assume
8 there is some intent to defraud, which I suggest
9 there's no evidence of that, the so called sworn
10 statement that has the box in their "other interests
11 or encumbrances", the agent testified it was not
12 discussed. He did not explain what that meant to
13 Mr. Cook. Simply none is written in there. That is
14 another slender reed with respect to building intent
15 to defraud or knowingly making a false claim. There's
16 no indication of that, because there is not a single
17 bit of evidence regarding what the contract between
18 Mr. Cook and Nationwide was. I don't know what kind
19 of policy he had. We've heard some general terms, but
20 no specifications about what that policy required,
21 what its definitions were, if it defined encumbrance
22 or other interests, which I believe the Court --
23 insurance policies usually define everything.

24 The sum total is that the evidence that we've
25 heard for the last couple of days is surely there was

1 a fire, but there's been no crime proved. Certainly
2 not been any proof that Mr. Cook set any fire, and
3 certainly the cases in here indicate that
4 circumstantial evidence of a much greater weight has
5 been thrown out by the Supreme Court, and there is
6 not a shred of evidence of fraud against an
7 insurance company. In fact, the evidence viewed
8 in the light of the Commonwealth is that Nationwide is
9 not out a penny; and we have briefed those particular
10 points.

11 MR. ALLISON: Your Honor, may it please the
12 Court: In dealing with arson cases we have to
13 establish one of two things. Either it's accidental,
14 and therefore no criminal charges will be present;
15 or it's got to be proven incendiary in nature.

16 The defense did not ask one single question
17 and has not rebutted one single item as far as whether
18 the fire itself was deliberately set or of an
19 incendiary nature; or has not brought up one single
20 accidental cause or probability of any accident when
21 the expert testified. They are saying at this point
22 from what I understand that there was a fire that was
23 deliberately set based upon the evidence presented
24 and looked upon in the light most favorable to the
25 Commonwealth at this point. From that point we go to

1 establish whether or not the defendant is the criminal
2 agent involved. We've heard testimony from different
3 people. We've heard Mr. Tholand state that the only
4 person that owned any guns was Mr. Mazza. Defense
5 states well, Mr. Mazza may have come back and gotten
6 his guns. That's pretty unlikely since Mr. Tholand
7 said that Mr. Mazza owned a pistol, and at that point
8 the fire lieutenant, Lieutenant Wade, stated that
9 there was a pistol right on the table. That was not
10 taken. They want to establish that somebody came in
11 there and took these weapons, yet left another weapon
12 on the table, this gun that Lieutenant Wade says
13 was there and then disappeared the next day; but it
14 was there when he got there at the time of the
15 investigation. There were also some speakers. They
16 want to try to establish burglary. It's not consistent,
17 Judge, because if somebody was going to come in and
18 take all of the items and guns, to burglarize the
19 place, they would have taken those new speakers that
20 hadn't been taken out of the box, and at the same time
21 they would have taken the gun off the table.

22 As far as the key in the door, two theories:
23 The defendant, after he set the fire was in such a
24 hurry to get out of there he left it in there, or in
25 the alternative left it in there to try to make it

1 look like a burglary; but that theory is not
2 consistent, because there were other items that would
3 have been taken out of there at that time. It's very
4 interesting to note that the defense tries to bring
5 out that there were guns there, yet the defendant
6 goes and gets his bow ties, leaves. Not smoking,
7 struck a lighter. No accelerants. Fire starts right
8 on the side of the couch as Lieutenant Wade has stated.
9 Let's listen to the defendant's own statement
10 starting from the very beginning, and the theories
11 evolve. We've got an individual that's behind in his
12 rent. Mr. Osmond stated that he had given him bad
13 checks on an account closed before. At the same time
14 he's behind in his rent in December. The next thing
15 that happens is his items get attached right in that
16 same apartment. So he's not supposed to remove them.
17 If he can't remove them how is he going to get them?
18 How much are they worth to him? Are they worth more
19 to him when he doesn't remove them? He's committing
20 a criminal offense if he removes them, but by the
21 same token if he burns them he collects the insurance
22 money then he's got the money and that resolves two
23 problems. He doesn't have to worry about getting
24 them any more, and at the same time he's got money.

25 We go on. Statement to Lieutenant Wade,

1 "Do you have insurance?" Answer: "No."

2 Defense would have you believe the defendant
3 has been serious and honest all the way up and down
4 the road. That's not the fact. He's been deceptive.
5 Everybody that he talks to he gives a different story.
6 Truth is consistent. Deception is not. These items
7 are burned, and in addition to that he not only sets
8 his own personal property on fire and then leaves and
9 puts himself there right at that time, and Claes
10 Tholand who is his roommate -- and I know his position.
11 He doesn't want anything to hurt his roommate, former
12 roommate; but by the same token he's gone forty-five
13 minutes. Puts himself there after 60 Minutes, which
14 is after 8:00. Then the Fire Department responds.
15 Forty-five minutes later. Okay. Then the fire engines
16 are coming right down the street just as he gets back,
17 which puts himself right there. What they would --
18 defense would have you believe he gets his bow ties,
19 and then in the meantime from the time that he leaves
20 to come back somebody goes in there and breaks in and
21 sets fire and steals the guns, which is totally
22 inconsistent. Totally inconsistent, because otherwise
23 they would have taken the gun off the table and
24 speakers off the table if burglary was the intent.
25 There was no intent to commit burglary by anyone else.

1 There was only one intent in this matter. That is
2 to commit arson of his own personal property and not
3 even to the extent that he cared about anything else,
4 and the building is burnt also.

5 As far as the insurance matter with Nationwide
6 being defrauded, obtaining money under false
7 pretenses, he signed a statement that he in no way had
8 anything to do with the loss itself, and that's an
9 alternate theory on the basis of the insurance,
10 obtaining money under false pretenses, because he
11 signed a statement that said he had nothing to do with
12 the loss itself; and as a result, looking in the
13 light most favorable to the Commonwealth, the
14 Commonwealth would ask that these motions be denied
15 at this point and the matter go to the -- well,
16 proceed and have the jury decide whether, in fact,
17 the fire was incendiary in nature, and at the same
18 time whether the defendant is the individual that
19 started this fire deliberately and maliciously at
20 6501 Atlantic Avenue.

21 MR. BARNES: Your Honor, briefly in rebuttal.
22 I don't believe that I did say in my opening on this
23 matter that we conceded there was a crime. I think
24 the thrust of my --

25 THE COURT: You didn't.

1 MR. BARNES: -- argument is that no crime was
2 committed, and I don't think it goes to the point here
3 that the defense hasn't proved anything by not asking
4 questions. We don't have the burden here.

5 THE COURT: No.

6 MR. BARNES: And so our not asking questions
7 about other accidental causes, I assume from that
8 that there are accidental causes that perhaps --
9 certainly all of them potentially have not been
10 excluded, but even without that particular theory I
11 come back to how did this fire start? I don't know
12 from this evidence.

13 Now, you can guess about how it started and
14 we can guess burglaries. We can guess former
15 roommates. We can guess Mr. Cook wanted this to look
16 like a burglary, and that's why he left the key in the
17 door. I don't think that's the way to make a place
18 look burglarized though, or that Mr. Cook started the
19 fire and then went looking for the guns and had to
20 get out quickly. I think if you were going to take
21 the items you would take them first and then set the
22 fire. That's a little more common sense; but there's
23 no shred of evidence that that's what happened. There
24 is not a shred of evidence that that's what
25 Mr. Cook -- and I believe I mentioned this in my

1 opening statement to the jury. If I ask this
2 gentleman over here did you see Mr. Cook burn that
3 house, and he said no, well, that doesn't leave
4 the inference that he did it and I didn't see it.
5 That can also very easily mean he didn't do it. So
6 the innuendo that's thrown in that kind of question is
7 not proof. We're not trying at this point to establish
8 anything except an analysis of the evidence that's
9 been set forth. We haven't put our case on. Everything
10 that's been put on is the Commonwealth's case, and
11 their case -- part of it is his statement, and I do
12 not agree with the characterization he's told a
13 different story to everyone. I think he's told
14 everyone a little after 8:00 when he went there. Told
15 everyone he went in for bow ties. Told everyone that
16 the key was under the third step of the steps there
17 under a little mat. He's told everyone that he went
18 in there and came back out and that he put the key
19 under it. Not everybody asked him the same questions,
20 and that's certainly a different breed of cat than
21 telling different stories. The officer never asked
22 him if he was smoking when he went in there, so I
23 guess he didn't give him an answer, but when the
24 insurance man asked him if he was a smoker he said he
25 was a smoker. Two, he used his lighter for visibility.

1 Third, he didn't think he was smoking when he went
2 in there. So that's the Commonwealth's evidence.
3 So the Commonwealth's evidence has him leaving with
4 no fire and putting the key back under. That's the
5 Commonwealth's evidence. That falls pretty short of
6 saying he set the fire.

7 Mr. Tholand says he doesn't think he left again
8 that night. Well, the Commonwealth says well, there
9 are two theories here: That he was making it look
10 like a burglary or he wasn't making it look like a
11 burglary, but under any of the two theories they
12 limit it to he set the fire. Well, there are a lot of
13 other theories. One, it was burglarized and set on
14 fire. Two, Mr. Doolin was mad enough to come
15 burn them out. Three --

16 MR. ALLISON: That's speculation.

17 MR. BARNES: That's hypothesis.

18 THE COURT: One at a time.

19 MR. BARNES: Hypothesis has to be excluded.
20 They don't have to be introduced. Another theory is
21 that it was --

22 THE COURT: At this time -- Let's go to
23 hypothesis. The hypothesis or the defense's evidence.
24 We don't have any hypothesis from the defense
25 standpoint. All we have is the Commonwealth's evidence.

1 MR. BARNES: Well I think from the
2 Commonwealth's evidence --

3 THE COURT: So you don't set up at this point
4 on a hypothesis of what his defense is. For instance,
5 the old instruction you shall find that he's
6 innocent if there is a hypothesis consistent with
7 that innocence. Let's assume that the defense says
8 I was not in the area. I was in New York; and you
9 have evidence supporting he's in New York. That is
10 a hypothesis consistent with innocence.

11 MR. BARNES: May I ask a question?

12 THE COURT: I don't think we can get into the
13 defense of hypothesis because none has been
14 introduced.

15 MR. BARNES: A hypothesis is not something
16 that -- It's not something that you have to
17 particularly prove. Let's assume at this particular
18 point that the Commonwealth's evidence is accurate.

19 THE COURT: Let me just -- I'm not -- Let me
20 tell some of the things that are going through my
21 mind, and I want to read them again and -- I mean I
22 want to read your briefs, and then I don't know how
23 much research you make to the Ramsey case. That's the
24 only one I've had a chance to read really since we
25 started the trial. So I didn't know what we were

1 going to try until I walked in the courtroom. That
2 sets forth a whole set of facts. It's not my basic
3 feeling from what I've read both in Michie's and here
4 that when the Court acts it acts as a matter of law
5 and that is that it doesn't speculate itself as to
6 whether a thing is accidental or not. If there are
7 facts that would show and are consistent with the
8 fact it might be accidental and if there are also
9 consistent facts that it might not be accidental then
10 you prompt a jury question.

11 At that point -- That's what we're dealing with
12 now, is that the presumptions -- and you've mentioned
13 some or Gary mentioned some -- but the only
14 presumptions we have at this time are we have a
15 presumption in law in arson that it's accidental, but
16 that doesn't mean that he's got to show how it starts.
17 All he's got to do is put on evidence that can tend
18 to disprove it's accidental. Obviously no one can
19 ever disprove -- If no one knew how a fire started
20 you could never disprove all the things as to how it
21 started. I am somewhat lost -- I don't fit the
22 burglary thing in. I get lost in that because there's
23 a lot of evidence that after the places have been
24 burnt they are looted, and I do know at this stage
25 there's been no showing that Mr. Cook went to the place

1 after the fire. We have the firemen, Lieutenant Wade
2 and someone sitting there when a similar type of
3 vehicle with the same license number -- I assume
4 478 or whatever the number was -- comes up there, but
5 we don't know whether it was -- it's a man or woman
6 driving. They don't get out, so there's no evidence
7 that would put him at the scene of the accident after
8 the fire. We do before by his admission. We know
9 that regardless of what type of weapons they may have
10 been or speakers, there were some there after the fire
11 since Lieutenant Wade saw them. When he returned in
12 the morning they were gone.

13 Now, we can have a burglary which would be
14 independent of any of these people. Somebody just
15 seeing a building that's open because there's been a
16 fire, and I guess there are fools that run around
17 -- and I go beyond that. An old house in my
18 neighborhood burnt down, and before they got to it
19 they took all the furniture. It didn't burn down.
20 Burnt and the people moved to a motel, and within the
21 day they had driven a truck up there and taken all
22 the man's furniture. So some people lay around looking
23 for fires. So I'm not going to speculate on that,
24 nor am I going to say it proves anything. That's the
25 type thing I'm going to leave out because it has

1 no bearing. It could be independent and have nothing
2 to do with any of this, and I can't fit it in on the
3 motion to strike or the Commonwealth's position for
4 objection; but the Ramsey case -- and that's why I
5 think that's important, but I want to see -- You've
6 cited some other instances, and the Ramsey case --

7 MR. RUPE: That was our earlier brief, the
8 Ramsey case.

9 THE COURT: What they did is reverse it because
10 they should not have allowed the hypothetical
11 question as to the opinion of the experts to the very
12 thing of the ultimate issue to be decided by the
13 Court, but they cite a bunch of facts. Oftentimes you
14 read into the case what -- They didn't say these
15 facts were insufficient for it to go to the jury.
16 They just said you shouldn't have done this. So they
17 reversed and remanded for that reason on the facts
18 they do know.

19 In reading those they are very standard, and
20 so is the -- so is Michie's on the fact that --
21 particularly in arson cases. Circumstantial evidence
22 is pretty much all you have in most of the cases.
23 Nobody admits to going in and setting the fire other
24 than to say I spilled a can of gas while I was there
25 and it set the fire. Other than that most people --

1 most arson cases you don't find any person there,
2 but you do have to establish -- Doesn't have to
3 establish it as a matter of law. He can show by
4 circumstances that it's not logical that it was --
5 the corpus delicti was other than a -- what was the
6 word?

7 MR. ALLISON: Incendiary.

8 THE COURT: But let me read your briefs and let
9 me read that case again, because it's different from
10 the normal cases.

11 MR. BARNES: One other thing on the question
12 of insurance fraud. Misrepresentation must be
13 material, and it must be for the purpose of getting
14 something from somebody they wouldn't give you unless
15 you made the misrepresentation.

16 MR. ALLISON: That's the statement he made
17 to Barnes that he hadn't already left, that he was
18 still living at 6501 Atlantic Avenue, when, in fact,
19 he was living somewhere else.

20 THE COURT: On that, these things may appear
21 unrelated, if -- and I will read it. If it has in
22 there that I didn't cause the fire -- If I conclude
23 that you met your basic burden for it to go forward,
24 then when he says I didn't do it, that's by moving
25 forward an issue.

1 MR. ALLISON: That's not the only thing I would
2 state, because he made a statement to Barnes, the
3 insurance agent, that he was living at 6501 Atlantic
4 Avenue, when, in fact, he had already moved out by
5 the 22nd, and Mr. Barnes stated that he never could
6 have issued that binder if he had known that at that
7 time. That was his statement. That was his testimony.

8 THE COURT: I'll review that. I've got some
9 of what you put down there.

10 MR. BARNES: Again on that point, I don't
11 know what the contractual obligations were between
12 these people. There's no policy.

13 MR. ALLISON: That's evidence, what was put in.

14 THE COURT: Let me study it and I'll try and
15 make a decision on your motion to strike. That's
16 what's before us at this time. Not the decision on the
17 case.

18 MR. ALLISON: It looks like we're going to
19 go to --

20 THE COURT: That's not to presume how I rule.
21 I wasn't going to give you an indication at this point.
22 I would conclude --

23 MR. ALLISON: Never mind. I'll withdraw that
24 statement. I understand what you're saying.

25 THE COURT: If I say yes, we are, I don't

1 think I've done very much for his motion at that point.
2 I'll try to --

3 MR. ALLISON: Approximately how long?

4 THE COURT: I tell you what. I'll give you a
5 half hour if you want, because I think I can do this
6 in a half hour. I have 3:30; is that right?

7 MR. ALLISON: Be back at 4:00?

8 I'd like to go back to my office and make a couple of
9 calls if I might.

10 (The trial recessed at 3:30 p.m. At 4:10 p.m.
11 the hearing continued as follows:)

12 THE COURT: Now, gentlemen, acknowledging that
13 I think in fairness that there is not always sufficient
14 time to trace every course down to its satisfactory end,
15 under the system that we have the best the Court can
16 do is try to judge the case in the time that it has
17 to make a decision. I have read the briefs, and I have
18 reviewed some of the evidence, and I have read some
19 other law. The -- I'll go it in reverse or -- In my
20 estimation and without giving any other particular
21 reasons, the claim -- and that would be the claim that
22 he did obtain money by false pretenses, so far as I'm
23 concerned that is part and parcel of the -- I think
24 what we refer to as the second indictment. Wrapped up
25 in it. I can't distinguish really between the two.

1 It seems that the second one claims exactly the same
2 thing in a different way. So I'll strike that.

3 MR. ALLISON: Would the Commonwealth be
4 entitled to an argument on that particular point?

5 THE COURT: You know, we'll never finish if
6 everybody keeps arguing.

7 I think probably I've listened to the arguments.
8 I really want to go ahead and rule.

9 MR. ALLISON: All right, Judge.

10 THE COURT: Now, in the other thing, and that
11 is the primary charge, that is of the charge of arson,
12 in reading the -- and I'm very impressed with your
13 statistics. That's the first time people totaled up
14 the number of times the Supreme Court has ruled one
15 way or the other.

16 MR. BARNES: Thank you, sir. I think we have
17 all the cases they have decided.

18 THE COURT: And evidently you have researched
19 it from the beginning.

20 In the section in Michie's, Page 157 --
21 I realize I'm picking a part of it, but it's for the
22 purpose of this particular hearing. This kind of
23 direct proof -- and I'm speaking of the proof of --
24 the direct proof of the cause of the fire -- is not
25 required to convict the defendant of the crime of

1 arson; but the coincidence of circumstances relied
2 on to convict, however strong and numerous, must
3 constitute proof that the crime has been perpetrated
4 and two that the accused is the guilty party.

5 Now, after going through your excellent briefs
6 I again turned back to the case I had the chance --
7 I like to read a whole case rather than take parts of
8 it. I went again back to the Ramsey case, and I wanted
9 to show you some facts which I think we could define
10 as correlary facts in the instance before us. In
11 the Ramsey case the defendant had acquired fire
12 insurance months before the fire. On the date in
13 question of the fire he left his house at 6:45 with
14 his family. He had left a fire burning in the stove
15 at the time. This was I think a -- All right. It was
16 a stove. What I call a woodburning stove. He went
17 to church. There hired a cab, returned to the house.
18 According to the cab driver he was gone two or three
19 minutes from the cab, was taken back to the church.
20 Arrived at the church at 7:55. The fire or the first
21 flames of the fire were noticed an hour and thirty
22 minutes later, or an hour and twenty-five minutes
23 later. Now, some of the evidence in that case was
24 that -- and I had read this several times to get the
25 meaning. Sometime between the afternoon preceding the

1 day of the fire and the next morning the position of
2 the truck had been reversed so that the front end of
3 the truck faced away from the house. I finally got
4 in my mind what they were attempting to say is that
5 he didn't want to burn the truck up, and that was the
6 reason for turning it around. It was further stated
7 that this was a -- being the cab driver -- it was a
8 cold, dark night. He didn't observe any lights in the
9 direction of the Ramsey dwelling. This would be the
10 fact of the two or three minutes he let Mr. Ramsey out.
11 He was not smelling -- did not smell the alcohol or
12 notice the energy or excitement; and that Ramsey
13 wanted to go and come. Then included among the articles
14 found in the debris were a gas iron heater, evidence
15 of electrical appliances, a gasoline powered saw,
16 several small metal cans and a five-gallon can; bits
17 of wire similar to extension cord wire, a small clamp
18 used to make electrical connections and an old model
19 fuse box.

20 Incidentally, that apparently had something to
21 do with there being be electrical service to the house.
22 Then as I had indicated to you the Supreme Court
23 reversed this case on the hypothetical question that
24 was asked of the expert.

25 "The hypthetical question propounded to Hydrick

1 and his response thereto were highly prejudicial to the
2 accused and constituted reversible error."

3 " It invaded the province of the jury as to the
4 ultimate issues to be decided. Those issues were
5 whether or not the fire was of incendiary origin and
6 whether or not Ramsey was the criminal agent."

7 " While Hydrick's answer told the jury in his
8 opinion the fire was incendiary in origin yet the
9 question and the answer to it" -- and I mean the question
10 of whether Ramsey was the criminal agent, this is the
11 part I would bring to your attention. "Under the facts
12 in this case the jury was able to form a correct
13 opinion without the aid of expert testimony, and such
14 testimony was not necessary." As I read that, and from
15 the evidence in this case they did not make any
16 determination that the fire was -- how the fire was
17 started; and there was more evidence here since the
18 wood fire was burning in the stove at the time they
19 left. It's simply that the -- that the fire started
20 and that it apparently is a jury question.

21 I tried to distinguish between a question
22 which is a matter of law, which is what you asked me
23 to decide at this stage of the game, and that which is
24 a jury question. If it's a matter of law it should
25 be clear that there is only one way something can go.

1 It would lead to speculation : between the various
2 causes or lack of causes at this time if we were just
3 discussing the particular facts of the origin of the
4 fire. Whether it was incendiary or otherwise, it
5 seems to me so long as there is evidence that can
6 support either side you then go into the fact is that
7 a legal question for the Court or a question for the
8 jury. My estimation under our system is it's a jury
9 question, not mine.

10 For those reasons -- and as best I can because
11 sometimes it's easier to rule on the motions and not
12 state any basis -- but from my standpoint as I see it,
13 and based on the propositions as presented to me which
14 is your motion to strike, I would overrule your motion
15 as to the other two offenses charged.

16 MR. BARNES: The Court is striking the third
17 indictment which alleges the false pretenses?

18 THE COURT: Right.

19 MR. BARNES: But overruling the motion only
20 on the two arson matters?

21 THE COURT: Right.

22 MR. BARNES: Personal property?

23 THE COURT: Yes. Let me proffer to you all a
24 procedural question. The jury supposedly does not know
25 that what we're now doing at this time is the question

1 of you submitting to the Court this legal question and
2 me making some determination. If I announce to them
3 at this point -- I'm just saying I want to do this
4 the way counsel thinks best -- that I have in their
5 absence reviewed the evidence and struck the evidence
6 as to one of them it may implicate to them I have
7 also reviewed the others and haven't struck it.
8 Therefore I find good cause in one and not in the other.
9 It seems to me that the appropriate method, not to
10 prejudice the case -- and it's something the Court
11 must watch on a motion to strike -- is to let it
12 continue on without any reference to what we've done
13 during this interim and then when we get to the
14 instructions there are no instructions dealing with
15 that particular thing and the Court simply tells
16 them at that point this one issue the Court has taken
17 to itself and you have nothing to do with it; and
18 that way they find they have no basis of knowing what
19 was presented to the Court, what ruling was made on it
20 and why, but particularly they have no way of
21 impugning in this instance that I have considered the
22 evidence to say in one instance there is sufficient
23 evidence and in another there isn't.

24 Now, my method of approaching this thing --
25 and that's why I asked you all -- is not to tell them

1 what I've done obviously, to avoid any prejudice to
2 Mr. Cook.

3 The next question would be -- as I would see it
4 would be to go through and conclude the trial and
5 either at the time that the case is presented to them
6 say there are only two issues for them to decide rather
7 than -- and assuming we get to that -- rather than
8 three; and then we have not said anything about why
9 or what we've done or how we arrived at it.

10 MR. BARNES: This also is a dilemma for the
11 Commonwealth and the defendant. Obviously if I had my
12 wish I'd like for you to tell them that he's --
13 you've struck the evidence on the one and that you
14 think it's close on the others. That would be my
15 preference.

16 MR. ALLISON: That's not the ruling.

17 THE COURT: Let me suggest one other way. I
18 can approach it that there are certain matters that
19 are legal and factual, and I have concluded one of the
20 indictments is within the rule of law and you should
21 not deal with the third issue involved; and they're
22 not going to --

23 MR. BARNES: I would suggest --

24 MR. ALLISON: I like your first suggestion
25 when you said it's part and parcel of the other two

1 and say we're going to proceed on the other two,
2 because that's what the Court --

3 THE COURT: I have to be very careful that I
4 don't say anything to suggest to them --

5 MR. ALLISON: I understand.

6 THE COURT: -- that I have been weighing or
7 balancing the evidence. It's important as I see it
8 that the Court never step into that.

9 MR. BARNES: Would it be appropriate --

10 THE COURT: Probably the third method I
11 suggested would be the -- or the method I suggested
12 first which is to say nothing, not have to get into
13 any evidence on that point, and then when we get down
14 to the instructions I can tell them it's a part of
15 the case I took under myself and they no longer have
16 any issue in that.

17 MR. ALLISON: I don't have any problem. I
18 prefer that nothing is said.

19 MR. BARNES: I prefer nothing be said, but
20 when we get to the instructions --

21 MR. ALLISON: I won't bring an instruction on
22 the third one if you're interested.

23 MR. BARNES: The Court will instruct them
24 there are two charges they have to decide and not
25 explain --

1 THE COURT: I'll separate it as a legal matter.
2 Just simply say that's not for them -- I've taken
3 it under myself and they have nothing else --

4 MR. BARNES: Do we have to say anything other
5 than there are two charges?

6 THE COURT: Well, if there's no instruction to
7 find anybody guilty or not guilty of a certain thing --

8 MR. ALLISON: That's fine. Don't say anything.

9 THE COURT: I don't think they're going to go
10 beyond that, because his argument would deal with only
11 the two. Your argument would deal with only the two.
12 They don't have to know the reason why, but they might
13 think well, for reasons we don't know --

14 MR. BARNES: They might think they misunderstood
15 to begin with?

16 MR. ALLISON: What are we going to do?

17 THE COURT: Just call them back and say that I
18 have -- the Court has also -- as part of the Court's
19 work I have been doing some studying in the matter and
20 we're now ready to proceed.

21 MR. ALLISON: Where are we --

22 MR. BARNES: Your Honor, procedurally, we've
23 got about twenty-five minutes to 5:00. This may alter
24 somewhat what kind of evidence we've put on since we
25 don't have to deal with that third offense. Can we

1 put our first witness on Monday?

2 THE COURT: Monday? As far as I'm concerned.
3 We can't certainly finish --

4 MR. BARNES: We wouldn't be able to finish
5 today at all, and there's another good reason for that.
6 Mr. Barnes.

7 THE COURT: Hugh Barnes?

8 MR. BARNES: Hugh Barnes. I told him he was
9 still on call and so forth. I did talk to him this
10 morning. His wife is having some medical problems,
11 and so I don't think there will be a problem having
12 him here Monday, but it will be difficult to get him
13 here right now.

14 THE COURT: I have no problem. They may wonder
15 what I've been keeping them for, but they'll just have
16 to wonder. Suppose we bring the jury in, recess
17 until 10:00 on Monday?

18 MR. ALLISON: 9:00 or 10:00?

19 THE COURT: 10:00 because I'm sure I'll have
20 morning docket.

21 (At 4:20 p.m. the judge, counsel for both
22 sides, the defendant and the court reporter returned
23 to the courtroom and the following occurred:)

24 (The jury was recalled to the courtroom and
25 the following occurred in the presence of the jury:)

1 THE COURT: Ladies and gentlemen of the jury,
2 after discussions with counsel, we're now ready to
3 proceed with additional evidence in the proceeding, and
4 again noting that it's 4:30 and coming up on 5:00
5 and that obviously we're not going to be able to
6 finish the case today I think I indicated to you
7 it might go over to Monday. Didn't I? So we will
8 continue the case until Monday and start then at
9 10:00 because we just don't see fit to put on just one
10 witness at this time. Better we start out fresh again
11 on Monday.

12 Now, one, two. Saturday and Sunday. Okay.
13 I would reiterate -- I think all of you indicated to
14 me none of you lived in the north end of the beach at
15 such a position you have to go past 65th Street and
16 Atlantic, right? Please do not take a Sunday drive
17 for curiosity sake. Stay away from the scene of
18 this alleged incident.

19 Secondly, guard well your duties as a juror
20 and do not -- do not read, hear or receive any
21 information from any source concerning the trial of
22 this case.

23 You are all intelligent looking people, and
24 intelligent people I would assume above and beyond
25 your jury duties, so I don't have to tell you precisely

1 how to do these things. I'm sure you can use your
2 own judgment to avoid anything that would jeopardize
3 the fair trial of this case.

4 I believe that is all that I have to remind you
5 of before I do recess you.

6 Sometimes it's an open ended thing. I get
7 myself in trouble, but do you have any questions of
8 the Court about the instructions before I release
9 you? Oh, one other final thing. When you do return
10 on Monday do not go to the jury assembly room. Do as
11 you did this morning. Come directly to this courtroom
12 and go into your jury room.

13 All right. You may stand in recess.

14 (The jury was excluded from the courtroom)

15 THE COURT: These briefs you filed with me
16 I have marked filed for the record.

17 MR. BARNES: Is the Court entering a finding --

18 MR. ALLISON: Wait a minute.

19 THE COURT: All right. Anything more from
20 counsel before we -- I think they're all gone.
21 Anything more?

22 MR. BARNES: I just wanted to ask the Court
23 is it entering a judgment in the one count of motion
24 sustained? Case dismissed? Is that correct?

25 THE COURT: It having been presented and gone

1 to the jury my motion is to enter summary judgment of
2 striking. Exactly. You moved me to strike, and I --
3 my indication was you -- I did strike.

4 MR. BARNES: Thank you very much, sir.

5 (The Court adjourned at 4:40 p.m.,
6 December 10, 1982, until 10:00 a.m., December 13, 1982.)
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Pages 261 and 262 including
the Clerk and Reporter's
certificates and captions
are deleted.

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of the transcript
which includes the
style and caption.

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1 (The judge, counsel for both sides, the
2 defendant, and the court reporter retired to chambers
3 where the following occurred:)

4 MR. BARNES: Your Honor, I had an additional
5 point with respect to our motion to strike. Let the
6 record show our client is present in chambers with us
7 at this time, and that was that in addition to the
8 other points we made it would be our position there
9 was no evidence that the building was burned. We have
10 smoke and heat damage, but there was no testimony
11 that the -- actually the structure was burned or
12 charred. I've looked at the photograph, and it shows
13 there was heat damage and that there was smoke damage,
14 but I haven't heard any evidence that there was
15 charring as required in arson cases or a burning of a
16 structure.

17 On that grounds we move to strike the count
18 concerning the burning of the building.

19 THE COURT: All right, sir.

20 MR. BARNES: One of the things concerning me in
21 thinking about this over the weekend, and not making
22 any mention at all, is that Count 2 as it stands does
23 have the word in it defraud.

24 THE COURT: Seems to me I remember that I saw
25 that, too.

1 MR. BARNES: Burning his own personal property
2 with intent to defraud the insurance company. That --
3 Unless the jury is instructed that it's burning of the
4 building that's the fraud, I wouldn't want the other
5 things that have been brought out to be flopping over
6 and concerning --

7 THE COURT: The burning of the building was the
8 fraud? What was that section? Eighteen --

9 MR. ALLISON: Judge, the instructions are going
10 to handle that. They're going to show the different
11 elements, one of them requiring a burning and the
12 other shows -- requires the intent to defraud.

13 THE COURT: Eighteen point -- Which is your
14 second count? 18.2-81 as the second count?

15 "Did maliciously or with intent to defraud an
16 insurance company or other person set fire to or
17 destroy -- or to burn or cause to be burned -- "

18 MR. BARNES: See, that defraud would not go to
19 any questions of claiming property they didn't own or
20 not living at the residence at the time the policy was
21 taken out or any of those others.

22 THE COURT: "-- of any personal property"; and
23 that's what it gets down to. Now, tell me what --
24 Where were you distinguishing here?

25 MR. BARNES: There is evidence in the case at

1 this point that perhaps his residence wasn't there on
2 the 22nd when Mr. Barnes testified the policy was
3 taken out, and I understood that that was considered
4 to be a misrepresentation by the Commonwealth, and
5 that perhaps a sofa was claimed in the claim that
6 wasn't his, and that was considered to be fraudulent
7 by the Commonwealth. At least that's the allegation.

8 This particular count goes to -- the fraud
9 is burning and then collecting the money, not those
10 other two things, and that would not be relevant to
11 any question of fraud when the jury gets to that
12 particular count.

13 THE COURT: Let's assume now -- All right.
14 We've got the three charges, or the three indictments.
15 I struck one. We just forget that. It's gone.

16 MR. BARNES: Right.

17 THE COURT: The particular section he's under
18 is a statutory -- has nothing to do with common-law
19 arson, but this is the burning in effect of personal
20 property with an intent to defraud the insurance
21 company, and that's what the statutory language is.
22 Now, I'm having problems with what you're asking of me.

23 MR. BARNES: Okay. The only way the jury can
24 find him guilty of that is that they believe he burned
25 that personal property.

1 THE COURT: No question. I didn't have any
2 problem with that. The burning is the --

3 MR. BARNES: The fraud.

4 THE COURT: -- the intent to defraud. The
5 other items are evidentiary to go into -- In other
6 words, he can still show -- and I'm arguing the point.
7 Let's assume the policy was never issued at the time
8 or that he wasn't living in the house or that he filed
9 for --

10 MR. BARNES: The sofa.

11 THE COURT: The sofa that wasn't his. These
12 are factual questions for the jury. These are
13 evidentiary items to determine whether that was what
14 the intent was in the ultimate thing, to obtain money
15 from the insurance company for the burning of the
16 property.

17 MR. BARNES: Yes, sir. I didn't want there to
18 be any question that the jury though could say well,
19 we're not sure whether he burned the property or not
20 but that the sofa wasn't his so that's fraud under
21 this, and I don't think they're at liberty to do that
22 under that count.

23 THE COURT: I think the instruction would cover
24 that, and that was that if he burned the property,
25 burned any of the personal property, basically with

1 the intent to obtain money from the insurance company,
2 that that burning was a fraud on the insurance
3 company.

4 Does that answer your question? I mean --

5 MR. BARNES: I think we understand each other,
6 but I think the jury should be instructed at this
7 particular stage that they must find he actually
8 burned that personal property for there to be any
9 fraud.

10 MR. ALLISON: Judge, I think the instruction
11 is going to cover that and his argument is going to
12 cover that.

13 THE COURT: If they don't find there's a
14 burning of the building they're not going to be able
15 to find the other. That's going to precede all the
16 others.

17 MR. BARNES: But, let's suppose they come back
18 and find him not guilty of burning the building and
19 find him guilty of burning his own personal property?

20 THE COURT: I have a lot of problem with that.
21 If there was no building to be burned I think
22 probably -- Let's assume an automobile. There are
23 plenty of cases where they burn the automobile -- no
24 building involved in it. Burn the automobile with
25 intent to get the insurance money to pay off the loan

1 on the car and all that. Now, when you say the two
2 are linked here, it's very hard to see how you can say
3 I've burnt the property but not the building. The
4 jury is going on the proposition that the building was
5 burnt and the property was in it. I don't anticipate
6 that as a problem.

7 If they can't find he burnt the building -- If
8 they say I don't think he burnt the building, then I
9 don't think they're going to say --

10 MR. ALLISON: They may just decide they don't
11 want to send him to the penitentiary for five years.
12 There's all sorts of reasons for them to do something
13 like that.

14 THE COURT: Maybe so. I haven't gone that far
15 down, but what I was saying is like if the automobile
16 is sitting on the side of the street with no building
17 involved then there wouldn't be -- You wouldn't have
18 to burn the garage in order to collect, but in this
19 case since all of the furniture is located in the
20 house that burned it is not logical to me -- unless
21 it's for some reason that Gary said, that there is an
22 option open to them under the -- under the penalty.

23 MR. BARNES: See, that's the point here. There
24 is no option to the jury to find him guilty of one at
25 this point and not the other.

1 MR. ALLISON: Well, you argue that then.

2 THE COURT: As we see it --

3 MR. ALLISON: You say you want him convicted
4 of both or neither.

5 THE COURT: It's not a logical thing to me that
6 they would do that, but I have seen people take the
7 lesser -- the malicious wounding -- We say there needs
8 to be a cutting. You can have mangling all over and
9 they come back with malicious assault because of the
10 circumstances involved.

11 We're wasting too much time here for you-all to
12 research everything. I thought you were really
13 interested about the motion or the things to tell the
14 jury about we had struck that clause, and I leave that
15 up to you-all.

16 MR. ALLISON: I thought we agreed we --

17 THE COURT: We had. I thought that's what we
18 were here to consider. My interest is to protect him.
19 He's innocent until proven guilty.

20 MR. BARNES: I think we would like the jury told
21 that in anything about it. This point I'm getting to,
22 we've got to get these other fraud things out; and I
23 think the only thing to say is that the Court has
24 dismissed that count.

25 THE COURT: Do you want me to do that?

1 MR. BARNES: Yes, sir.

2 MR. ALLISON: I want to know exactly what the
3 wording is going to be. Your wording was previously
4 that you found it was merged with the other count.

5 THE COURT: All right. Gary, you-all are
6 trying to pin me down too close. In my estimation it
7 is merged with it, but it simply is the same thing as
8 he's being tried for the same thing twice.

9 MR. ALLISON: All right.

10 THE COURT: In other words, I'm not having the
11 question of the sofa or of when he took out the policy.
12 It seems to me that the one count covers anything he's
13 charged with, and I'm dismissing it because I don't
14 have the evidence to sustain it.

15 MR. ALLISON: Because you're saying it's merged
16 in the other one?

17 THE COURT: I'm not going to tell the jury.
18 It's on a motion. I find there's a legal basis that
19 there's no basis to sustain it because it's like
20 charging him for the same murder twice and trying to
21 get two verdicts on it; and I'm finding there's only
22 evidence to support one of them at this period of the
23 motion.

24 MR. BARNES: We wouldn't want the Court to say
25 there's evidence to support it.

1 THE COURT: No. I'm not going to tell them I
2 haven't found sufficient evidence on anything for your
3 motion to strike.

4 MR. BARNES: I don't think you have to tell the
5 jury that.

6 THE COURT: Oh, no. That's what I've been
7 trying to stay away from.

8 All right.

9 MR. BARNES: I think it's simply this: --

10 THE COURT: Now, the way I'm going to do it --
11 and I'll try to write it up. That after the jury was
12 sent out I considered the matters from a legal
13 standpoint and have either dismissed Count 3 -- and
14 it's no longer for them to decide, and then go from
15 there.

16 MR. BARNES: The Court has considered --

17 THE COURT: And I've not dismissed the other
18 two, and that's still before them.

19 MR. BARNES: I have dismissed Count 3, so the
20 only cases that they are left to decide are Counts 1
21 and 2. Just that simple?

22 THE COURT: Uh-huh. That's all I'm going to
23 say.

24 MR. ALLISON: Well, Judge, that's what they're
25 requesting. I think there's a problem with it. I

1 would just state that for the Court to state all that
2 is before the jury to decide are Counts 1 and 2 --
3 They don't know what Counts 1, 2 or 3 were.

4 THE COURT: I realize that. But there was a
5 count that he defrauded -- there was three counts he
6 pled not guilty to. One being he defrauded an
7 insurance company, whatever that thing was. That on
8 motion by counsel at the end of the Commonwealth's
9 evidence, I have taken it as a legal matter and
10 decided that there's insufficient evidence to support
11 that, and I have dismissed that. Therefore, it's no
12 longer before them.

13 MR. BARNES: I think we should keep it simply
14 I dismissed that and not go into it, because the
15 presumption would be there is sufficient evidence for
16 the other two.

17 Maybe after the Commonwealth's case was over I
18 have dismissed the third count with reference to
19 defrauding the insurance company, so the only two
20 matters for you left to decide are Counts 1 and 2.

21 MR. ALLISON: Judge, at this point I'm going to
22 put something on the record: that since the defendant
23 is requesting that something be said I would state
24 that whatever is said that the defense will not be
25 able to object to it since it's done at their request,

1 regardless of the wording. It should not be grounds
2 for any error at this point.

3 THE COURT: All right. Got that on the record.

4 MR. BARNES: I heard it.

5 THE COURT: Let's see if I can -- At the
6 conclusion of the Commonwealth's evidence on Friday I
7 dismissed Count 3 which was the count charging him
8 with defrauding the -- so forth. Bring me the --

9 MR. ALLISON: See, we get into another problem.

10 THE COURT: Well, remember your instructions
11 cover the other two. So I don't think you've got any
12 problem with that.

13 MR. ALLISON: Okay.

14 THE COURT: I don't know any simpler way of
15 doing it, and I don't want --

16 MR. ALLISON: I think you should state what
17 they have to consider and not what they don't have to
18 consider.

19 THE COURT: I'll state that the other two
20 counts are still before the jury as an issue to be
21 decided. Is that what you want or don't want?

22 MR. ALLISON: What the Commonwealth is
23 requesting --

24 THE COURT: Or I dismissed one and it leaves
25 two counts?

1 MR. ALLISON: The only thing I'd state is that
2 there are two counts to be decided by this jury. I
3 wouldn't get into the other one at all.

4 THE COURT: Well, I have to show that I've taken
5 from their --

6 MR. ALLISON: You'll do that by the
7 instructions you give them.

8 THE COURT: Well, he's requesting it, and I
9 think he's got a right to do it. I think it's more
10 protective. It hurts you more, because it looks like
11 a finding I found sufficient in one and not sufficient
12 in the other.

13 MR. BARNES: They're not going to understand
14 the reason you dismissed it.

15 THE COURT: No. They're not going to know the
16 reason at all.

17 I dismissed Count 3? Is that it?

18 MR. BARNES: Yes, sir.

19 THE COURT: It really wasn't designated as
20 counts, but --

21 MR. BARNES: The indictment regarding --

22 MR. ALLISON: Is the Court going to state because
23 it was covered in the second count?

24 THE COURT: Unh-unh.

25 MR. ALLISON: Well, that's -- If the Court is

1 going to give a reason for its ruling I think it
2 should be stated with sufficient particularity.

3 THE COURT: I'm not, Gary.

4 MR. ALLISON: All right, sir.

5 Is there going to be any argument to that
6 effect, because --

7 MR. BARNES: I'm not going to argue about it
8 being dismissed in the closing. Not going to make any
9 comment on it. The closest I might come is only thing
10 they have to decide is whether he burnt that building.
11 That's the closest I'll get to it, because in fairness
12 I think you could argue if I did that.

13 MR. ALLISON: That's what -- I just wanted to
14 cover that up front.

15 MR. BARNES: I might say the ownership of the
16 sofa is not an issue.

17 MR. ALLISON: What sofa? You mean Elke's sofa?

18 THE COURT: At the conclusion of the evidence
19 on Friday I reached a decision to dismiss the
20 indictment charging the defendant with obtaining
21 money from Nationwide Insurance Company by fraudulent
22 pretenses. This leaves for your consideration the
23 remaining charges to consider.

24 MR. BARNES: I think that's fine.

25 THE COURT: All right.

1 MR. ALLISON: Judge, I would state what the
2 charges are they are to consider at this point.

3 MR. BARNES: You're going to give them this in
4 the instructions.

5 THE COURT: I was going to defer that to the
6 instructions. I don't want to get too much into
7 restating it. I'm repeating items.

8 MR. ALLISON: What you're eliminating is one of
9 the elements I have to prove in the second count, and
10 I'm concerned because I have to prove, Number One,
11 there was arson and it was done with intent to
12 defraud; and you're saying you're dismissing the count
13 of intent to defraud Nationwide, and that's one of
14 the elements I have to prove in the second count.

15 THE COURT: I think it will work out. You're
16 going to get that in your instructions, Gary, and I
17 feel like we should not jeopardize somebody in trying
18 to do what we're supposed to be doing.

19 MR. BARNES: Will the Court tell them this at
20 the close of all of the evidence?

21 THE COURT: I'm going to tell them as soon as
22 we go out. Isn't that what you wanted?

23 MR. BARNES: Yes, sir. That's fine.

24 THE COURT: After we reconvene them, I'll say
25 I didn't tell them the other day but I'm telling them

1 now. All right?

2 MR. BARNES: Yes, sir.

3 MR. ALLISON: Well --

4 THE COURT: Anything else?

5 MR. ALLISON: If you state one you ought to
6 state what the others are unless you're going to do it
7 at the time of the instructions so they'll know
8 immediately --

9 THE COURT: Maybe I should, but I'm not. I am
10 going to do what I think is safe. The more you talk
11 about it the more you're trying to construct it out,
12 and I think the more safer and appropriate way is like
13 this. Not to emphasize anything I've done.

14 All right.

15 (The judge, counsel for both sides, the
16 defendant and the court reporter returned to the
17 courtroom, and the following occurred:)

18 (The jury was recalled to the courtroom, and
19 the following occurred in the presence of the jury:)

20 THE COURT: Mr. Allison, are you ready to
21 proceed today?

22 MR. ALLISON: Commonwealth is ready.

23 THE COURT: Mr. Barnes?

24 MR. BARNES: Yes, sir, we are.

25 THE COURT: Ladies and gentlemen of the jury --

1 MR. BARNES: We call --

2 THE COURT: Ladies and gentlemen of the jury,
3 at the -- before the conclusion -- before I released
4 you on Friday I had recessed the proceedings in court
5 to take up certain matters. I will inform you at this
6 time that when the proceeding which is before you began
7 there were three charges then pending against the
8 accused.

9 At the conclusion of the evidence on Friday, I
10 reached a decision to dismiss the indictment that
11 charged the defendant with obtaining money from
12 Nationwide Insurance Company by false pretenses.
13 Therefore, this leaves you for your consideration the
14 remaining two charges to consider.

15 Do you have any questions?

16 Hearing none, who would you call?

17 MR. BARNES: We call Hugh Barnes, Your Honor.

18 THE COURT: I should ask since I was requested
19 the other day during the recess, did any of you have
20 any occasion to read, hear or discuss, or was it read
21 or discussed with you, anything concerning this case?

22 Further asked that you not go by 6501 Atlantic
23 Avenue. Did any of you have any problem with
24 following the Court's instructions there?

25 Fine. Thank you.

1 THE BAILIFF: Your Honor, Mr. Barnes was sworn
2 in previously.

3 THE COURT: We'll reswear him because I
4 released him.

5 (The witness was duly sworn.)
6

7 -----oOo-----
8

9 J. HUGH BARNES, called as a witness on behalf of the
10 defendant, having been first duly sworn, was examined and
11 testified as follows:
12

13 DIRECT EXAMINATION
14

15 BY MR. BARNES:

16 Q Mr. Barnes, you testified previously under oath
17 in this case on Thursday of last week; is that correct?

18 A Beg your pardon?

19 Q You testified under oath in this case on
20 Thursday of last week; is that correct?

21 A Yes, sir.

22 Q You previously testified that it was on
23 December 22nd, 1981, that Mr. Cook came to your home for
24 dinner; is that right?

25 A It's possible. It could have been.

1 Q My question to you --

2 A Since you brought it to my attention and I
3 conferred with my wife it was on Thanksgiving Day. Night.
4 Evening.

5 Q Okay. You testified --

6 A The 22nd was the day that I put the property
7 under binder.

8 Q Sir, my question to you was you testified under
9 oath on Thursday it was the 22nd you had dinner; is that
10 correct?

11 A That's what the testimony said.

12 MR. ALLISON: He's just answered the question.
13 He's repeating it again.

14
15 BY MR. BARNES:

16 Q My question was what he testified.

17 THE COURT: Why do you object to it, if you're
18 objecting?

19 MR. ALLISON: He's already asked the question
20 and he's already answered it.

21 THE COURT: I'll overrule.

22
23 BY MR. BARNES:

24 Q I'll restate the question. Last week you
25 testified from that seat that Mr. Cook had dinner at your

1 house on December 22nd; isn't that correct?

2 A I would say yes, that's what I said.

3 Q In fact, Mr. Cook did not have dinner at your
4 house on December 22nd, did he?

5 A He had it Thanksgiving night.

6 Q All right, sir. The answer to that then is no,
7 he didn't have dinner on December 22nd?

8 A Is that what you want me to say? No.

9 Q I want the truth.

10 A He had dinner on Thanksgiving.

11 Q Is that the truth?

12 A Yes.

13 Q That's all I'm asking. When did he have dinner
14 at your house?

15 A Thanksgiving, I believe it was.

16 Q Okay. Who was present at that dinner?

17 A Mr. Cook, Tracy -- I don't even know the name.
18 Teacher that works with my wife -- My wife and I. Four of us.

19 Q All right, sir. And at that dinner,
20 Thanksgiving, you brought up the question of insurance;
21 isn't that correct?

22 A I didn't bring up the question. I just said I
23 was in the insurance business.

24 Q You brought up the subject of insurance?

25 A All right. Then I brought up the subject of

1 insurance.

2 Q Isn't it true that it was discussed in terms of
3 theft insurance?

4 A Whatever we discussed. I would say yes.
5 Renter's policy covers everything.

6 Q Do you recall Ms. Fair bringing up -- being the
7 one who brought up insurance? Tracy Fair?

8 A I can't recall that.

9 Q Do you recall her telling you that the reason
10 she was talking about insurance was that there had been a
11 burglary at her apartment?

12 A I can't remember that.

13 Q You don't remember that? Did Mr. Cook ever
14 come to your house again after Thanksgiving?

15 A No.

16 Q Now, after December 27, the date of the fire in
17 this particular matter, did Mr. Cook call you?

18 A I think he called me prior to that.

19 Q I didn't ask you that, sir. Please answer my
20 question. After the fire, did he call you?

21 A I'm sure he did. He reported the loss.

22 Q So your answer is that he did call you or you
23 don't remember?

24 A I don't remember, but I'm sure he did. He would
25 have called.

1 Q You received a report of the loss somehow?

2 A He brought that -- delivered this loss to me in
3 person.

4 Q All right, sir. Do you recall whether he phoned
5 you or just came by?

6 A Well, I can't remember the phone call, but I do
7 know he came by and brought the loss.

8 Q All right, sir. In fact, were you supposed to
9 issue the binder sometime after Thanksgiving of '81 for
10 Mr. Cook's insurance?

11 A I can't recall it. I issued it on the 22nd.
12 I'm sure I did it at his request.

13 Q Did you ever ask your wife to ask Ms. Fair for
14 Mr. Cook's address so you could issue the binder in the first
15 week of December of 1981?

16 A No, because I had Mr. Cook's card if I wanted to
17 get him. He came by and we discussed it, and I think we even
18 talked about automobile insurance, and I told him I couldn't
19 write him.

20 Q May I see the card you're referring to?

21 A His business card?

22 Q Which card are you referring to, sir?

23 A This one. (Indicating)

24 Q This is the card that refers your recollection
25 about his coming by and talking to you?

1 A I think he left me that card when he came by.

2 Q You think he did? Did he leave it with you?

3 A I printed it myself. I'm sure it's his card--

4 Q Did he leave it in your file with you when he
5 came by with the claim information or at some previous time?

6 A Prior to that -- I'm pretty sure I've been in his
7 presence three times. At dinner, when he brought that card by
8 and wanted the policy, and when he brought the claim in. I
9 believe that's three times I've seen Mr. Cook.

10 Q What was the day you say he came by?

11 A Well, I'm sure it was the 28th, because the loss
12 was on the 27th, and he went to see Mr. John Hooker, and he
13 brings this in. I'm sure this is the legal pad from the
14 attorney's office that Mr. Hooker helped him with the claim
15 information.

16 Q Okay. Did you know Mr. Hooker was his attorney
17 with respect to the claim that Mr. Osmond had filed?

18 A I --

19 Q For rent?

20 A To tell you the truth I didn't know who John
21 Hooker was until a later date.

22 Q All right, sir. Now, back to my question.
23 What date, if you recall, was it that you say Mr. Cook came
24 by your office?

25 A I issued the binder on the 22nd day of

1 December. Here's a copy of the letter, and I'm sure that had
2 to be the date I issued the binder and that's the date -- I'm
3 just -- and that would more or less make sense that that was
4 the date he came back by.

5 Q That makes sense or that's what happened?

6 A I'm sure that's what happened. Best of my
7 knowledge.

8 Q Did you make any notes at all on the day that
9 Mr. Cook was supposed to have come by your office prior to the
10 fire?

11 A No.

12 Q Do you recall testifying last Thursday?

13 A Made notes, you said?

14 Q Yes, sir.

15 A No, sir.

16 Q Do you recall testifying last Thursday?

17 A Yeah.

18 Q Do you recall what your testimony was at that
19 time?

20 A No, I do not.

21 Q Do you recall stating that Mr. -- that your
22 testimony was Mr. Cook had called you on the phone?

23 A Well, I said he either called or came by.

24 MR. ALLISON: I object. This is his witness
25 he has called.

1 THE COURT: I sustain the objection, counsel.

2 MR. BARNES: May we approach the bench, Your
3 Honor?

4 (A side-bar conference was held by the Court
5 with counsel for both sides out of the hearing of the
6 jury and the court reporter.)

7
8 BY MR. BARNES:

9 Q Mr. Barnes, what was your testimony last
10 Thursday with respect to whether Mr. Cook came to your office
11 or made a telephone call to you?

12 A I can't remember. I believe the young lady
13 here, the recorder, could read it back to you.

14 Q Is it your testimony you don't remember what
15 you testified to?

16 A I really can't. I can't remember it. When I
17 came here my wife was in the emergency room, and she was
18 having terrible problems, and I don't even remember being
19 here.

20 Q All right, sir. Did you go to your office
21 Friday morning?

22 A I'm sure I did.

23 MR. ALLISON: Judge, I object. I don't see the
24 relevance of what he did Friday.

25 MR. BARNES: I'll tie it in.

1 MR. ALLISON: Unless he ties it into something --

2 THE COURT: The question is is it inadmissible,
3 and the answer is no, it's not inadmissible, and I
4 overrule the objection.
5

6 BY MR. BARNES:

7 Q Did you go to your office Friday?

8 A I met you there.

9 Q Did you review your file at that time?

10 A I didn't look at it. I gave it to you and let
11 you look at it. I've cooperated with you. Got there at 7:00
12 that morning so you could have the opportunity to review this
13 folder.

14 Q Okay. And we did?

15 A The only thing I can say is Mr. Cook came to my
16 house for dinner. I did write the policy. I issued a binder.
17 I issued the policy. I took his \$56. The company paid the
18 claim. I don't know what else I can do for you.

19 Q I'm not trying to make it difficult for you.
20 Okay. You testified -- Did you testify previously that the
21 policy had been sent to Mr. Cook?

22 A No, I did not. I said a binder had been sent
23 to Mr. Cook.

24 Q Okay. Policy was never sent to Mr. Cook?

25 A No.

1 Q Because the policy was still in your file on
2 Friday?

3 A That's correct.

4 Q And this is it? (Indicating)

5 A You notice the date is January 5th. Uh-huh.
6 That's the policy.

7 Q This is the policy?

8 A Right.

9 Q All right, sir.

10 A Mr. Cook had been paid off prior to that.

11 Q I understand. No policy had been mailed to
12 Mr. Cook prior to December 27th?

13 A Only the binder.

14 Q All right, sir. So if you testified the policy
15 had been sent to him that would be incorrect?

16 MR. ALLISON: He stated he didn't testify to
17 that, Judge.

18 MR. BARNES: I'll withdraw the question.

19 THE COURT: I sustain the objection.

20
21 BY MR. BARNES:

22 Q All right. I'll ask you to look at the policy
23 and tell the ladies and gentlemen of the jury what the
24 coverages are you wrote for Mr. Cook.

25 A Well, the coverage is a renter's policy. It's

1 for \$8,000. It's an all-risk policy. It covers fire, theft,
2 vandalism, and that's basically what an all-risk policy is.

3 Q Does it cover --

4 A Liability.

5 Q -- medical payments?

6 A Medical payments.

7 Q All right, sir. And was a special rider put on
8 this particular policy?

9 A Not particularly, no.

10 Q Would you tell the ladies and gentlemen of the
11 jury if there was a special rider on that policy concerning
12 theft.

13 A The deductible is standard on all tenant
14 policies. \$250 theft deductible.

15 Q On this policy, isn't the deductible \$100 and
16 becomes \$250 when you put the rider on it?

17 A Only for theft, and that's normal. That's the
18 only way we write a tenant policy.

19 Q You increase the deductible for the theft part?

20 A For the theft part.

21 Q All right, sir. Is there another rider on the
22 policy?

23 A Installment premium payments. Yes, sir.

24 Q Yes, sir.

25 A It's compulsory by the state you put that on

1 there.

2 Q People are permitted to pay their policies in
3 installments?

4 A If they so desire they can make two payments.

5 Q But the particular policy for Mr. Cook was never
6 mailed to him; is that right?

7 A Never mailed.

8 Q Do you recall any mention of an oriental rug
9 that Mr. Cook had?

10 A I believe you see that in the binder if you
11 would like to look --

12 MR. ALLISON: Commonwealth would not object to
13 putting that into evidence if you like.

14
15 BY MR. BARNES:

16 Q All right. Would you identify this letter then
17 please.

18 Thank you.

19 Did -- Is this a letter or copy of a letter that
20 was sent?

21 A Copy of a letter binder sent to Mr. Cook at
22 6501 Atlantic Avenue. I was informed that's where he lived.

23 Q All right, sir. And you make reference in the
24 letter to an oriental rug.

25 A That he had discussed.

1 Q Okay. That rug never got covered, did it?

2 A Never did because I never got an appraisal.

3 Q Mr. Cook never got around to having it covered?

4 A That's correct.

5 Q All right, sir. Because he didn't take the time
6 to get it appraised and get you the information?

7 MR. ALLISON: I object to counsel testifying.

8 THE COURT: Sustain the objection.

9 MR. BARNES: All right, sir.

10 I'd like to introduce that as defense exhibit --
11 I believe it would be B, Your Honor.

12 THE COURT: Would you show this to the counsel
13 for the Commonwealth. I don't believe I saw you doing
14 that.

15 MR. BARNES: Okay.

16 (Shown to Mr. Allison)

17 MR. BARNES: Your Honor, when I handed the
18 letter to Mr. Barnes and I asked him to identify it,
19 in the lower right corner about two-thirds of the way
20 down the paper he signed his name. It wasn't on there
21 prior. It's just his identification.

22 THE COURT: All right. And this will be
23 introduced as an exhibit, Defendant's Exhibit B.

24 MR. ALLISON: It was never issued, but go ahead.
25 It doesn't matter to me.

(Marked by the Court as Defendant's Exhibit B)

BY MR. BARNES:

Q One more time. Was that the policy issued for Mr. Cook?

A That's correct.

Q Okay. This policy remained in your file until last Friday?

A That's correct.

MR. BARNES: I move this as Defense Exhibit Number, I believe, C. The letter C. Commonwealth has seen it.

THE COURT: It will be so marked as Defendant's Exhibit C.

(Marked by the Court as Defendant's Exhibit C)

MR. BARNES: Those are all the questions I have. Thank you, Mr. Barnes.

CROSS-EXAMINATION

BY MR. ALLISON:

Q Mr. Barnes, according to this letter -- it's marked as Defendant's Exhibit B. Is that it, Your Honor?

THE COURT: Yes.

1 BY MR. ALLISON:

2 Q That was issued on the 22nd; is that correct?

3 A That's correct.

4 Q Okay. At the defendant's request; is that
5 correct?

6 A I'm sure it's the only reason I would have done
7 it.

8 Q Yes, sir. And you stated this was sent to what
9 address?

10 A 6501 Atlantic Avenue.

11 Q The defendant had not told you he had moved out
12 of that place as of that date, did he?

13 A I don't know that he hasn't yet.

14 Q All right, sir. Your name was on here I think.
15 It was.

16 A J. Hugh --

17 Q It was typed on here?

18 A Right.

19 Q And you just signed it down here for
20 identification; is that right?

21 A Right.

22 Q Okay. Now, there's no doubt in your mind he
23 had only been to your residence one time for dinner; is that
24 correct?

25 A That's correct.

1 Q Okay. But the binder -- You didn't issue the
2 binder until he requested it on the 22nd of December?

3 A To my knowledge.

4 Q Okay. How many days will you issue a binder for
5 before it's cancelled?

6 A Normally ten days unless there's some -- you
7 know, some circumstances that you just can't control.

8 Q Okay. And the ten days was up on January 2nd,
9 and I show you Defendant's Exhibit A, and that's when it was
10 paid, was it not?

11 A Well, he told me prior -- I think he testified
12 he had mailed me a check and then he called me and brought me
13 that check by. I'm sure he had mailed it.

14 Q And five days after the binder was issued at
15 his request the fire occurred; is that correct?

16 A The 27th of December.

17 Q There was a discussion at your house during that
18 dinnertime, but there was no binder requested at that time;
19 is that correct?

20 A We discussed insurance. Now, I can't remember
21 all the details, and I'm sure that if he wanted the binder I
22 could have given it to him that night. I could have written
23 it on the back of a business card. I can't recall, but I do
24 know that the binder was issued the 22nd. I don't know why
25 I would have issued it unless he requested it.

1 Q That's correct.

2 I would have no further questions -- further as
3 to that particular point.

4 And this was the card he gave you? (Indicating)

5 A Yes.

6 MR. ALLISON: Commonwealth would introduce
7 this into evidence, Your Honor.

8 THE COURT: All right. Give me just a minute.

9 This will be 31.

10 (Marked by the Court as Commonwealth's Exhibit
11 Number 31.)

12 THE COURT: All right. The business card has
13 been marked as an exhibit, Commonwealth's Exhibit
14 Number 31.

15
16 BY MR. ALLISON:

17 Q All right. You had stated you had seen him
18 three times, and that was at the dinner --

19 A That's as close as I can recall. Been over a
20 year.

21 Q All right. When were those three times you
22 stated?

23 A At dinner at my house. I believe he stopped by
24 the office, and we talked about the policy; and then when he
25 brought me the -- I think he left the check. I wasn't there

1 the day he brought the check I don't believe. I could have
2 been, but I don't think I was; but he got the check to us in
3 person. I had talked to him on the telephone. Then I saw him
4 on the day of the loss -- when he brought it in the day after
5 the loss.

6 Q Okay.

7 A I've had no problems with Mr. Cook. All I did
8 was issue him a binder, issue him a policy. He paid for it,
9 and we paid him for his loss. I don't know what else I can do.

10 Q Yes, sir.

11 A I have copies of the checks where he's been
12 paid. I have copies of the cancellation.

13 Q We have that in evidence.

14 A All right.

15 MR. ALLISON: I would have nothing else of
16 Mr. Barnes at this point, Judge.

17 THE COURT: All right. Are we finished with
18 Mr. Barnes?

19 MR. BARNES: Yes, sir. Thank you.

20 THE COURT: All right. You may step down, and
21 you are released.

22 THE WITNESS: Am I released this time?

23 THE COURT: Yes, sir.

24 Who would you have next, sir?

25 MR. BARNES: Tracy Fair, Your Honor.

1 THE COURT: Counsel, let me see one of the
2 exhibits I entered there. I don't have it in front of
3 me.

4 THE BAILIFF: Your Honor, I think she's not
5 been sworn.

6 THE COURT: All right.

7 (The witness was duly sworn.)
8

9 -----oOo-----
10

11 TRACY FAIR, called as a witness on behalf of the
12 defendant, having been first duly sworn, was examined and
13 testified as follows:
14

15 DIRECT EXAMINATION
16

17 BY MR. BARNES:

18 Q Would you state your full name, please, for the
19 jury.

20 A Tracy Fair.

21 Q Could you speak up just a little bit so that
22 the jurors at the other end --

23 A Tracy Fair.

24 Q And, Ms. Fair, what is your occupation or
25 profession?

1 A I'm a teacher.

2 Q Okay. Where do you teach?

3 A Brandon Junior High School.

4 Q How long have you taught there?

5 A This is my fifth year.

6 Q Okay. Do you know Mr. and Mrs. J. Hugh Barnes?

7 A Very well.

8 Q How long have you known them?

9 A Six or seven years.

10 Q Okay. Did you have occasion to have dinner
11 with them in the latter part of 1981 with Mr. Cook?

12 A Yes, sir, I did.

13 Q Okay. Where was that dinner held?

14 A At the Barnes's house.

15 Q Okay. Do you know when it was?

16 A Yes, sir. It was Thanksgiving.

17 Q All right. Why do you know -- Why do you
18 recall it was Thanksgiving?

19 A Well, there are several reasons. First of all,
20 we had two Thanksgiving dinner days.

21 Q Who is we?

22 A Mr. Cook and I did.

23 Q Okay.

24 A Second of all, the Barnes and I have always
25 had Thanksgiving dinner together at my home, and they didn't

1 want me to be by myself on Thanksgiving, so they had me there.

2 Q Okay. Had you had Thanksgiving with them the
3 previous Thanksgiving in 1980?

4 A Yes, sir.

5 Q Where was that dinner held?

6 A That dinner was held at my home when I was
7 married.

8 Q Were you married in 1981 for Thanksgiving?

9 A No.

10 Q Did you and Mr. Cook ever have dinner at the
11 Barnes's home after that Thanksgiving night?

12 A No, sir.

13 Q Was the subject of insurance brought up at the
14 Thanksgiving dinner?

15 A Yes, sir.

16 Q Okay. Do you recall who brought it up?

17 A I did.

18 Q What was the reason for bringing it up?

19 A After I left my husband our house was robbed,
20 and I lost a great deal of valuables; and I had just moved
21 into a new townhouse with some other girls, and I had asked
22 Mr. Barnes about getting renter's insurance.

23 Q Okay. Was the subject of insurance discussed
24 also by Mr. Cook that night? Do you recall?

25 A I really can't remember. I -- Mr. Barnes told

1 me that everybody should have renter's insurance, and I -- we
2 mentioned the fact that Mr. Cook also rented, and he said
3 that it was good for everybody to have it.

4 Q Was there ever an inquiry made of you by either
5 Mr. Barnes or Mrs. Barnes --

6 MR. ALLISON: Judge, I object to that.

7 MR. BARNES: Your Honor, I could see --

8 MR. ALLISON: That would be hearsay.

9 MR. BARNES: Your Honor, it would be -- The
10 hearsay is not for the truth of it, but the fact it
11 was done.

12 THE COURT: Ask your question and I'll --

13 MR. BARNES: All right, sir.

14 THE COURT: Sounds like it's going to be a
15 leading question anyway, so --

16 MR. BARNES: All right, sir. I'm trying to
17 phrase it so it won't be.

18
19 BY MR. BARNES:

20 Q Did there ever come an occasion when you had to
21 give Mr. Cook's address to either Mr. or Mrs. Barnes?

22 A Yes, sir.

23 Q And to whom did you give the address?

24 A I gave it to Mrs. Barnes.

25 Q Okay. Do you remember when that was done?

1 A I would say -- I remember because she was at
2 school to see my play, and it was the first week of December
3 last year.

4 Q Did you volunteer to give it to her or did she
5 ask you for it?

6 A She asked me.

7 Q Did she tell you why she was asking?

8 A Because --

9 Q Withdraw that. That would be hearsay, Your
10 Honor. I'm sorry.

11 That's -- Oh, did you see Mr. Cook during the
12 month of December?

13 A Yes, sir.

14 Q Did you see him on December 22nd?

15 A Yes, sir. December 22nd evening, yes.

16 Q What did you and Mr. Cook do that evening?

17 A We went Christmas shopping to buy his mother a
18 present, and then had dinner at my house.

19 Q Why do you remember that night?

20 A Because I flew home the next day for Christmas,
21 and I hadn't been home for Christmas for a long time.

22 Q You-all did not have dinner with Mr. Barnes?

23 A No. We had dinner at my house.

24 MR. BARNES: All right, ma'am. That's all I
25 have.

CROSS-EXAMINATION

BY MR. ALLISON:

Q So you weren't in town December 27, 1981; is that correct?

A No. I was in Nashville.

Q What kind of car did Mr. Cook drive?

A Now?

Q No. At that time. November, December.

A A green Volvo.

Q Was there any -- Was it a station wagon?

A Uh-huh. Yes.

MR. ALLISON: I would have nothing further of this witness.

THE COURT: All right. May she step down to be released?

MR. BARNES: Yes, sir. We have nothing further.

THE COURT: You may step down to be released.

MR. BARNES: Your Honor, we have a matter we'd like to take up with the Court at this time.

THE COURT: All right.

Members of the jury, would you be kind enough to step into your jury room, please.

Before they do, bring me that exhibit that I didn't see.

1 (The jury was excused from the courtroom and
2 the following took place out of the presence of the
3 jury:)

4 THE COURT: All right. Go ahead, sir.

5 MR. BARNES: Your Honor, that would be the
6 evidence for the defendant. We renew our motions to
7 strike. We suggest to the Court that at this time the
8 standard by which the Court views the evidence is now
9 different. I do not believe the Court must give the
10 Commonwealth all the inferences at this stage since
11 we are concluded and are renewing our motions to
12 strike; and I would again point to the evidence that
13 there is no evidence of how this particular fire
14 occurred or that it was of an incendiary nature. That
15 is, intentional.

16 Our briefs cover that particular point. I
17 would like to point out the Ramsey case did not deal
18 with the question of sufficiency of evidence. I know
19 the Court has read that case very carefully. I point
20 to the other cases that we have cited in our brief
21 also. I think the Court only had before it in the
22 Ramsey case the question of the hypothetical, and
23 therefore was not able to get to the question of
24 sufficiency in that case, and I think the principle is
25 well settled the Court does not decide questions not

1 before it or decide unnecessary issues, and since the
2 question of the hypothetical decided the case, the
3 fact the Supreme Court didn't go further and say the
4 evidence was insufficient would not have been in
5 accordance with their practice of not deciding things
6 that weren't before them.

7 Also point out that in felony cases, where the
8 Court reverses felony cases, unless there is some
9 constitutional point or some reason that the
10 Commonwealth could never go forward again, they
11 uniformly remand the cases because the Commonwealth
12 may have more evidence than is before the Court, and
13 the Court does not foreclose the Commonwealth from
14 trying people again where either through the lack of
15 a witness or something of that nature the Commonwealth
16 may have more evidence the second time around. In
17 misdemeanor cases they do reverse and dismiss, but in
18 felony cases they always reverse and remand.

19 I would suggest to the Court that the evidence
20 here is totally devoid of proof beyond a reasonable
21 doubt that this was an incendiary fire, and further,
22 the evidence is totally void that Mr. Cook -- even if
23 the Commonwealth has proved a criminal agent in this
24 case -- was the criminal agent. The evidence is he
25 was there between 8:00 and 8:15. The exhibits show

1 the fire was reported around 9:00, forty-five minutes
2 later. Mr. Cook, the evidence is, was at the Ramada
3 Inn at that time with Mr. Tholand. The fire
4 investigator testified that this was not a slow
5 developing fire. He testified it was fast, which I
6 believe precludes as a hypothesis the fire was set and
7 let smoulder for forty-five minutes and then
8 discovered, because his evidence was this was a quick
9 fire.

10 It was reported originally sighted at 9:00.
11 The fire people were called, or the fire department was
12 called, at 9:18. They got there at 9:22. There is no
13 evidence of who was around that building at that time
14 the fire started.

15 The Commonwealth's evidence is putting in
16 Mr. Cook's statement he was there between 8:00 and
17 8:15, took the key out of the door and put it under
18 the mat. The key wasn't under the mat when the fire
19 department got there. The key was in the door.

20 There's also evidence from Mr. Tholand that
21 many people knew about that key being under the door
22 and Mr. Doolin who was pretty well forced out by
23 cutting off his heat or electricity knew about the key
24 under the door because he lived there.

25 Mr. Mazza whose guns it was the testimony were

1 missing knew the key was under there. There's another
2 principle here. One, presence at the scene of a crime
3 -- even if Mr. Cook was there while somebody set it,
4 he's not guilty, because mere presence at the scene is
5 not evidence. That's one.

6 The other is where there are several
7 possibilities as to the criminal agent all of those
8 must be excluded except the defendant beyond a
9 reasonable doubt before a conviction can be had. Now,
10 at this stage of the evidence what do we have that the
11 Commonwealth can say points the finger beyond a
12 reasonable doubt -- and that's a doubt that is so small
13 that we don't have any problem putting somebody in the
14 penitentiary and taking away their freedom. What do
15 we have?

16 There was a fire. What else do we have?
17 Mr. Cook, the Commonwealth would argue, told the fire
18 investigator at their quick ten-minute meeting the
19 next morning at which the fire investigator did not
20 take any detailed notes -- The fire investigator got
21 on here with no problem at all. No notes, and he
22 testified Mr. Cook said he did not have insurance; and
23 I asked him did he say he didn't have insurance or
24 didn't have an insurance policy, because the evidence
25 is clear he never got a policy before the fire; and

1 the investigator said he didn't write the questions
2 down or the answers, but he's sure he said he didn't
3 have insurance; but he was in a hurry that day. He
4 only had a few minutes to talk to Mr. Cook because he
5 had to be somewhere else.

6 Mr. Cook has told his version to Nationwide
7 Insurance Company, and their agents testified they're
8 not out any money and they've closed their files. He
9 gave the same statement to the fire investigator. He
10 volunteered to go to the fire department to meet him.
11 Not a single thing that he has done would raise the
12 inference of guilt feelings on his part.

13 He permitted a recorded statement to be made by
14 Nationwide Insurance claim adjusters after he had
15 already been paid on the claim. He had been paid on
16 the claim approximately ten days before that, and an
17 investigator from Nationwide called him up and wanted
18 to talk about it, and he agrees to the taped
19 conversation on the phone at which time he tells the
20 agent he knew nothing about how the fire started.

21 He told the agent he was at the scene that
22 night. He went in there to get a bow tie. The same
23 thing he told the investigator from the fire
24 department. Saw no smoke or fire when he left. Same
25 thing he told the fire investigator.

1 If the Commonwealth can grab ahold of what I
2 think they may feel is the two things here -- One, he's
3 got insurance. Well, that can't be enough, otherwise
4 everyone who has insurance when they've got a claim is
5 going to be charged with arson. That's not enough.
6 What do they have left then? They've got perhaps an
7 argument that he said he didn't have insurance, but
8 that is weak at best because the agent or the
9 lieutenant -- I don't believe he was that strong on
10 whether he asked him whether he had a policy or asked
11 him whether he had insurance actually, but even
12 assuming -- Even assuming that Cook in that quick
13 ten-minute interview looked at the fire investigator
14 and said I didn't have insurance at the time, that's
15 not enough.

16 The cases are replete. Suspicion, probability,
17 hypothecation, those sorts of things, are not enough;
18 and I believe at this stage the Court has to look at
19 this as to whether or not there is sufficient
20 evidence that reasonable tryers of fact could conclude
21 beyond a reasonable doubt that there was an
22 intentionally set fire and that Mr. Cook is the one
23 who did it; and I suggest to the Court that the
24 evidence is woefully short on both of those points,
25 and the Supreme Court in the cases we have cited in

1 our briefs seem to have carved out -- because of the
2 fact that arson cases are a bit special -- not only
3 the presumption of innocence -- because we don't know
4 that much about physics and chemistry and all those
5 sorts of things.

6 Certainly we don't know anything in this case
7 because there were no samples taken of what was burnt.
8 No samples taken to see if there is anything that was
9 burned sitting on the sofa. It just isn't here; and
10 I ask the Court not to put Mr. Cook through the
11 torment of having to wait for the jury to come back in
12 this case when the evidence is not sufficient.

13 Our law doesn't require him to have to do that,
14 and it is this law that separates us from the -- from
15 what are the uncivilized ways, at least in our
16 uncivilized countries. I mean this man is presumed
17 innocent, and there is no evidence that rebuts that.
18 That fire is presumed accidental, and there is no
19 evidence that rebuts that.

20 I urge the Court to strike both of those cases
21 because that's the law.

22 THE COURT: Mr. Allison?

23 MR. ALLISON: Your Honor, may it please the
24 Court. The defense forgets about all the facts and
25 factors that led up to the burning itself. Doesn't

1 want the Court to hear about all those items,
2 including Mr. Osmond. There's a history of problems
3 with the rent. The defendant as of the middle of
4 December moved out without having paid his rent. The
5 defense has stipulated that as of December 13th the
6 defendant had already moved out.

7 Yet, on December 17th Mr. Osmond appears and
8 there are boxes and other items that leads him to
9 believe that the defendant is getting ready to skip.
10 He immediately goes down and obtains a distress
11 warrant and attaches the property that's left in the
12 apartment.

13 At that point none of the furniture can be
14 removed by Mr. Cook. So his furniture is sitting there
15 and he can't touch it. He doesn't even have the
16 money to pay his rent. He doesn't have the money to
17 do anything else, and it's obvious that the defendant
18 doesn't have the money to pay for the insurance policy
19 until January 2nd so that he's able to collect.

20 Five days after the claim, Number One; and ten
21 days after the binder is issued. The defendant
22 himself has VEPCO turned off, and then on the 22nd
23 we have insurance issued. A binder is issued on the
24 22nd of December, and the address on that letter is
25 sent to 6501 Atlantic Avenue.

1 Mr. Barnes has already testified he couldn't
2 issue the binder of insurance if the defendant had
3 already moved out on that date. He also would not --
4 as he stated, he would not have issued the binder if
5 he found out there was already a distress warrant
6 issued. If you can't issue the binder, there would be
7 no insurance.

8 The fire occurs that night, and who do we hear
9 from that night? We hear from Claes Tholand, the
10 roommate. He doesn't want to state a specific time
11 the defendant left, but the defendant puts himself
12 there somewhere between 8:00 and 8:15. It's relatively
13 close, and Claes Tholand said he didn't return for
14 forty-five minutes.

15 Yet near the time of his return all of a
16 sudden he hears fire engines, and they comment on it,
17 and they discuss it. At that point the defendant is
18 sitting back at his place at the Ramada Inn.

19 The fire department arrives. They see a couch
20 that's burning. All right. Fahrig said that. That's
21 what he saw burning, and that's what he put out. The
22 arson or fire investigator, Lieutenant Wade, arrives;
23 and what does he observe? That the fire as he stated
24 -- There are two types of fire. Either accidental or
25 incendiary, which is deliberately set.

1 His investigation leads him to rule out all
2 accidental causes, and what are they, and he went
3 through them. He went through the receptacle. At
4 that point he stated he didn't know whether the
5 electricity was on or off. We knew it was off because
6 the defendant had requested it be turned off on
7 December 22nd; and he found only exterior damage,
8 which would mean there was no interior damage. He
9 stated there were no cords or lamps. So he's ruled
10 out all the mechanical problems.

11 He stated as to the weather there was no act of
12 God, no electricity, no lightning or anything of that
13 nature. He ruled out spontaneous combustion because
14 that only occurs naturally, and he gave the example
15 of hay, not man-made materials.

16 He stated it was not a smouldering fire because
17 that would take at least one and a half to two hours
18 to go and the couch would have shown internal damage
19 and the springs would have been melted which
20 eliminates that. So it had to be the surface burning
21 of the couch which exactly is what is consistent with
22 what Lieutenant Fahrig stated happened when he saw
23 the couch on fire.

24 The burning had gone on about twenty minutes
25 the experts stated. The defendant told Southerland,

1 Cary Southerland, from Nationwide that there was no --
2 that he was not smoking in there. Said no, and then he
3 said he didn't believe he was. Twice.

4 There was a pistol found and stereo speakers,
5 and what happened approximately an hour and a half to
6 two hours later while the arson investigator is
7 outside? He sees a green Volvo station wagon that
8 looks suspicious, so what does he do? He runs the
9 plate. Comes back registered to somebody else that he
10 doesn't know. Somebody in Richmond. So he doesn't
11 think anything else about it.

12 We see a key in the door, the defendant's key
13 that was under the mat that he stated he used, and
14 there was no other one under the mat. That was the
15 one that was sitting in the door.

16 On the next day the defendant has his list
17 prepared and presents that to Mr. Barnes. The loss.
18 Five days after he obtains the binder and right around
19 Christmastime, obviously, two days after; and he
20 states that he had gone there to get a bow tie for his
21 New Year's Eve party.

22 When Lieutenant Wade was asking his questions
23 to the defendant, one question was do you have
24 insurance. The answer was no, and he was conclusive
25 as to that. He did not waver one bit.

1 It's not important again how we remember. It's
2 how the jury remembers it and the facts that are before
3 them. The defendant stated to Cary Southerland that
4 he was inside that night, and what was he inside with?
5 A lighter. He struck the lighter because the
6 electricity had been turned off, and he proceeded to
7 get his bow tie and left, and the inference is there,
8 Judge, it's very simple. The defendant was in there
9 with a lighter, and on his way out he set that couch
10 on fire.

11 All accidental probabilities have been
12 eliminated. We have but himself there by his own
13 statements during the time of the fire. All of the
14 times are consistent. We have put him there with his
15 statements to Lieutenant Wade and to Mr. Southerland
16 from Nationwide.

13 17 The evidence at this point shows that he
18 obtained insurance five days, as the letter indicates,
19 five days prior to the insurance -- Excuse me.
20 Obtained insurance five days prior to the fire. He
21 deliberately misled Mr. Barnes in issuing the policy
22 because if the fact were known as Mr. Barnes indicated
23 and testified he wouldn't have issued that binder.

24 The defendant can't touch his furniture. It's
25 worthless to him because he can't pay the money at

1 that point to get it out. The only way his furniture
2 is worth anything to him is if he has insurance on it,
3 it burns, and he collects.

4 The defendant's actions and the Commonwealth's
5 evidence is consistent all the way through. As far
6 as what the defense has put on, we've heard from the
7 defense that Mr. Barnes now remembers that the party
8 that was at his house was on November 22nd or
9 November, whenever Thanksgiving was. That's the only
10 thing that the defense has put on that's rebutted
11 anything. The facts are the same.

12 The Court decides matters of law. The jury
13 decides questions of fact. All that has been
14 presented have been facts, and it's up to the jury to
15 decide the factual issues at hand. Was this fire
16 deliberately set since Lieutenant Wade at this point
17 has eliminated all accidental probabilities, and was
18 the defendant the one that did it; and his conduct
19 all the way through this matter is consistent with
20 his guilt, and we would therefore -- the Commonwealth
21 would ask that the motion be overruled at this point
22 and the ultimate issue go to the jury for factual
23 determination by them.

24 MR. BARNES: Briefly in rebuttal.

25 THE COURT: Mr. Barnes, let me suggest -- I

1 don't want you to outargue yourself at this stage of
2 the proceeding. I have made up my mind on the
3 motion, and I wanted to -- I recognize that the amount
4 of evidence has been put on by the defense hasn't
5 changed the basic evidence. It's changed one strong
6 point. Maybe confirmed it in one strong point, and
7 that was the date that the discussion originally took
8 place, and that, of course, has some bearing to be
9 considered.

10 I'm well familiar, and I assume that any judge
11 certainly sitting on the bench in Virginia should
12 recognize the trauma that the defendant charged with
13 the crime goes through at all stages of the
14 proceeding. Having been a defense lawyer I
15 respectfully state that when the counsel gets a case
16 in which he more firmly believes his client is
17 innocent because -- the more traumatic it is in that
18 situation, and if that were the -- the strong point,
19 and it's a -- that considered with the presumption is
20 something that I think I as the Court -- and I think
21 most judges I've met do consider it -- we don't want
22 to put the defendant through any defense or any
23 position of having to come forward with any defense,
24 if there is good reason for not doing so.

25 Now, I asked Mr. Allison to argue the case. I

1 was pretty well thinking the facts hadn't changed, but
2 I wanted him to argue his points so that I can say to
3 you there is two points of view in this thing as you
4 well can see. You're able enough from what I've seen
5 of you to recognize when there's stronger points and
6 weaker points, and you can feel the weight of those.
7 I don't want to -- sometimes the Court seems to grab
8 ahold of one case and cling to it as if it's the sole
9 life raft, and that is not to say the other cases --
10 and I did not get a chance to look up and read every
11 case you referred to, but I did read some of them.

12 Many of them related to statements regarding
13 codefendants. Certainly not all similar. It seemed
14 to me gauged in time -- because some of yours went
15 back to 87 Virginia, but gauged in time 200 Virginia
16 was one of the later cases on arson. There aren't
17 that many in there. It involved no codefendant. It
18 had an elaborate set of facts, and I agree with you
19 when the Court is looking at one thing -- and their
20 central thrust was this was the wrong question to ask
21 of the expert, and but as I read to you their final
22 statement was there was plenty here for the jury to
23 act upon without having asked that question of the --
24 and seeking the opinion of the expert; and what I
25 was trying to show is that the parallel insofar as

1 the cases on all fours, one was never found, but the
2 parallel of the circumstances involved and no one else
3 present, some basis for doing it, that is motive if
4 we're talking about that.

5 Those were there sufficient enough for me to
6 find a parallel here. As I indicated to you they
7 didn't say in that case -- because in the -- in the
8 generalized law -- I guess we call it Hornbook law --
9 we find in Michie's one of the things we must find
10 is that there was a fire that was started by -- I
11 have forgotten the word again.

12 MR. ALLISON: Incendiary.

13 THE COURT: Incendiary as opposed to
14 accidental, and that's been bothering me right along,
15 but in this case they never say this is what started
16 it. They said these facts are not present.
17 Eliminated some, and that still left the ultimate
18 issue open and the Supreme Court says this is
19 sufficient for the jury to decide.

20 Now, basically what I was getting down to, I
21 didn't want you to think I was relying totally on the
22 Ramsey case, but of the ones I did get to research
23 and read myself and read what you have written, it
24 seems the parallel was closer. That is, is the set of
25 facts sufficient to go to the jury. Well, here we

1 have a set of facts and the question is do they go to
2 the jury?

3 At this stage in the proceeding it's not for me
4 to say -- as you have in similar cases -- it's not
5 for the Court to say the defendant is preponderated.
6 You find there has -- he had sufficient evidence to
7 put the question before the jury. We're not in a
8 civil procedure. We're in a criminal proceeding, and
9 the question that the jury must decide, the guilt or
10 innocence, must be beyond a reasonable doubt; and what
11 do we explain that is?

12 That doesn't mean beyond all doubt, but beyond
13 a reasonable doubt, and we're talking about the doubt
14 in the instructions of what the reasonable person
15 would have in the judgment of his affairs. The
16 answer is that as a matter of law the Court should
17 strike it when there's no doubt. No question in my
18 mind about that, but we have facts that are on both
19 sides.

20 Now, putting a weight on those facts, putting
21 a value on those facts is where the Court draws the
22 line between what it is supposed to do and what the
23 jury is to do, and if there is some basis for a jury
24 to decide that he took out insurance on such and such
25 a day and this is an indication of a motive, that --

1 the weight and value they place upon that is for them
2 to decide under all circumstances, not for the Court
3 to say there is no basis. It's only when there isn't
4 any basis that you find that.

5 So as I see it, the -- respecting his rights
6 not to be placed in a more traumatic position of
7 having the jury have to decide the issue -- and that's
8 why I said I'd let Gary argue, because there is an
9 argument on the other side of this case, and the
10 weight and the balance to be placed on those facts
11 and whether there is -- whether the defendant is
12 responsible beyond a reasonable doubt, that's their
13 province, and it goes beyond the province of the
14 Court to make that final determination if there are
15 facts that can go both ways, and based on these
16 matters we have discussed, I will overrule your
17 motion.

18 Note your exception.

19 MR. BARNES: Yes, sir.

20 THE COURT: I believe now --

21 MR. BARNES: Instructions.

22 THE COURT: Take up instructions. I assume
23 since the jury will wonder what I'm doing, maybe we
24 should bring them out and -- let me just -- It's now
25 eleven -- well, let's say 11:40. Instructions should

1 be not too difficult. We probably could finish by
2 12:15, 12:30. Don't you think?

3 MR. ALLISON: Judge, excuse me. Do you intend
4 to --

5 THE COURT: Unless it is different, I would go
6 with argument and then recess it for lunch. That
7 would be my point, because if I'm correct, we should
8 be finished instructions by 12:15 or 12:30, I think.
9 If that be the case, then that's giving you-all
10 another half hour.

11 MR. BARNES: Could we give the jury the option
12 of getting them sandwiches brought in so they would
13 not be out in the area? They could start deliberating --

14 THE COURT: I respect your question, but we
15 never had any way of -- That's the one thing we
16 haven't considered, bringing in sandwiches. I would
17 rather that we follow the procedure we use here, and
18 we don't have any problem with recessing for lunch.
19 Sometimes I leave and let them start deliberating
20 before, and say I'll call you back in or you let me
21 know when you want to go to lunch.

22 MR. ALLISON: Maybe we should let them go now
23 and be back at 1:00 and they can deliberate right
24 after.

25 THE COURT: That's a good suggestion.

1 11:45. I could do that, and tell them to come
2 back --

3 MR. ALLISON: They're doing something while
4 we're doing something.

5 THE COURT: And I could tell them to come back
6 at what? 1:30?

7 MR. BARNES: And if the Court would admonish
8 them not to talk about the case. Maybe they shouldn't
9 know the evidence is over at this point.

10 MR. ALLISON: It doesn't matter.

11 MR. BARNES: If they think they've heard it all,
12 the irresistible impulse is to start talking about it.

13 THE COURT: You worry about things I don't.
14 I want them thinking about it, but I don't want them
15 making any decisions.

16 MR. BARNES: Or discussing it.

17 THE COURT: All right. Bring them in.

18 I'm going to suggest they come back at 1:30 to
19 give you-all some time.

20 (The jury was recalled to the courtroom, and
21 the following occurred in the presence of the jury:)

22 THE COURT: Ladies and gentlemen of the jury,
23 the evidence has now been presented to you, and the
24 next procedural step to be taken at this time is for
25 the Court to take up its instructions and by take up

1 I mean to determine its instructions that I will give
2 to you concerning the law in this case. Anticipating
3 the time that that takes, anticipating that counsel
4 thereafter probably would want to eat before they
5 start into their argument and you into your
6 deliberations, we have concluded from a time element
7 it probably is best to recess you at this time for
8 lunch and do what you want to do and have you return
9 at 1:30.

10 I realize that's roughly two hours rather than
11 one -- or one hour and forty-five minutes, but we
12 should be finished with instructions and ready to go,
13 and you should be finished with lunch, recognizing we
14 would be determining them at the time you will be
15 recessed for lunch.

16 Now, having so stated, during this time -- and
17 I would reiterate to you an additional instruction,
18 and I gave you -- and I think I gave you this in the
19 opening instructions to you; and that was that you
20 should decide no issue until all the evidence has been
21 presented and until you had had the further
22 instructions of the Court and the final argument of
23 counsel.

24 At this time you've had all the evidence.
25 You've not had the further legal instructions of the

1 Court or the final argument of counsel. So you
2 certainly have a right to think of any of the evidence
3 that you have heard from the witness stand, but I ask
4 you to follow the Court's instruction. Do not reach
5 any decision until you have had the further
6 instructions of the Court and the final argument of
7 counsel.

8 Upon your return from lunch, whenever that may
9 be, please remember what I've stated and told you
10 previously. Come into the courtroom to the front door.
11 Go into your jury room and remain there until we call
12 you out for the further trial of the matter.

13 During the course of time that you're at lunch,
14 do not -- do not discuss the case amongst yourselves
15 nor with anyone, nor remain within the hearing of
16 anyone discussing it.

17 I don't think it's necessary to say this, but
18 do not go by the scene of the alleged offense.

19 Any questions before I recess you for lunch?

20 I should add that you don't have to leave. If
21 you want to stay into -- in the jury room, if you
22 brought your lunch or whatever the case may be, that's
23 your privilege. It's available to you.

24 (The jury was excluded from the courtroom for
25 the luncheon recess.)

1 THE COURT: While they're out, so I can be
2 doing something proceduralwise, we seldom have the
3 court reporter during the argument, but you can make
4 any objections and put those on the record after it's
5 done. Is that all right?

6 MR. BARNES: Yes, sir. That's fine.

7 THE COURT: Suppose we stand in recess then.

8 Mr. Bailiff, we're going to stand in recess.

9 (The trial recessed at 11:47 a.m. At 1:32 p.m.
10 the trial continued as follows:)

11 MR. BARNES: Your Honor, as a precautionary
12 matter, it's my understanding a conversation occurred
13 between Lieutenant Wade and a juror during the recess.
14 I'm trying not to speak so loud. It's my understanding
15 a conversation took place between Lieutenant Wade and
16 one of the jurors during the recess. I'd like to
17 voir dire Lieutenant Wade concerning that.

18 THE COURT: How did that happen?

19 MR. ALLISON: Lieutenant Wade was sitting in
20 here and the juror approached him and asked him a
21 question. He tried to ignore him.

22 THE COURT: All right. Let's bring him
23 forward here.

24 Swear Lieutenant Wade.

25 (The witness was duly sworn.)

1 MR. BARNES: May I approach the witness so my
2 voice won't carry?

3 State your name for the record, please.

4 MR. WADE: Michael W. Wade.

5 MR. BARNES: And are you the same Lieutenant
6 Wade that's testified as a witness for the
7 Commonwealth in this case?

8 MR. WADE: Yes.

9 MR. BARNES: And you're chief investigating
10 officer in this matter?

11 MR. WADE: Yes.

12 MR. BARNES: During our recess break for lunch
13 with the jury, did you have occasion to have any
14 conversation with one of the jurors?

15 MR. WADE: Yes, sir, I did.

16 MR. BARNES: Did you have a conversation with
17 more than one of the jurors?

18 MR. WADE: No, sir.

19 MR. BARNES: Only one juror you talked to?

20 MR. WADE: Yes, sir.

21 MR. BARNES: Was that a male or female?

22 MR. WADE: Male.

23 MR. BARNES: And how did that occur?

24 MR. WADE: I was sitting at the counsel's
25 table looking through one of the state code books,

1 and myself and Lieutenant Fahrig, a member of the fire
2 department were sitting there, and he approached me and
3 asked me if I knew a man by the name of Sam Cobb, a
4 member of the Norfolk Fire Department, which I
5 responded yes.

6 MR. BARNES: Did you say anything else other
7 than the word yes?

8 MR. WADE: He asked me if I knew any other
9 people associated with the Norfolk Fire Department, and
10 I named one or two people, and that was the extent of
11 the conversation.

12 MR. BARNES: Was the file of the Commonwealth
13 open when you approached the table?

14 MR. WADE: No.

15 MR. ALLISON: I had the file.

16 MR. BARNES: You had the file?

17 Anything else?

18 MR. RUPE: No.

19 MR. BARNES: That's all.

20 MR. ALLISON: Was the case discussed in any
21 form or fashion?

22 MR. WADE: No.

23 MR. ALLISON: Did he ask you any questions
24 about the case?

25 MR. WADE: No.

1 MR. ALLISON: Did you mention anything about the
2 case?

3 MR. WADE: No.

4 MR. ALLISON: All right. I would have nothing
5 further, Judge.

6 MR. BARNES: Just one thing. I wanted to put
7 that on the record just in case.

8 THE COURT: I don't blame you, and I guess I'm
9 thinking about Lieutenant Wade, what does he do with
10 himself to stay away from people? Put a hood over
11 himself, I guess. I don't think anybody's violated
12 anything, any restrictions the Court has put on the
13 parties, so I'll ask you to just step down and we'll
14 proceed with the case.

15 MR. BARNES: Your Honor, we reserve the right at
16 this time in the event the jury comes back adversely
17 to voir dire that particular juror.

18 THE COURT: I have no problem.

19 MR. ALLISON: In reference to that, what --

20 THE COURT: Let's just leave it rather than get
21 into it.

22 All right. Now, bring in -- Let me just say to
23 counsel one thing. After argument and before the jury
24 goes to the jury room, and assuming that all of the
25 twelve original are then physically and mentally in

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Pages 330 - 371 of the
trial transcript are deleted.
It includes jury instructions
and closing remarks.

..*

1 room to deliberate on your verdict.

2 Do you have any questions before we do so?

3 Hearing none, would you see the jury to the
4 jury room.

5 Ms. Sturm, you may be excused at this time.

6 THE BAILIFF: Ms. Sturm has her coat in here.

7 THE COURT: All right. Would you go in and
8 get your coat, please.

9 (At 2:52 p.m. the jury retired to the jury
10 room to consider its verdict.)

11 THE COURT: Ms. Sturm, thank you very much.
12 We always find it somewhat a poor duty to have to
13 tell someone at the last minute after they've sat
14 through the thing that no longer are they going to be
15 considered, but it's better than telling you
16 beforehand when you know you're not likely to have
17 the same interest in the matter.

18 MS. STURM: Sure. I understand that.

19 THE COURT: But thirteen -- I guess that may
20 have been on some of your minds, what was the
21 thirteenth member for; but you were selected behind
22 the others, and I say you were selected when the
23 others were not. So thank you for your service, and
24 you may go.

25 (Ms. Sturm was excluded from the courtroom.)

1 THE COURT: All right. Now, ladies and
2 gentlemen, we have -- The jury is out, and we are now
3 -- Do you-all want to -- for your own benefit put on
4 the record what we discussed with respect to the
5 exclusion of the alternate or striking of it?

6 MR. BARNES: Yes. I think in all candor we
7 were relying on statements made by Lieutenant Wade
8 that the case was not discussed and that was the full
9 extent of the comment. The Court offered to us the
10 option of making that particular juror the alternate
11 and dismissing him, and we elected to keep the
12 alternate we had chosen and go with the jury as it was
13 impanelled.

14 Is that accurate?

15 MR. ALLISON: I think what we agreed to do was
16 strike the original individual designated the
17 alternate --

18 THE COURT: If they had any objections to that
19 person? Right. We all understand what we're doing.
20 So we'll stand in recess.

21 (The trial recessed at 2:55 p.m. At 4:52 p.m.
22 the trial continued as follows:)

23 THE COURT: Ladies and gentlemen of the jury,
24 have you reached a verdict?

25 THE FOREMAN: We have, Your Honor.

1 THE COURT: All right, sir. Will you harken to
2 the clerk.

3 Mr. Clerk, will you --

4 THE CLERK: Circuit Court, City of Virginia
5 Beach, term of December, January, '82. Commonwealth
6 of Virginia versus James E. Cook.

7 We the jury find the accused guilty of arson
8 of a dwelling house and fix his punishment at five
9 years imprisonment.

10 Signed R. J. Leydet.

11 THE COURT: What is it?

12 THE CLERK: Leydet.

13 Similar indictment against Commonwealth of
14 Virginia versus James E. Cook.

15 We the jury -- verdict. We the jury find the
16 defendant guilty of arson of personal property and
17 fix his punishment at two years imprisonment.

18 R. J. Leydet.

19 Is this your verdict? So say you all?

20 THE COURT: All right. Mr. Allison, do you
21 have any requests for polling the jury?

22 MR. ALLISON: No, sir, Your Honor. The
23 Commonwealth --

24 MR. BARNES: We have one, Your Honor.

25 THE COURT: Ladies and gentlemen of the jury,

1 on the request for poll of the jury, the question that
2 is propounded to you, ladies and gentlemen, and
3 individually, is this your verdict. So when the clerk
4 asks or calls on your particular name, your response
5 should be yes, it is or no, it is not.

6 You have to do that.

7 THE CLERK: William Kigerl, is this your
8 verdict?

9 MR. KIGERL: Yes.

10 THE COURT: You've got two verdicts there.

11 THE CLERK: Well, read them twice?

12 THE COURT: Right. Pick out the one you want
13 to start with.

14 THE CLERK: Is this your verdict of guilty of
15 arson of personal property?

16 MR. KIGERL: Yes.

17 THE CLERK: And the verdict of the accused
18 guilty of arson of a dwelling house and fix his
19 punishment at five years imprisonment? Is this your
20 verdict?

21 MR. KIGERL: Yes.

22 THE CLERK: Julian Lassiter, is this your
23 verdict that the accused is guilty of arson of
24 personal property?

25 MR. LASSITER: Yes.

1 THE CLERK: And two years imprisonment; and
2 the verdict of guilty of arson of a dwelling house and
3 fix his punishment at five years imprisonment? Is
4 this your verdict?

5 MR. LASSITER: Yes.

6 THE CLERK: Joan Lee, is this your verdict?
7 Guilty of arson of personal property and two years
8 imprisonment?

9 MS. LEE: Yes.

10 THE CLERK: And guilty of arson of a dwelling
11 house and fix his punishment at five years
12 imprisonment?

13 MS. LEE: Yes.

14 THE CLERK: Robert Leydet, is this your verdict?
15 The accused guilty of arson of personal property and
16 fix his punishment at two years?

17 MR. LEYDET: Yes, it is.

18 THE CLERK: The verdict of accused guilty of
19 arson of a dwelling house and affix his punishment at
20 five years? Is this your verdict?

21 MR. LEYDET: Yes, it is.

22 THE CLERK: Carl McClees, Jr., is this your
23 verdict? Guilty of arson of personal property and
24 two years imprisonment?

25 MR. McCLEES: Yes, it is.

1 THE CLERK: And the verdict of guilty of arson
2 of a dwelling house and fix his punishment at five
3 years imprisonment?

4 MR. McCLEES: Yes, it is.

5 THE CLERK: Mary Ann McGrath, is this your
6 verdict? Accused guilty of arson of personal property
7 and two years?

8 MS. McGRATH: Yes, it is.

9 THE CLERK: And the verdict of guilty of arson
10 of a dwelling house and fix his punishment at five
11 years imprisonment? Is this your verdict?

12 MS. McGRATH: Yes, it is.

13 THE CLERK: Josette Keech, is this your
14 verdict? Guilty of arson of personal property and
15 fix his punishment at two years imprisonment?

16 MS. KEECH: Yes.

17 THE CLERK: And verdict of guilty of arson of
18 a dwelling house and fix his punishment at five years
19 imprisonment? Is this your verdict?

20 MS. KEECH: Yes.

21 THE CLERK: Drema Morris, is this your verdict?
22 Guilty of arson of personal property and two years
23 imprisonment?

24 MS. MORRIS: Yes, it is.

25 THE CLERK: And the verdict of guilty of arson

1 of a dwelling house and fix his punishment at five
2 years imprisonment? Is this your verdict?

3 MS. MORRIS: Yes, it is.

4 THE CLERK: Mary Morton, is this your verdict?
5 Accused guilty of arson of personal property and two
6 years imprisonment?

7 MS. MORTON: Yes, it is.

8 THE CLERK: And guilty of arson of the dwelling
9 house and fix his punishment at five years
10 imprisonment?

11 MS. MORTON: Yes, it is.

12 THE CLERK: Mary Sawyer, is this your verdict?
13 Accused guilty of arson of personal property and
14 punishment of two years imprisonment?

15 MS. SAWYER: Yes.

16 THE CLERK: And verdict guilty of arson of a
17 dwelling house and fix his punishment at five years
18 imprisonment? Is this your verdict?

19 MS. SAWYER: Yes.

20 THE CLERK: Gloria Smith, is this your verdict?
21 The accused guilty of arson of personal property and
22 punishment at two years imprisonment?

23 MS. SMITH: Yes, it is.

24 THE CLERK: And the accused guilty of arson of
25 a dwelling house and fix his punishment at five years

1 imprisonment? Is this your verdict?

2 MS. SMITH: Yes.

3 THE CLERK: So say you all?

4 THE COURT: All names called?

5 MS. LEOTTA: No.

6 THE COURT: Your name?

7 MS. LEOTTA: Joyce Leotta.

8 THE CLERK: Did I miss one?

9 MS. LEOTTA: Joyce Leotta.

10 THE CLERK: Oh, yeah. I guess I did.

11 Joyce Leotta, is this your verdict? Guilty of
12 arson of personal property and fix his punishment at
13 two years imprisonment?

14 MS. LEOTTA: Yes, it is.

15 THE CLERK: And verdict guilty of arson of a
16 dwelling house and fix the punishment at five years
17 imprisonment? Is this your verdict?

18 MS. LEOTTA: Yes, it is.

19 THE CLERK: So say you all?

20 THE COURT: Now, I want to just ask -- it's
21 duplicity, but have all your names been called?

22 All right. Do any of you -- Do you have
23 anything further, or do you have any motions?

24 MR. ALLISON: No, sir.

25 THE COURT: Thank you.

1 MR. BARNES: No, Your Honor.

2 THE COURT: Ladies and gentlemen of the jury,
3 that now concludes the work you were called upon to do
4 for the public and the court in this particular
5 matter. The Court will now discharge you from any
6 further duties in this case, and Mr. Bailiff, do you
7 have any further information?

8 THE BAILIFF: We'll call them as we need them.

9 THE COURT: Okay. You're now dismissed.

10 (The jury was excluded from the courtroom.)

11 THE COURT: All right. Motions?

12 MR. BARNES: Your Honor, we move to set the
13 verdict aside as contrary to the law and evidence for
14 the reason we argued on our motion to strike. There
15 was no evidence of an incendiary nature here, and no
16 evidence that the defendant set the fire.

17 On those motions and the reasons in our briefs,
18 we move the Court to set the verdict aside.

19 THE COURT: I'll overrule your motion, and
20 enter a judgment on the jury's verdicts; but I will
21 reserve to myself to go through your briefs again
22 and study them. I can resolve that just as easily
23 at a later time as I can right now.

24 MR. BARNES: Would the Court like to set a time
25 for argument on that?

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Pages 380 - 384 including
the bond hearing are deleted.

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Pages 387 - 388 including
the Clerk and Reporter's
certificate are deleted.

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Page 1 including the
caption is deleted.

* * *

1 (The court reporter was first duly sworn.)

2 THE COURT: All right, gentlemen. Let me
3 bring us up to date in the case.

4 The case came on for trial in December. The
5 case was tried by a jury. The defendant was found
6 guilty, and at that time two charges, one of arson,
7 punishment was fixed at five years, and the second
8 one accused -- rather guilty of the burning of
9 personal property pursuant to the indictment in
10 that matter, and punishment was two years. Thereafter,
11 it was on motion of the Commonwealth presentence
12 report requested. The report has been filed with
13 the Court by Mr. Christie, Probation Officer,
14 bears the date of the 10th of this month, and I
15 received a copy of it yesterday and have read the
16 report.

17 MR. Allison, have you received a copy of the
18 report?

19 MR. ALLISON: Yes, sir, and I have read it.

20 THE COURT: Mr. Barnes, have you and Mr. Rupe
21 received a copy of the report?

22 MR. BARNES: Yes, we did.

23 One other matter, we had asked -- we had
24 made motion to set aside the verdicts in this case,
25 and the Court indicated that he would read the briefs

1 that we had filed in the case. We would ask to
2 argue the matter again today.

3 THE COURT: Yes, I did that, and I would
4 advise you that I have read all the cases to which
5 you have made reference. I think probably picked up
6 a few points on some of the law. Probably that
7 would be the -- well, first of all, let me just find
8 out for the purposes with respect to the report,
9 would you be as far as -- Do you have any desire
10 to question the Probation Officer?

11 MR. BARNES: Just on one or two points,
12 Your Honor.

13 THE COURT: So then, Mr. Christie, you remain.

14 All right. Do you wish to proceed with your
15 argument at this time?

16 MR. BARNES: Yes, sir.

17 THE COURT: All right.

18 MR. BARNES: As the Court I'm sure recalls at
19 the conclusion of the Commonwealth's case, we moved
20 to strike the Commonwealth's evidence on the ground
21 that corpus delicti, the crime of arson had not been
22 proved and that it had not been proved even assuming
23 that particular threshold point that the criminal
24 agency had not been proved for several reasons.
25 The Court overruled that motion at that time. And

1 at the conclusion of the evidence that we put on in
2 the case, we renewed it and renewed our motion by
3 way of set aside the verdicts after the jury had
4 returned. At the time we filed our motion to strike
5 at the conclusion of the Commonwealth's case, we
6 filed with the Court a brief that detailed cases
7 that had been decided by the Supreme Court of
8 Virginia concerning arson. And I refer the Court
9 to the Pryor case, which is on page 2 and discussed
10 in some detail. In that particular case is a
11 barn burning, and the individual charged in that
12 particular case had expressed a revenge motive prior
13 to the setting of the fire, or prior to the fire.
14 There had been an argument between the defendant
15 and the person who owned the barn. There seemed
16 to be plenty of motive in the particular case. And
17 the defendant in that case had even pledged revenge
18 against the person who owned the barn. The fire
19 occurred, and the barn was burned and the defendant's
20 footprints were traced from the barn to his residence
21 the next morning. A jury found in that case guilty,
22 but the Supreme Court stated that -- and I believe
23 we made this point before -- that if the liberty of
24 the citizen, however humble, is to be taken away
25 upon such slender evidence and an infamous offense

* * *

Pages 5 - 36 are deleted
including argument of counsel
and discussion of the Court.

* * *

1 their duty in finding together as a matter of law
2 and as expressed in so many of these cases by the
3 Supreme Court -- maybe Mr. Barnes' testimony was
4 wishy-washy and wobbly, and I would have to concur
5 with you he was, but, unfortunately, or fortunate,
6 what he had to say didn't have a great deal to do
7 with the case one way or the other because it really
8 didn't go to the pertinent part because we know that
9 he did have insurance, that he did make application
10 for it, that it did cover his personal property and
11 that he recovered on it. And they are the things
12 that are essential in that it dissected any basis
13 for motive.

14 I'm of the conclusion, having again listened
15 carefully to both of you and having studied the matter,
16 that the jury decision should be upheld. So I
17 overrule your motion.

18 MR. BARNES: Please note our exception.

19 THE COURT: Now, gentlemen, I think we go
20 to our next step, which would be the request of the
21 hearing, and no one said any different. I assume
22 that we are prepared to go forward with the sentence
23 and hearing.

24 Is that correct?

25 MR. ALLISON: Yes, sir. At this point, I

1 would point to the Court that a finding was deferred
2 at the time of the original hearing for the defense
3 to make its argument on the lack of the sufficiency of
4 the evidence. I would just point that out to the
5 Court that a finding of guilt is necessary at this
6 point.

7 THE COURT: All right. The Court didn't
8 remember, and I appreciate your bringing it to my
9 attention.

10 Based on overruling your motion, the verdict
11 of the jury -- I am upholding the verdict of the
12 jury in the two matters.

13 Now, those of you that are going to testify
14 as witnesses in this case, will you stand for the
15 purpose of being sworn? Anyone that's going to
16 testify.

17 (The witnesses were called up and sworn.)

18 THE COURT: Mr. Christie, will you take
19 the stand, please, sir?

20 (The witness complied.)

21 THE COURT: Let me go over -- Have you had a
22 chance to go over it?

23 MR. BARNES: We have received the report.
24 Mr. Rupe has talked with Mr. Christie. We have
25 reviewed the report with Mr. Cook, and we are prepared

* * *

Pages 39 - 45 including
the pre-sentence report
and argument as to the
defendant's prior criminal
record are delted.

* * *

1 strong reluctance to do it because of the background
2 records that I received on Mr. Cook. But maybe I
3 don't give up hope. Maybe that's why they use the
4 term a con man. Maybe he has conned me. He has
5 been polite during the trial through all the stages.
6 He has showed up when he is supposed to have showed
7 up. These are certainly something to bear some
8 consideration with the Court, and so I'm now prepared
9 to sentence you, Mr. Cook.

10 MR. ALLISON: Your Honor, if the Commonwealth
11 could just say one more thing, that the defendant was
12 given probation previously, at which time the
13 probation was violated and that was revoked also.
14 I would just point that out to the Court.

15 THE COURT: Yes.

16 Mr. Cook, is there anything you would want
17 to say to the Court before I sentence you?

18 THE ACCUSED: I didn't do it. I know I've
19 been in a lot of trouble, but I didn't have anything
20 to do with that fire. I'm thirty-five now, and I've
21 tried to stay out of trouble since I went to jail.
22 And I think I have done a pretty good job of it.
23 I know it's bad. I guess it's because of some
24 leniency, and I know I learned my lesson when I went
25 to prison the last time. I made -- I mean I guess

1 you can tell a little bit about my background and
2 being put in incarceration. The last time I went,
3 I learned. I haven't been in trouble since then.
4 There was something about an assault one night,
5 but that was actually when I was helping -- I was
6 guilty of it. I was defending somebody that was
7 in a restaurant, and I was guilty. I overstepped
8 my bounds. But after that incarceration period in
9 South Carolina, Your Honor, I felt like I had learned
10 my lesson.

11 THE COURT: Mr. Cook, I appreciate your --
12 what you are saying, or you wouldn't be here today
13 if I had anything to do with it. It came through
14 the lawful authorities bringing you before the
15 Court. You have had, to me, not only a fair trial,
16 you have had excellent representation throughout.

17 THE ACCUSED: Yes, sir.

18 THE COURT: And by that, I think you are
19 insured of a fair trial. A jury of your peers has
20 tried the case and found you guilty. Given to my
21 discussion here earlier today of the legal aspects
22 of it, the Court will sentence you on the jury's
23 recommendation of the felony and the finding of
24 five years in the state penitentiary, the Court will
25 sentence you to five years in the state penitentiary.

1 On the second offense, that of the burning of the
2 personal property with intent to defraud, the
3 jury gave you two years penitentiary on that
4 sentence. The Court will modify that sentence and
5 allow that two years to run concurrently with the
6 five previously imposed.

7 MR. BARNES: Thank you, very much, Your Honor.

8 Your Honor, at this stage, would the Court
9 note our continuing objections to the Court's
10 ruling concerning the merits. I would ask the Court
11 to continue Mr. Cook on his present bond pending
12 appeal. He has requested that we appeal concerning
13 the matter of guilt, and I would ask the Court to
14 appoint us to represent him with respect to the
15 appeal.

16 THE COURT: All right. Mr. Barnes, I would
17 say that based on what you have already presented
18 to me in brief and argument, that a good lawyer would
19 appeal because there has been so many appeals on it
20 and so many reversals. I commend you on that.

21 I don't think that the Court can allow the
22 same bond to stand. I would want to hear -- it
23 seems to me that now we are past that point and
24 gotten to sentencing that the bond should be
25 increased. I hope that we can set one that would be

* * *

Pages 49 - 53 including
bond motions and Clerk
and reporter's certificates
are deleted.

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J. Hugh Barnes
P.O. Box 5188
Virginia Beach, VA 23455
454-6846
December 22, 1981

James E. Cooke
6501 Atlantic Ave.
Virginia Beach, VA 23451

Dear Mr. Cooke:

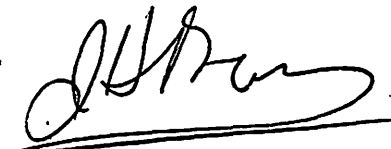
This will serve as a binder on your renters policy, until receipt of an appraisal, for coverage of an oriental rug worth \$8,000.00.

Sincerely,


J. Hugh Barnes

JHB/pme

cc: Mike Clark



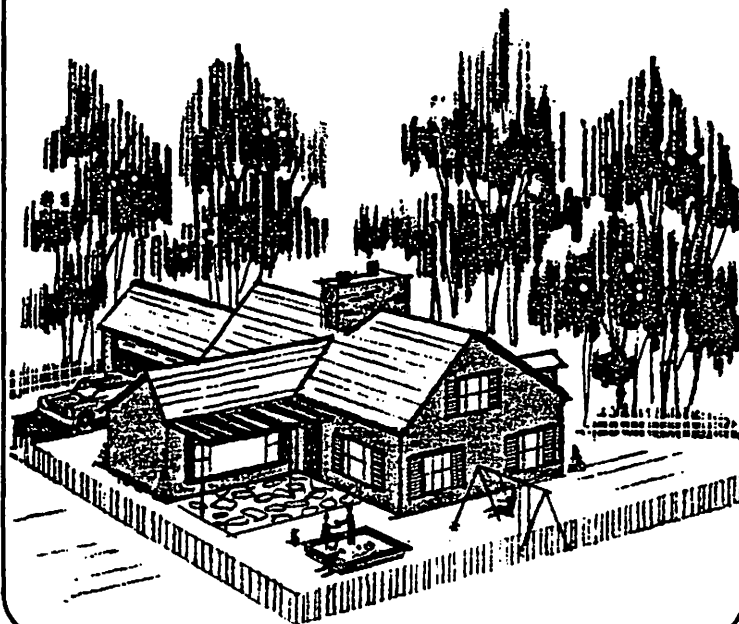
THIS IS YOUR NATIONWIDE HOMEOWNERS POLICY

PLTF DFFD C EXHIBIT

VS
DATES 12/13/82

HOMEOWNERS POLICY

Protecting your possessions against loss from Fire, Windstorm, Theft and other perils...plus claims arising from Legal Liability.



**Thank you
for depending
on Nationwide**

For answers to questions regarding this policy, or for immediate help on claims, call your Nationwide agent:

J. HUGH BARNES
General Insurance Agency
P. O. Box 5188
Virginia Beach, Va. 23455



NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

(herein called this Company)

HOME OFFICE • COLUMBUS, OHIO

Non-Assessable

In Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Premium Herein Specified (or specified in endorsement attached hereto), this Company, for the term shown herein from inception date shown herein (At Noon Standard Time) to expiration date shown herein (At Noon Standard Time) at location of property involved, to an amount not exceeding the amount(s) herein specified, does insure the Insured named in the declarations herein and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND OTHER PERILS INSURED AGAINST IN THIS POLICY INCLUDING REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

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SPECIAL CONDITIONS**CONTINUOUS RENEWAL PLAN —**

If the Declarations indicate this is a Continuous Renewal policy, the following SPECIAL CONDITIONS are hereby made a part of this policy:

CONTINUOUS RENEWAL: Subject to the consent of this Company, and subject to the premiums, rules and forms then in effect for this Company, this policy may be continued in force by payment of the required continuation premium for each successive policy term. Such continuation premium must be paid to the Company prior to the expiration of the then current policy term and if not so paid the policy shall terminate.

With respect to a mortgagee (or trustee) declared under this policy, this insurance will continue in force as to only the interest of the mortgagee (or trustee) for ten (10) days after written notice of termination to the mortgagee (or trustee), and shall then terminate.

All other terms and conditions of the policy remain unchanged.



DATE _____

SIGNATURE _____

GENERAL CONDITIONS

1. EXCLUSION OF LOSS BY GOVERNMENTAL ACTION: Under Section I as respects all perils insured against hereunder (except the perils of fire and lightning which are otherwise provided for on page 4 of this policy), and under Section II, this policy shall not apply to loss, bodily injury or property damage caused directly or indirectly by:

a. hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (1) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (2) by military, naval or air forces; or (3) by an agent of any such government, power, authority or forces, it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such government, power, authority or forces;

b. insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence; seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority; or risks of contraband or illegal transportation or trade.

2. NUCLEAR CLAUSE—SECTION I—(Not Applicable in New York): The word "fire" in this policy is not intended to and does not embrace nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and loss by nuclear reaction or nuclear radiation or radioactive contamination is not intended to be and is not insured against by this policy, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by "fire" or any other perils insured against by this policy, however, subject to the foregoing and all provisions of this policy, direct loss by "fire" resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against by this policy.

3. NUCLEAR EXCLUSION—SECTION I—(Not Applicable in New York): This policy does not insure against loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by any of the perils insured against by this policy; and nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, is not "explosion" or "smoke". This clause applies to all perils insured against hereunder except the perils of fire and lightning, which are otherwise provided for in the Nuclear Clause contained above.

4. NUCLEAR EXCLUSION—SECTION II: This policy does not apply, under Coverage E—Personal Liability, to bodily injury or property damage with respect to which any insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability.

5. MODIFICATION OF TERMS:

a. The provisions on page 4 of this policy relating to uninsurable and excepted property, the exclusion of loss by theft and suspension of insurance are hereby waived.

b. The provisions on page 4 of this policy, other than those pertaining to waiver, cancellation, concealment and fraud and subrogation do not apply to Section II of this policy.

c. The provisions on page 4 of this policy relating to subrogation are not applicable to Coverage F—Medical Payments to Others and Supplementary Coverages—Damage to Property of Others.

d. The words "five days" in the cancellation provision on page 4 of this policy are deleted and the words "ten days" are substituted therefor.

e. The terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.

6. APPORTIONMENT—SECTION I:

a. Loss by fire or other perils not provided for in 6 b. below:

This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this policy than:

(1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; nor

(2) for a greater proportion of any loss than the amount hereby insured bears to all insurance, whether collectible or not, covering in any manner such loss or which would have covered such loss except for the existence of this insurance.

b. Coverage C—Unscheduled Personal Property—Loss by theft or loss of unscheduled personal property covered on an unspecified peril basis: Insurance under this policy shall apply as excess insurance over any other valid and collectible insurance which would apply in the absence of this policy.

c. Deductible: When loss under this policy is subject to a deductible, this Company shall not be liable for more than its share of such loss in excess of the deductible amount as provided in 6 a. or 6 b. above.

7. APPORTIONMENT—SECTION II:

a. Except as provided in 7 b. below if the Insured has other valid and collectible insurance against a loss covered under Coverage E—Personal Liability, this Company shall not be liable under this policy for a greater proportion of such loss than that stated in the applicable following provision:

(1) Contribution by Equal Shares;

If all of such other insurance includes a provision for contribution by equal shares, this Company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid. With respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(2) Contribution by Limits;

If any of such other insurance does not include a provision for contribution by equal shares, this Company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

b. With respect to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any motor vehicle, recreational motor vehicle or watercraft to which this policy applies, this insurance under Coverage E—Personal Liability, shall be excess insurance over any other valid and collectible insurance available to the Insured.

8. DEFINITIONS: (Refer to Section II of the Form made a part of this policy for Additional Definitions).

When used in this policy the following definitions apply:

a. "Insured" means

(1) the Named Insured stated in the Declarations of this policy;

(2) if residents of the Named Insured's household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of any Insured; and

(3) under Coverage E—Personal Liability and Coverage F—Medical Payments to Others:

(a) with respect to animals or watercraft to which this insurance applies, owned by any Insured, any person or organization legally responsible therefor, except a person or organization using or having custody or possession of any such animal or watercraft in the course of his business or without the permission of the owner; and

(b) with respect to any vehicle to which this insurance applies, any employee of any Insured while engaged in the employment of the Insured.

b. "Insured premises" means

(1) the residence premises described in the Declarations of this policy; and

(2) Under Section II only;

(a) any other residence premises specifically named in this policy;

(b) any residence premises acquired by the Named Insured or his spouse during the term of this policy;

(c) any residence premises which are not owned by any Insured but where an Insured may be temporarily residing;

(d) vacant land, other than farm land, owned by or rented to any Insured; and

(e) individual or family cemetery plots or burial vaults.

c. "residence premises" means

(1) a one or two family dwelling building, appurtenant structures, grounds and private approaches thereto; or

(2) that portion of any other building occupied as a residence; provided that such premises is used as a private residence by the Named Insured or his spouse but excluding any portion of the premises used for business purposes.

d. "business" means

(1) a trade, profession or occupation, including farming, and the use of any premises or portion of residence premises for any such purposes; and

(2) the rental or holding for rental of the whole or any portion of the premises by any Insured;

but business shall not include:

(a) the occasional rental or holding for rental of the residence premises for dwelling purposes;

(b) the rental or holding for rental of a portion of the residence premises for dwelling purposes unless for the accommodation of three or more roomers or boarders;

(c) the rental or holding for rental of a portion of the residence premises for private garage purposes; or

(d) the rental or holding for rental of a portion of the residence premises as an office, school or studio.

9. DEATH OF NAMED INSURED: In the event of death of the Named Insured, the definition of "Insured" is modified as follows:

- a. the Named Insured shall mean:
 - (1) the spouse, if a resident of the household at the time of such death; and
 - (2) the legal representative but only with respect to the premises and property of the deceased covered under this policy at the time of such death.
- b. Insured shall also include:
 - (1) any member of the deceased's household who was covered under this policy at the time of such death, but only while a resident of the insured premises; and
 - (2) with respect to the property of the Named Insured, the person having proper

temporary custody thereof, but only until the appointment and qualification of the legal representative.

10. LIBERALIZATION CLAUSE: If within 45 days prior to the inception of this policy, or during the term hereof, this Company adopts any revision of the forms or endorsements made part of this policy which would broaden coverage presently granted hereunder without additional premium charge, such broadened coverage will automatically apply to this policy.

11. POLICY TERM: This policy applies only to loss under Section I or bodily injury or property damage under Section II, which occurs during the policy term.

CONDITIONS APPLICABLE ONLY TO SECTION I

1. PERMISSION GRANTED:

- a. for such use of the premises as is usual or incidental to a dwelling;
- b. for the premises to be vacant or unoccupied without limit of time, except as otherwise provided in this policy for certain specified perils; however, a building in the course of construction shall not be deemed vacant;
- c. for Named Insured to make alterations, additions and repairs, and to complete structures in course of construction;
- d. for Insured, in the event of loss hereunder, to make reasonable repairs, temporary or permanent, provided such repairs are confined solely to the protection of the property from further damage and provided further that the Insured shall keep an accurate record of such repair expenditures. The cost of any such repairs directly attributable to damage by any peril insured against shall be included in determining the amount of loss hereunder. Nothing herein contained is intended to modify the policy requirements applicable in case loss occurs, and in particular the requirement that in case loss occurs the Insured shall protect the property from further damage.

2. OTHER INSURANCE: Other insurance covering the described dwelling building (except insurance against perils not covered by this policy) is not permitted.

3. CONTROL OF PROPERTY: This insurance shall not be prejudiced by any act or neglect of any person, other than an Insured, when such act or neglect is not within the control of any Insured.

4. SUBROGATION: This insurance shall not be invalidated should the Named Insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the property covered herein.

5. NO BENEFIT TO BAILEE: This insurance shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire.

6. PAIR AND SET CLAUSE: If there is loss of an article which is part of a pair or set, the measure of loss shall be a reasonable and fair proportion of the total value of the pair or set, giving consideration to the importance of said article, but such loss shall not be construed to mean total loss of the pair or set.

7. LOSS PAYABLE CLAUSE: Loss, if any, shall be adjusted with the Named Insured and shall be payable to him unless other payee is specifically named hereunder.

CONDITIONS APPLICABLE ONLY TO SECTION II

1. LIMITS OF LIABILITY:

Regardless of the number of:

- a. Insureds under this insurance;
 - b. persons or organizations who sustain bodily injury or property damage;
 - c. claims made or suits brought on account of bodily injury or property damage;
- this Company's liability is limited as follows:

- (1) Coverage E—Personal Liability—The limit of liability stated in the Declarations as applicable to "each occurrence" is the total limit of the Company's liability under Coverage E—Personal Liability for all damages as the result of any one occurrence.
- (2) Coverage F—Medical Payments to Others—The limit of liability stated in the Declarations as applicable to "each person" is the limit of the Company's liability under Coverage F—Medical Payments to Others for all medical expense for bodily injury to any one person as the result of any one accident; but subject to the above provision respecting "each person", the total liability of the Company under Coverage F—Medical Payments to Others for all medical expense for bodily injury to two or more persons as the result of any one accident shall not exceed the limit of liability stated in the Declarations as applicable to "each accident".

2. SEVERABILITY OF INSURANCE: The insurance afforded under Section II applies separately to each Insured against whom claim is made or suit is brought except with respect to this Company's limit of liability.

3. INSURED'S DUTIES IN THE EVENT OF ACCIDENT, OCCURRENCE, CLAIM OR SUIT:

- a. Under Coverage E—Personal Liability and Coverage F—Medical Payments to Others:

(1) In the event of an accident or occurrence, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the Insured to this Company or any of its authorized agents as soon as practicable.

(2) If claim is made or suit is brought against the Insured, the Insured shall immediately forward to this Company every demand, notice, summons or other process received by him or his representative.

(3) The Insured shall cooperate with this Company and, upon this Company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the Insured shall

attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

b. Under Supplementary Coverages—Damage to Property of Others: When loss occurs, the Insured shall give written notice as soon as practicable to this Company or any of its authorized agents and file sworn proof of loss with this Company within sixty days after the occurrence of loss. The Insured shall exhibit the damaged property, if within his control, and cooperate with this Company in all matters pertaining to the loss or claims with respect thereto.

4. INJURED PARTY'S DUTY IN CASE OF ACCIDENT—UNDER COVERAGE F—MEDICAL PAYMENTS TO OTHERS: The injured party or someone on his behalf shall:

- a. give this Company written proof of claim, under oath if required, as soon as practicable;
- b. execute authorizations enabling this Company to obtain copies of medical reports and records, and the injured party shall submit to physical examination by a physician selected by this Company at such times and as often as this Company may reasonably require.

5. PAYMENT OF CLAIM—COVERAGE F—MEDICAL PAYMENTS TO OTHERS: This Company may pay the injured person or any person or organization rendering medical services and the payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of any liability by any Insured or this Company.

6. SUIT AGAINST THIS COMPANY:

- a. No suit or action shall lie against this Company, unless:
 - (1) as a condition precedent thereto there has been full compliance with all of the provisions and stipulations of this policy, and
 - (2) the amount of the Insured's obligation to pay has been finally determined:
 - (a) by judgment against the Insured after actual trial; or
 - (b) by written agreement of the Insured, the claimant and this Company.
- b. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded under this policy.
- c. No person or organization shall have any right under this policy to join the Company as a party to any action against the Insured to determine the Insured's liability. This Company shall not be impleaded.
- d. Bankruptcy or insolvency of the Insured or his estate shall not relieve this Company of its obligations under this policy.

MUTUAL POLICY CONDITIONS

This policy is issued by a Mutual Company, having special regulations, lawfully applicable to its organization, membership, policies or contracts of insurance, of which the following shall apply to, and form a part of this policy.

CONTINGENT LIABILITY.—This policy is non-assessable.

MUTUALITY OF POLICY.—The Insured, by accepting this policy, becomes a member of this Company and shall be entitled to such dividends as may from time to time be declared by the Board of Directors. As a member of the Company, the Insured shall be entitled to one vote at all meetings of the members of the Company. Upon cancellation or other termination of this policy, the Insured shall cease to be a member.

315 DATE OF ANNUAL MEETING.—The annual meeting of the members of the Company shall be held at the Home Office of the Company at Columbus, Ohio, on the first Thursday of April, at the hour of 9:30 A. M.

HOMEOWNERS POLICY

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY (herein called this Company)

Non-Assessable



Page 3

DECLARATIONS

POLICY NO. **53 MP.. 660-321**

*CONTINUOUS RENEWAL ☒

months, from 1-5-82

to 1-5-83

and for successive policy terms as provided under SPECIAL CONDITIONS on page 2 in the policy.

Replacing Policy Number(s)

POLICY TERM: YEARS ☐

NAMED INSURED AND ADDRESS

James E. Cook
6501 Atlantic Avenue
Virginia Beach, Virginia
23451

*Not applicable in North Carolina and Puerto Rico.

Inception (Mo. Day Yr.)

Expiration (Mo. Day Yr.)

ADDITIONAL INSURED AND ADDRESS

NAME OF FIRST MORTGAGEE AND ADDRESS

6501 Atlantic Avenue
Virginia Beach, Virginia

Loan No.

LOCATION OF DESCRIBED PROPERTY (if different from mailing address, inc. County)

Insurance is provided only with respect to the following Coverages for which a limit of liability is specified, subject to all conditions of this policy.

SECTION I

COVERAGES	A. DWELLING	B. APPURTENANT STRUCTURES	C. UNSCHEDULED PERSONAL PROPERTY	D. ADDITIONAL LIVING EXPENSE
LIMIT OF LIABILITY	\$	\$	\$8,000	\$1600

SECTION II

E. PERSONAL LIABILITY (BODILY INJURY & PROPERTY DAMAGE)	F. MEDICAL PAYMENTS TO OTHERS
each occurrence	each person
\$100,000	\$1000
	each accident
	\$25,000.00

OPTIONAL COVERAGES

COVERAGES	SCHEDULED PERSONAL PROPERTY	CREDIT CARD AND DEPOSITORS FORGERY
LIMIT OF LIABILITY	\$	\$

DEDUCTIBLE — SECTION 1: Any loss by perils insured against under Section 1 of this policy is subject to a deductible. Exceptions, if any:

☒ Deductible applicable only to loss caused by the peril of windstorm or hail (Clause No. 1)

☐ Deductible applicable to loss caused by other perils (Clause No. 2).

☐ Deductible not applicable

☐ Special Loss Deductible \$ (Amount) Clause

Deductible applicable to BOATS \$

PREMIUM

BASIC POLICY PREMIUM	Additional Premiums	Total Prepaid Premium	Premium if paid in installments	At Inception	Payable: (and)	At each subsequent anniversary
\$53.00	Theft Extension \$3.00	\$56.00	\$	\$	\$	\$
	CREDIT CARD AND DEPOSITORS FORGERY \$	\$	\$	\$	\$	\$
	Premium for Scheduled Personal Property \$	\$	\$	\$	\$	\$
	Combined Premium \$56.00	\$	\$	\$	\$	\$

FORMS

Form and Endorsements made part of this Policy at time of issue: Insert Number(s) and Edition Date(s)

Form HO-4(5-74)

Endorsement(s) HO-24SSW(3-79), 177(7-69), 281(7-79), 156(10-68), 1746

SECTION II — Additional residence premises, if any, located: (No., Street, Town or City, County, State, Zip Code)

Agency at: **Virginia Beach, Virginia**

Agent & No. **J. Hugh Barnes, 3157**

Countersignature Date **January 6, 1982**

Rating Information Only	Dwelling occupied by <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 families.	Tenant <input checked="" type="checkbox"/>	Deductibles: All Perils \$100.00	Clause No. 1 \$	Clause No. 2 \$	Zone 10	Not more than 1000 feet from Hydrant	Not more than 1 miles from Fire Dept.
Construction of dwelling: <input checked="" type="checkbox"/> Frame	<input type="checkbox"/> Frame with aluminum or plastic siding	<input type="checkbox"/> Brick, Stone or Masonry Veneer	<input type="checkbox"/> Brick, Stone or Masonry	<input type="checkbox"/> Fire Resistive	<input checked="" type="checkbox"/> Ap-proved	<input type="checkbox"/> Roof Un-approved	Prot. Cl. 7	Premium Group No.
Complete when Form HO-4 is made a part of this policy			Southern States			Fire District		
Total Annual Fire and Extended Coverage Rate	Number of Apartments in building	<input checked="" type="checkbox"/> Inside City Limits	<input type="checkbox"/> Inside Protected Suburban Area	<input checked="" type="checkbox"/> Inside Fire District	Virginia Beach 316			

(a) The described dwelling is not seasonal; (b) no business pursuits are conducted on the described premises; (c) the described premises is the only premises where the Named Insured or spouse maintains a residence other than business or farm properties; (d) the Insured has no full time residence employee(s); (e) the Insured has no outboard motor(s)

1050-1E-53 - 1-77-N

MISSOURI: Lines 56 through 67 of Cancellation of Policy shall be superseded by the following:

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled, renewed, reduced in amount, or adversely modified at any time by this Company by giving to the insured a thirty days' written notice of such action with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand.

Only five days notice is required where such action is based upon nonpayment of premium or evidence of incendiarism by the insured.

Lines 141 through 147 of the numbered line provisions are amended to read:

Company's options. Upon partial destruction of, damage to insured property, this Company shall pay the insured a sum of money equal to the damage done or repair the same to the extent of such damage, not exceeding the amount written in the policy, so that said property shall be in as good condition as before the fire, at the option of the insured, pursuant to Section 379.150 RS Mo. 1969.

Includes Standard Fire Insurance Policy for Missouri.

NORTH CAROLINA: The words "twelve months" in line 161 are changed to "three years".

VIRGINIA: The words "twelve months" in line 161 are changed to "two years".

STATE
EXCEP-
TIONS

1 Concealment, This entire policy shall be void if, whether
2 fraud. before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof, or the interest of the insured therein, or in case
6 of any fraud or false swearing by the insured relating thereto.
7 Uninsurable This policy shall not cover accounts, bills,
8 and currency, deeds, evidences of debt, money or
9 excepted property. securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 Perils not This Company shall not be liable for loss by
12 included. fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by mili-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack; (b) invasion; (c) insurrections; (d)
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy; (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this Company be liable for loss by theft.
25 Other Insurance. Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto.
28 Conditions suspending or restricting insurance. Unless other-
29 wise provided in writing added hereto this Company shall
30 not be liable for loss occurring:
31 (a) while the hazard is increased by any means within the con-
32 trol or knowledge of the insured; or
33 (b) while a described building, whether intended for occupancy
34 by owner or tenant, is vacant or unoccupied beyond a period of
35 sixty consecutive days; or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 that event for loss by fire only.
38 Other perils Any other peril to be insured against or sub-
39 or subjects. ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 Added provisions. The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this Company in case of loss, and any other provi-
45 sion or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no pro-
47 vision may be waived except such as by the terms of this policy
48 is subject to change.
49 Waiver No permission affecting this insurance shall
50 provisions. exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this Company relating to appraisal or to any examination
55 provided for herein.
56 Cancellation This policy shall be cancelled at any time
57 of policy. at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above
60 the customary short rates for the expired time. This poli-
61 cy may be cancelled at any time by this Company by giving
62 to the insured a five days' written notice of cancellation with
63 or without tender of the excess of paid premium above the pro
64 rata premium for the expired time, which excess, if not ten-
65 dered, shall be refunded on demand. Notice of cancellation shall
66 state that said excess premium (if not tendered) will be re-
67 funded on demand.
68 Mortgagee If loss hereunder is made payable, in whole
69 interests and or in part, to a designated mortgagee not
70 obligations. named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 cellation.
74 If the insured fails to render proof of loss such mortgagee, upon
75 notice, shall render proof of loss in the form herein specified
76 within sixty (60) days thereafter and shall be subject to the pro-
77 visions hereof relating to appraisal and time of payment and of
78 bringing suit. If this Company shall claim that no liability ex-
79 isted as to the mortgagor or owner, it shall, to the extent of pay-
80 ment of loss to the mortgagee, be subrogated to all the mort-
81 gagee's rights of recovery, but without impairing mortgagee's
82 right to sue; or it may pay off the mortgage debt and require
83 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may
85 be added hereto by agreement in writing.
86 Pro rata liability. This Company shall not be liable for a great
87 er proportion of any loss than the amount
88 hereby insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not
90 Requirements in The insured shall give immediate written
91 case loss occurs. notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, pur-
94 it in the best possible order, furnish a complete inventory of
95 the destroyed, damaged and undamaged property, showing in
96 detail quantities, costs, actual cash value and the amount of loss
97 claimed; and within sixty days after the loss, unless such time
98 is extended in writing by this Company, the insured shall
99 render to this Company, a proof of loss, signed and sworn to by
100 the insured, stating the knowledge and belief of the insured as to
101 the followings: the time and origin of the loss, the interest of the
102 insured and of all others in the property, the actual cash value of
103 each item thereof and the amount of loss thereto, all encum-
104 brances thereon, all other contracts of insurance, whether valid
105 or not, covering any of said property, any changes in the title,
106 use, occupation, location, possession or exposures of said prop-
107 erty since the issuing of this policy, by whom and for what
108 purpose any building herein described and the several parts
109 thereof were occupied at the time of loss and whether or not it
110 then stood on leased ground, and shall furnish a copy of all the
111 descriptions and schedules in all policies and, if required, verified
112 plans and specifications of any building, fixtures or machinery
113 destroyed or damaged. The insured, as often as may be reason-
114 ably required, shall exhibit to any person designated by this
115 Company all that remains of any property herein described, and
116 submit to examinations under oath by any person named by this
117 Company, and subscribe the same; and, as often as may be
118 reasonably required, shall produce for examination all books of
119 account, bills, invoices and other vouchers, or certified copies
120 thereof if originals be lost, at such reasonable time and place as
121 may be designated by this Company or its representative, and
122 shall permit extracts and copies thereof to be made.
123 Appraisal. In case the insured and this Company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then, on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire; and failing for fifteen days to agree upon
130 such umpire, then, on request of the insured or this Company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized, of any two when filed with this Company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.
141 Company's It shall be optional with this Company to
142 options. take all, or any part, of the property at the
143 agreed or appraised value, and also to re-
144 pair, rebuild or replace the property destroyed or damaged with
145 other of like kind and quality within a reasonable time, on giv-
146 ing notice of its intention so to do within thirty days after the
147 receipt of the proof of loss herein required.
148 Abandonment. There can be no abandonment to this Com-
149 pany of any property.
150 When loss The amount of loss for which this Company
151 payable. may be liable shall be payable sixty days
152 after proof of loss, as herein provided, if
153 received by this Company and ascertainment of the loss is made
154 either by agreement between the insured and this Company ex-
155 pressed in writing or by the filing with this Company of an
156 award as herein provided.
157 Suit. No suit or action on this policy for the recovery
158 of any claim shall be sustainable in any
159 court of law or equity unless all the requirements of this policy
160 shall have been complied with, and unless commenced within
161 twelve months next after inception of the loss.
162 Subrogation. This Company may require from the insured
163 an assignment of all right of recovery against
164 any party for loss to the extent that payment therefor is made
165 by this Company.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

M. E. Fitzpatrick
Secretary

John E. Grisher
President

necklaces, bracelets, gems, precious and semi-precious stones, gold, platinum and furs including articles containing fur which represents its principal value;

(5) \$500 in the aggregate on watercraft, including their trailers (whether licensed or not), furnishings, equipment and outboard motors; or

(6) \$500 on trailers, not otherwise provided for, whether licensed or not.

2. Loss Clause: (Not applicable in Alabama and South Carolina) Loss hereunder shall not reduce the applicable limit of liability under this policy.

3. Other Insurance: Other insurance on the property covered hereunder (except insurance against perils not covered by this policy) is not permitted.

4. Unearned Premium Clause — (Applicable only in Alabama and South Carolina): If a loss is paid under this policy, the Named Insured shall be indemnified for loss of the pro rata unearned premium on the amount of such loss payment; however, this Company may elect by written notice within 60 days after time of loss to reinstate this policy in the amount of such loss and, in consideration of such reinstatement, make no payment to the Named Insured as otherwise provided by this clause.

5. Occupancy Clause: It is a condition of this policy that if the described dwelling is associated with and in proximity to farming operations (1) the agricultural products produced on the land are incidental to the occupancy of the dwelling and are principally for home consumption, or (2) that the occupants of the dwelling and buildings appurtenant thereto are not engaged in the operation of the farm and said buildings are in addition to a complete set of farm buildings on the farm and are not exposed within 200 feet by any farm building.

SECTION II COVERAGES

COVERAGE E — PERSONAL LIABILITY

This Company agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence. This Company shall have the right and duty, at its own expense, to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient. This Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of this Company's liability has been exhausted by payment of judgments or settlements.

COVERAGE F — MEDICAL PAYMENTS TO OTHERS

This Company agrees to pay all reasonable medical expenses, incurred within one year from the date of the accident, to or for each person who sustains bodily injury to which this insurance applies caused by an accident, while such person is:

1. on an insured premises with the permission of any Insured; or
2. elsewhere, if such bodily injury
 - a. arises out of a condition in the insured premises or the ways immediately adjoining,
 - b. is caused by the activities of any Insured, or by a residence employee in the course of his employment by any Insured,
 - c. is caused by an animal owned by or in the care of any Insured, or
 - d. is sustained by any residence employee and arises out of and in the course of his employment by any Insured.

EXCLUSIONS

This policy does not apply:

1. Under Coverage E — Personal Liability and Coverage F — Medical Payments to Others:

a. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:

- (1) any aircraft; or
- (2) any motor vehicle owned or operated by, or rented or loaned to any Insured; but this subdivision (2) does not apply to bodily injury or property damage occurring on the residence premises if the motor vehicle is not subject to motor vehicle registration because it is used exclusively on the residence premises or kept in dead storage on the residence premises; or
- (3) any recreational motor vehicle owned by any Insured, if the bodily injury or property damage occurs away from the residence premises; but this subdivision (3) does not apply to golf carts while used for golfing purposes.

This exclusion does not apply to bodily injury to any residence employee arising out of and in the course of his employment by any Insured except while such employee is engaged in the operation or maintenance of aircraft;

b. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any watercraft:

- (1) owned by or rented to any Insured if the watercraft has inboard or inboard-outboard motor power of more than 50 horsepower or is a sailing vessel (with or without auxiliary power) 26 feet or more in overall length; or
- (2) powered by any outboard motor(s), singly or in combination of more than 25 total horsepower, if such outboard motor(s) is owned by any Insured at the inception of this policy and not

endorsed hereon, unless the Insured reports in writing to this Company within 45 days after acquisition his intention to insure the outboard motor or combination of outboard motors, ownership of which was acquired prior to the policy term.

This exclusion does not apply to (a) bodily injury or property damage occurring on the residence premises or (b) bodily injury to any residence employee arising out of and in the course of his employment by any Insured;

c. to bodily injury or property damage arising out of the rendering of or failing to render professional services;

d. to bodily injury or property damage arising out of business pursuits of any Insured except activities therein which are ordinarily incident to non-business pursuits;

e. to bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any Insured; but this exclusion does not apply to bodily injury to any residence employee arising out of and in the course of his employment by any Insured;

f. to bodily injury or property damage which is either expected or intended from the standpoint of the Insured.

2. Under Coverage E — Personal Liability

a. to liability assumed by the Insured under any contract or agreement not in writing or under any contract or agreement in connection with the Insured's business;

b. to bodily injury to any person, including a residence employee, if the Insured has a policy providing workmen's compensation or occupational disease benefits for such bodily injury or if benefits for such bodily injury are in whole or in part either payable or re-

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quired to be provided by the Insured under any workmen's compensation or occupational disease law;

c. to property damage to property owned by the Insured;

d. to property damage to property occupied or used by the Insured or rented to or in the care, custody or control of the Insured or as to which the Insured is for any purpose exercising physical control;

e. to sickness, disease or death resulting therefrom of any residence employee unless written claim is made or suit is brought therefor against the Insured within 36 months after the end of the policy term.

3. Under Coverage F — Medical Payments to Others

SUPPLEMENTARY COVERAGES

1. **Damage to Property of Others:** This Company will, at its option, either pay for the actual cash value of property damaged or destroyed during the policy period by any Insured, or repair or replace such property with other property of like quality and kind, but in no event shall this Company's limit of liability exceed \$250 in any one occurrence.

This coverage does not apply to damage to or destruction of property:

a. caused intentionally by any Insured who has attained the age of 13;

b. owned by or rented to any Insured, any tenant of any Insured or any resident of Named Insured's household;

c. arising out of (1) any act or omission in connection with premises (other than the insured premises) owned, rented or controlled by any Insured, (2) business pursuits or professional services or (3) the ownership, maintenance, operation, use, loading or unloading of any land motor vehicle, trailer or semi-trailer, farm machinery or equipment, aircraft or watercraft;

d. if insurance therefor is provided under Section I of this policy.

2. **Personal Liability Claim Expenses:** This Company will pay:

a. all expenses incurred by this Company and all costs taxed against the Insured in any suit defended by this Company;

b. all premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the Insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but this Company shall have no obligation to apply for or furnish any such bonds;

c. all interest on the entire amount of any judgment which accrues after entry of the judgment and before this Company has paid or

a. to bodily injury to any person, including a residence employee, if any person or organization has a policy providing workmen's compensation or occupational disease benefits for such bodily injury or if benefits for such bodily injury are in whole or in part either payable or required to be provided under any workmen's compensation or occupational disease law;

b. to bodily injury to:

(1) any Insured under parts (1) and (2) of the definition of "Insured";

(2) any person, other than a residence employee, regularly residing on any part of the insured premises, or

(3) any person while on the insured premises because a business is conducted or professional services are rendered thereon.

tendered or deposited in court that part of the judgment which does not exceed the limit of this Company's liability thereon;

d. reasonable expenses incurred by the Insured at this Company's request, including actual loss of earnings (but not loss of other income) not to exceed \$25 per day because of his attendance at hearings or trials at such request.

Any expenses incurred by this Company under this provision shall not reduce the applicable limit of liability.

3. **First Aid Expenses:** In addition to this Company's limit of liability, this Company will pay expenses incurred by the Insured for first aid to others at the time of an accident, for bodily injury to which this insurance applies.

4. **Property In Control of the Insured:** Such insurance as is afforded under Coverage E — Personal Liability, applies to property damage to any insured premises and to house furnishings therein if such property damage arises out of fire, explosion, or smoke or smudge caused by sudden, unusual and faulty operation of any heating or cooking unit. Exclusion 2.d. does not apply to this Supplementary Coverage.

5. **Construction of New Residence:** Such insurance as is afforded under Coverage E — Personal Liability, applies to bodily injury and property damage arising out of any vacant land owned by or rented to any Insured on which a one or two family dwelling is being constructed for use by any Insured as a residence. Such insurance as is afforded under Coverage F — Medical Payments to Others, applies to bodily injury sustained by any person while on such vacant land with the permission of any Insured. This coverage does not apply to bodily injury to any employee, other than a residence employee, of any Insured arising out of and in the course of his employment by any Insured. Exclusion 1.e. does not apply to this Supplementary Coverage.

ADDITIONAL DEFINITIONS

The following definitions apply only to coverage afforded under Section II of this policy.

1. **"bodily injury":** means bodily injury, sickness or disease, including care, loss of services and death resulting therefrom.

2. **"medical expenses":** means expenses for necessary medical, surgical, x-ray, dental services, including prosthetic devices, ambulance, hospital, professional nursing and funeral services.

3. **"motor vehicle":** means a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto) but does not include, except while being towed by or carried on a motor vehicle, any of the following: utility, boat, camp or home trailer, recreational motor vehicle, crawler or farm type tractor, farm implement or, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads.

4. **"property damage":** means injury to or destruction of tangible property, including loss of use thereof.

5. **"occurrence":** means an accident, including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage.

6. **"recreational motor vehicle":** means (1) a golf cart or snowmobile or (2) if not subject to motor vehicle registration, any other land motor vehicle designed for recreational use off public roads.

7. **"residence employee":** means an employee of any Insured whose duties are in connection with the maintenance or use of the insured premises, including the performance of household or domestic services, or who performs elsewhere duties of a similar nature not in connection with any Insured's business.



HOMEOWNERS POLICY — CONTENTS BROAD FORM

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—SW—

SECTION I

DESCRIPTION OF PROPERTY AND INTERESTS COVERED

COVERAGE C — UNSCHEDULED PERSONAL PROPERTY

This policy covers unscheduled personal property usual or incidental to the occupancy of the premises as a dwelling and owned or used by an Insured, while on the described premises and, at the option of the Named Insured, owned by others while on the portion of the premises occupied exclusively by the Insured.

This coverage also includes such unscheduled personal property while elsewhere than on the described premises, anywhere in the world:

1. owned or used by an Insured; or
2. at the option of the Named Insured,
 - a. owned by a guest while in a residence occupied by an Insured; or
 - b. owned by a residence employee while actually engaged in the service of an Insured and while such property is in the physical custody of such residence employee or in a residence occupied by an Insured;
3. but the limit of this Company's liability for the unscheduled personal property away from the premises shall be an additional amount of insurance equal to 10% of the amount specified for Coverage C, but in no event less than \$1,000.

This coverage excludes:

1. animals, birds or fish;
2. motorized vehicles, except such vehicles pertaining to the service of the premises and not licensed for road use;
3. aircraft;
4. property of roomers and boarders not related to the Insured;
5. property carried or held as samples or for sale or for delivery after sale;
6. property rented or held for rental to others by the Insured, except property contained in that portion of the described premises cus-

tomarily occupied exclusively by the Insured and occasionally rented to others or property of the Insured in that portion of the described dwelling occupied by roomers or boarders;

7. business property while away from the described premises;
8. any device or instrument for the recording, reproduction or recording and reproduction of sound which may be operated by power from the electrical system of a motor vehicle, or any tape, wire, record disc or other medium for use with any such device or instrument while any of said property is in or upon a motor vehicle; or
9. property which is separately described and specifically insured in whole or in part by this or any other insurance.

COVERAGE D — ADDITIONAL LIVING EXPENSE

If loss or damage by a peril insured against under this policy to property covered hereunder or to the building containing such property renders the premises untenable, this policy covers the necessary increase in living expense incurred by the Named Insured to continue as nearly as practicable the normal standard of living of the Named Insured's household for not exceeding the period of time required:

1. to repair or replace such damaged or destroyed property as soon as possible; or
2. for the Named Insured's household to become settled in permanent quarters; whichever is less.

This coverage also includes the period of time, not exceeding two weeks, while access to the premises is prohibited by order of civil authority, as a direct result of damage to neighboring premises by a peril insured against.

The period described above shall not be limited by the expiration of this policy.

This coverage excludes expense due to cancellation of any lease, or any written or oral agreement.

SUPPLEMENTARY COVERAGES

The following supplementary coverages shall not increase the applicable limit of liability under this policy:

1. **Automatic Removal:** If, during the term of this policy, the Named Insured removes unscheduled personal property covered under Coverage C from the premises to another location within the Continental United States or the State of Hawaii, to be occupied as his principal residence, the limit of liability for Coverage C shall apply at each location in the proportion that the value at each location bears to the total value of all such property covered under Coverage C. Property in transit shall be subject to the limit of liability for unscheduled personal property away from the premises.

This coverage shall apply only for a period of 30 days from the date removal commences and shall then cease.

2. **Building Additions and Alterations** — Applicable only if the Insured is not the owner of the premises. This policy covers under Coverage C, building additions and alterations, defined as fixtures, alterations, installations or additions comprising a part of the described building, only when situated within that portion of the premises used exclusively by the Named Insured, and made or acquired at the expense of the

Named Insured for an amount not exceeding 10% of the limit of liability applicable to Coverage C.

3. **Debris Removal:** This policy covers expenses incurred in the removal of all debris of the property covered hereunder, occasioned by loss thereto for which coverage is afforded.

4. **Fire Department Service Charge:** This policy covers for an amount not exceeding \$250 the Named Insured's liability, assumed by contract or agreement for fire department charges where fire department is called because of a fire in, on or exposing property insured hereunder, while located on the premises described. This coverage does not cover Named Insured's liability, by contract or otherwise, to indemnify either a city, municipality or fire protection district, or any other person, firm or corporation against loss, claim or liability arising by reasons of the movement or functioning of fire apparatus or members of a fire department; or by reason of any accident arising out of the performance of services by any fire department. Coverage afforded under this clause applies only if the property is not located within the limits of the city, municipality or fire protection district furnishing such fire department response.

DEDUCTIBLE

Loss Deductible Clause: With respect to loss covered under this policy, this Company shall be liable only when such loss in each occurrence exceeds \$100 and then only for the amount of such excess.

This loss deductible clause shall not apply to Coverage D — Additional Living Expense or Fire Department Service Charge.

PERILS INSURED AGAINST

This policy insures against direct loss to the property covered by the following perils as defined and limited herein:

1. **Fire or Lightning.**
2. **Removal,** meaning direct loss by removal of the property covered hereunder from premises endangered by the perils insured against. The applicable limit of liability, had the property not been removed, applies pro rata for 30 days at each proper place to which any of the property shall necessarily be removed for preservation from or for repair of damages caused by the perils insured against.
3. **Windstorm or Hail, excluding loss:**
 - a. caused directly or indirectly by frost or cold weather or ice (other than hail), snow or sleet, all whether driven by wind or not;
 - b. caused by rain, snow, sand or dust, all whether driven by wind or

not, unless the building containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then this Company shall be liable for loss to the property covered therein caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail; or

c. to watercraft (except rowboats and canoes on premises) including their trailers, furnishings, equipment and outboard motors while such property is not inside fully enclosed buildings.

d. to the following property unless liability therefor is assumed by endorsement hereon: (1) awnings including their supports; (2) fences; (3) seawall, property line and similar walls; (4) greenhouses, hot-houses, slathouses, trellises, pergolas, cabanas and outdoor equipment pertaining to the service of the premises; (5) wharves, docks, piers,

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boathouses, bulkheads or other structures located over or partially over water and the property therein or thereon.

4. Explosion.

5. Riot or Civil Commotion, including direct loss from pillage and looting occurring during and at the immediate place of a riot or civil commotion.

6. Aircraft, including self-propelled missiles and spacecraft.

7. Vehicles.

8. Sudden and accidental damage from smoke, other than smoke from agricultural smudging or industrial operations.

9. Vandalism or Malicious Mischief, meaning only the wilful and malicious damage to or destruction of the property covered.

10. Theft, meaning any act of stealing or attempt thereat, including loss of property from a known place under circumstances when a probability of theft exists.

Unscheduled personal property contained in any bank, trust or safe deposit company, public warehouse or occupied dwelling not owned or occupied by or rented to an Insured in which the property covered has been placed for safekeeping shall be considered as being on the described premises.

Upon knowledge of loss under this peril or of an occurrence which may give rise to a claim for such loss, the Insured shall give immediate notice to this Company or its authorized agents and also to the police.

a. General Theft Exclusions:

This policy does not apply to loss:

- (1) if committed by an Insured;
- (2) in or to a dwelling under construction or of materials or supplies therefor until completed and occupied;
- (3) arising out of or resulting from the theft of any credit card or loss by forgery or alterations of any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain in money; or
- (4) of a precious or semi-precious stone from its setting.

b. Theft Exclusions applicable while the described dwelling is rented to others:

This policy does not apply to loss from the described dwelling while the portion of the described dwelling customarily occupied exclusively by an Insured is rented to others:

- (1) of money, bullion, numismatic property or bank notes;
- (2) of securities, accounts, bills, deeds, evidences of debt, letters of credit, notes other than bank notes, passports, railroad and other tickets or stamps, including philatelic property;
- (3) of jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones; articles of gold and platinum; or any article of fur or article containing fur which represents its principal value; or
- (4) caused by a tenant, his employees or members of his household while renting the portion of the described dwelling customarily occupied exclusively by an Insured.

ADDITIONAL EXCLUSIONS

This policy does not insure against loss:

1. occasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair, or demolition of building(s) or structure(s) unless such liability is otherwise specifically assumed by endorsement hereon;
2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting; unless loss by fire or explosion ensues, and this company shall then be liable only for such ensuing loss, but this exclusion does not apply to loss by theft;
3. caused by, resulting from, contributed to or aggravated by any of the following:

- a. flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;

b. water which backs up through sewers or drains; or

c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss, but these exclusions do not apply to loss by theft;

4. caused by or resulting from power, heating or cooling failure, unless such failure results from physical damage to power, heating or cooling equipment situated on the premises, caused by a peril insured against.

ADDITIONAL CONDITIONS

1. Special Limits of Liability on Certain Property:

a. This Company shall be liable for loss to trees, shrubs, plants and lawns (except those grown for business purposes) only when the loss is caused by fire, lightning, explosion, riot, civil commotion, vandalism, malicious mischief, theft, aircraft, or vehicles not owned or operated by an occupant of the premises. This Company's liability for loss in any one occurrence under this provision shall not exceed in the aggregate for all such property 10% of the limit of liability of Coverage C nor more than \$250 on any one tree, shrub or plant, including expense incurred for removing debris thereof.

b. Under Coverage C, this Company shall not be liable for loss in any one occurrence with respect to the following property for more than:

- (1) \$100 in the aggregate on money, bullion, numismatic property and bank notes;
- (2) \$500 in the aggregate on securities, accounts, bills, deeds, evidences of debt, letters of credit, notes other than bank notes, passports, railroad and other tickets or stamps, including philatelic property;
- (3) \$1,000 on manuscripts;
- (4) \$500 in the aggregate for loss by theft of jewelry, watches,



ADDITIONAL POLICY CONDITIONS MANDATORY ENDORSEMENT

It is agreed that the following provisions apply with respect to the insurance afforded under this policy.

A. Under GENERAL CONDITIONS

8. Definitions: Paragraph b. "insured premises" is amended to read as follows:

b. "insured premises" means

- (1) the residence premises described in the Declarations of this policy, and
- (2) Under Section II only:
 - (a) any other residence premises specifically named in this policy;
 - (b) all other premises and private approaches thereto for use of the Named Insured or his spouse in connection with the residence premises;
 - (c) any residence premises acquired by the Named Insured or his spouse during the term of this policy;
 - (d) any premises which are not owned by any Insured but where an Insured may be temporarily residing;
 - (e) vacant land, other than farm land, owned by or rented to any Insured; and
 - (f) individual or family cemetery plots or burial vaults.

B. Under PERILS INSURED AGAINST—Form HO-1, HO-2, HO-3, HO-4 or HO-6 only.

Under the peril of Theft, the Exclusion applicable to property away from the described premises Exclusion c. (1) is amended to read as follows:

This policy does not apply to loss away from the described premises of:

- (1) property while in any dwelling or premises thereof, owned, rented or occupied by an Insured except while an Insured is temporarily residing therein; however, property of a student who is an Insured is covered while at a residence away from home if the student has been at that residence at any time during the 45 days immediately before the loss.

C. Under WINDSTORM OR HAIL

Under Forms HO-1, HO-2, HO-4 and HO-6 under Perils Insured Against, Peril 3, Windstorm or Hail subparagraph d.
Under Form HO-3 under Additional Exclusions, Paragraph 7
Under Form HO-5 under Additional Exclusions, Paragraph 8
is deleted and replaced by the following:

to the following property unless liability therefor is assumed by endorsement hereon: (1) any overhead structure (including its supports and screening), whether attached to a building or not, whose rooflike cover is constructed principally of cloth, metal, fiberglass or plastic, which has been erected to provide protection from the elements for windows, doors, stoops, steps, walkways, patios, carports and other dining and/or recreational areas; (2) fences; (3) seawall, property line and similar walls; (4) greenhouses, hothouses, slathouses, trellises, pergolas, cabanas and outdoor equipment pertaining to the service of the premises; (5) wharves, docks, piers, boathouses, bulkheads or other structures located over or partially over water and the property therein or thereon.

D. Under ADDITIONAL EXCLUSIONS

The following exclusion under Additional Exclusions:

Forms HO-1, HO-2, HO-4 and HO-6—Exclusion 1
Form HO-3—Exclusion 4
Form HO-5—Exclusion 6

is hereby deleted and the following substituted:

This policy does not insure against loss:

occasioned directly or indirectly by enforcement of any ordinance or law regulating the construction, repair or demolition of building(s) or structure(s) unless such liability is otherwise specifically assumed by endorsement hereon. However, this policy does cover the replacement of damaged glass, constituting a part of the building covered herein, with safety glazing material where required by any ordinance or law.

The following exclusion under Additional Exclusions:

Forms HO-1, HO-2, HO-4 and HO-6—Exclusion 4
Form HO-3—Exclusion 6
Form HO-5—Exclusion 7

is hereby deleted and the following substituted:



\$250 SPECIAL THEFT LOSS DEDUCTIBLE CLAUSE

(Form HO-1, HO-2, HO-3 or HO-4 Only — Section 1)

HO-177
(Ed. 7-69)

In consideration of a premium credit, with respect only to loss by theft of property covered under Coverage C of this policy, the following Loss Deductible Clause is substituted for any other Loss Deductible Clause which may form a part of this policy:

SPECIAL THEFT DEDUCTIBLE

Loss Deductible Clause: With respect to loss by theft of property covered under Coverage C of this policy, each claim shall be adjusted separately and from the amount of each such adjusted claim or the applicable limit of liability, whichever is less, the sum of \$250 shall be deducted.

6501 Atlantic Ave.

Virginia Beach, Virginia 23451

HO-177
(Ed. 7-69)



**VIRGINIA
AMENDATORY ENDORSEMENT**

**HO-281/IL 01 12
(Ed. 07 79)**

The numbered line provisions of this policy are replaced by the following:

- 1 Concealment, This entire policy shall be void if, whether
2 Fraud, before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof, or the interest of the insured therein, or in case
6 of any fraud or false swearing by the insured relating thereto.
7 Uninsurable This policy shall not cover accounts, bills,
8 and currency, deeds, evidences of debt, money or
9 excepted property. securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 Perils not This Company shall not be liable for loss by
12 included. fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by mili-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack; (b) invasion; (c) insurrection; (d)
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy; (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this Company be liable for loss by theft.
25 Other Insurance. Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto.
28 Conditions suspending or restricting insurance. Unless other-
29 wise provided in writing added hereto this Company shall not
30 be liable for loss occurring
31 (a) while the hazard is increased by any means within the con-
32 trol or knowledge of the insured; or
33 (b) while a described building, whether intended for occupancy
34 by owner or tenant, is vacant or unoccupied beyond a period of
35 sixty consecutive days; or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 that event for loss by fire only.
38 Other perils Any other peril to be insured against or sub-
39 or subjects. ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 Added provisions. The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this Company in case of loss, and any other pro-
45 vision or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no pro-
47 vision may be waived except such as by the terms of this policy
48 is subject to change.
49 Waiver No permission affecting this insurance shall
50 provisions. exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this Company relating to appraisal or to any examination
55 provided for herein.
56 Cancellation This policy shall be cancelled at any time
57 of policy. at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above
60 the customary short rates for the expired time. This pol-
61 icy may be cancelled at any time by this Company by giving
62 to the insured a five days' written notice of cancellation with
63 or without tender of the excess of paid premium above the pro
64 rata premium for the expired time, which excess, if not ten-
65 dered, shall be refunded on demand. Notice of cancellation shall
66 state that said excess premium (if not tendered) will be re-
67 funded on demand.
68 Mortgagee If loss hereunder is made payable in whole
69 interests and or in part, to a designated mortgagee not
70 obligations. named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 cellation.
74 If the insured fails to render proof of loss such mortgagee, upon
75 notice, shall render proof of loss in the form herein specified
76 within sixty (60) days thereafter and shall be subject to the pro-
77 visions hereof relating to appraisal and time of payment and of
78 bringing suit. If this Company shall claim that no liability ex-
79 isted as to the mortgagor or owner, it shall, to the extent of pay-
80 ment of loss to the mortgagee, be subrogated to all the mort-
81 gagee's rights of recovery, but without impairing mortgagee's
82 right to sue; or it may pay off the mortgage debt and require
83 an assignment thereof and of the mortgage. Other provisions
84 relating to the interests and obligations of such mortgagee may
85 be added hereto by agreement in writing.
86 Pro rata liability. This Company shall not be liable for a greater
87 proportion of any loss than the amount
88 hereby insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not.
90 Requirements in The insured shall give immediate written
91 case loss occurs. notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, put
94 it in the best possible order, and furnish a complete inventory
95 of the destroyed or damaged property setting forth for each item,
96 or by category if itemization is not reasonably practicable,
97 the amount of loss claimed. The company may, in addition,
98 require the insured to furnish a complete inventory of
99 the destroyed, damaged and undamaged property, showing in
100 detail quantities, costs, actual cash value and amount of loss
101 claimed; and within sixty days after the loss, unless such time
102 is extended in writing by this Company, the insured shall render
103 to this Company a proof of loss, signed and sworn to by the
104 insured, stating the knowledge and belief of the insured as to
105 the following: the time and origin of the loss, the interest of the
106 insured and of all others in the property, the actual cash value of
107 each item thereof and the amount of loss thereto, all encum-
108 brances thereon, all other contracts of insurance, whether valid
109 or not, covering any of said property, any changes in the title,
110 use, occupation, location, possession or exposures of said prop-
111 erty since the issuing of this policy, by whom and for what
112 purpose any building herein described and the several parts
113 thereof were occupied at the time of loss and whether or not it
114 then stood on leased ground, and shall furnish a copy of all the
115 descriptions and schedules in all policies and, if required, verified
116 plans and specifications of any building, fixtures or machinery
117 destroyed or damaged. The insured, as often as may be reason-
118 ably required, shall exhibit to any person designated by this
119 Company all that remains of any property herein described, and
120 submit to examinations under oath by any person named by this
121 Company, and subscribe the same; and, as often as may be
122 reasonably required shall produce for examination all books of
123 account, bills, invoices and other vouchers, or certified copies
124 thereof if originals be lost, at such reasonable time and place as
125 may be designated by this Company or its representative, and
126 shall permit extracts and copies thereof to be made.
127 Appraisal. In case the insured and this Company shall
128 fail to agree as to the actual cash value or
129 the amount of loss, then, on the written demand of either, each
130 shall select a competent and disinterested appraiser and notify
131 the other of the appraiser selected within twenty days of such
132 demand. The appraisers shall first select a competent and dis-
133 interested umpire; and failing for fifteen days to agree upon
134 such umpire, then, on request of the insured or this Company,
135 such umpire shall be selected by a judge of a court of record in
136 the state in which the property covered is located. The ap-
137 praisers shall then appraise the loss, stating, separately actual
138 cash value and loss to each item; and, failing to agree, shall
139 submit their differences, only, to the umpire. An award in writ-
140 ing, so itemized, of any two when filed with this Company shall
141 determine the amount of actual cash value and loss. Each
142 appraiser shall be paid by the party selecting him and the ex-
143 penses of appraisal and umpire shall be paid by the parties
144 equally; provided, however, if the written demand is made by this
145 Company, then the insured shall be reimbursed by this Company for
146 the reasonable cost of the insured's appraiser and the insured's
147 portion of the cost of the umpire.
148 Company's It shall be optional with this Company to
149 options. take all, or any part, of the property at the
150 agreed or appraised value, and also to re-
151 pair, rebuild or replace the property destroyed or damaged with
152 other of like kind and quality within a reasonable time, on giv-
153 ing notice of its intention so to do within thirty days after the
154 receipt of the proof of loss herein required.
155 Abandonment. There can be no abandonment to this Com-
156 pany of any property.
157 When loss The amount of loss for which this Company
158 payable. may be liable shall be payable sixty days
159 after proof of loss, as herein provided, is
160 received by this Company and ascertainment of the loss is made
161 either by agreement between the insured and this Company ex-
162 pressed in writing or by the filing with this Company of an
163 award as herein provided.
164 Suit. No suit or action on this policy for the recov-
165 ery of any claim shall be sustainable in any
166 court of law or equity unless all the requirements of this policy
167 shall have been complied with, and unless commenced within
168 two years next after inception of the loss.
169 Subrogation. This Company may require from the insured
170 an assignment of all right of recovery against
171 any party for loss to the extent that payment therefor is made
172 by this Company.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency herein before mentioned.



WARRANTY ENDORSEMENT
(For Form HO-4 only)

HO-156
Virginia
(Ed. 10-68)

It is warranted that the Insured is not the owner-occupant of the described premises.

6501 Atlantic Ave.
Virginia Beach, Virginia 23451

HO-156
Virginia
(Ed. 10-68)

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

INSTALLMENT PREMIUM PAYMENT ENDORSEMENT

It is agreed that the term premium, annual premium on a continuous policy, or any annual premium installment may, at the election of the named Insured, be paid in installments under terms and conditions on file by the Company with the Department of Insurance.

If the Insured elects the option provided by this endorsement, there shall be an additional installment premium loading of one dollar (\$1.00) for each such installment.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
Columbus, Ohio

W. E. Fitzpatrick
Secretary

John E. Fisher
President

PLEASE ATTACH THIS ENDORSEMENT TO YOUR POLICY AS IT CONSTITUTES AN IMPORTANT PART OF THE CONTRACT.

File 1746-3-76

LEASE

This Agreement of Lease, Made this 13th day of August, 19 81.

between Mr. Jack J. Omond PLTF DFFD EXHIBIT
by none VS
and James Cook and Michael Mazza DATES 12/9/81
agents, hereafter called lessor,

(All words herein referring to lessee to be taken to be of such gender and number as the circumstances may require), hereinafter called tenant.

WITNESSETH, That the lessor lets unto the tenant all that certain Masonry building
located at 6501 Atlantic Ave, downtown
1st floor apt. Va. Beach Ver. 2345
Street No. City - County State

To be used as a private residence and for no other purpose

for the term of one year

beginning on the 1st day of Sept. 19 81

and ending on the 31 day of August 19 82

at MIDNIGHT, paying therefore unto the parties of the first part, or their Agents, the term rental,

or sum of fifty four hundred payable in advance as follows:

The sum of four hundred and fifty dollars
due and payable on the first day of each
month.

without formal demand, during business hours, at the office of the said Agent.

The above letting is on the following terms and conditions:

Manner of -
Payment and
Remedies of
Owner

FIRST.—The tenant will without any previous demand therefore pay the rent at the time and in the manner above provided, and in case of non-payment of said rent, or in case the leased premises shall be deserted or vacated, or should tenant breach any condition of the lease, lessor shall have the right to enter the same at once either by force or otherwise, without being liable to any prosecution therefore, and to distrain for rent, and also to re-let the said premises as agent of tenant for any unexpired balance of the term and receive the rent therefor. The tenant also agrees that all property on the said premises and for thirty days after removal shall be liable to distress for rent, and waives the benefit of all laws exempting any of his property from levy and sale either on distress for said rent or on judgment obtained in a suit therefor.

Rent in Arrears
and Remedies.

SECOND.—It is further agreed, that if said rent in whole or in part shall at any time be in arrears and unpaid, said lessor or agent may distrain or sue therefor; and if the tenant shall fail to comply with any of the conditions of this lease, or notice given under the terms hereof, then lessor may at his option re-enter upon the premises hereby rented without further form of process of law, and such re-entry shall, at the option of the lessor, constitute a termination of this lease. No such termination of this lease, however, nor recovering possession of the premises, shall deprive the owner of any other action or remedy against the tenant for possession, for rent or for damages.

Breach of
Agreement.

THIRD.—If tenant shall breach any covenant or agreement herein contained on his part to be kept and performed, said lessor and/or assigns may re-enter the demised premises and repossess and enjoy the same as of lessor's former estate therein; but before any such re-entry shall be made by owner or assigns by reason of any such default or breach, lessor shall notify tenant in writing of said default or breach (said notice to be delivered as hereinafter provided in paragraph twelve or served on tenant by an officer) specifying the default or breach and demanding that it be remedied; and the right of re-entry shall not accrue unless tenant shall have failed to remedy the specified default or breach within ten days after receipt of said notice.

No Assignment
of Subletting.

FOURTH.—Tenant shall not without the written consent of the lessor first endorsed on this lease use or allow to be used the said premises for any purpose other than above mentioned, nor assign this lease for the whole or any part of the term, nor under-let the whole or any part of the said premises, nor allow said premises or any part thereof to be occupied by any other person than tenant, his family and/or his employees. Any lawful levy or sale or execution or other legal process, and also any assignment, or sale, in bankruptcy, or insolvency, or under any compulsory procedure shall be deemed an assignment within the meaning of this lease. Any failure by lessor to insist upon strict observance on the part of tenant of any covenant in this paragraph contained, whether or not lessor shall have knowledge of the breach thereof, shall not be deemed a waiver of owner's right at any time during the term hereof to insist upon such strict observance during the remainder of the term.

Repairs
Upkeep of
Property.

FIFTH.—The tenant agrees to do at his own expense, such improvements, repairs, decorations, and upkeep to the premises during the term of this lease as he desires for his convenience and comfort, to conform, at his own expense, with such ordinances and regulations which now are or may be hereafter put in effect by the City of Norfolk and/or City of Portsmouth and the County of Norfolk and/or the County of Princess Anne, with reference to the control of rats, vermin, insects and other pests as may be provided by Ordinance. The tenant agrees to keep the plumbing, sewerage, heating and lighting fixtures in good order, and to keep the premises in sanitary condition.

Improvements and Fixtures.	SIXTH.—The tenant agrees to permit the lessor or his agent to enter the property to make emergency repairs and it is also understood as a part of this lease that any repairs or alterations which may be made by the lessor at the request or by permission of the tenant, during this lease or any renewals or continuance of the same, are to be construed as done by lessor only for the preservation or improvement of the property. No matter how often, nor for what purpose they may be done, they are not to be taken as indicating the existence of any agreement implied or otherwise, that it shall be the duty of the lessor to do such things, nor any similar, nor other things in connection with the leased property, no matter how long this lease may be continued, nor how often such things may arise.
Alterations or Additions.	SEVENTH.—Tenant will during the term keep and at the expiration thereof deliver up said premises in as good order and condition as the same now are, reasonable wear and tear and damage by accident or fire alone excepted. Tenant shall not make any alterations or additions without lessor's written consent, endorsed on this lease, and all alterations, additions or improvements made by either of the parties thereto upon the premises, except moveable furniture put in at the expense of the tenant, shall be the property of the lessor and shall remain upon and be surrendered with the premises at the termination of this lease.
Liability.	EIGHTH.—The tenant will not hold the lessor liable for any damage to his property. He agrees to assume all risks of every kind, whether relating to property or person in connection with his occupancy of the leased premises, whether the same arise from defects latent or patent in connection with the building or other parts of the leased premises and whether or not the same were known by the lessor at the time of making this lease and were not disclosed by the lessor at that time, or at any subsequent time.
Damages to Premises.	NINTH.—The tenant agrees that he will not drive nails, fix screws, mar the wall, injure or disfigure the said premises nor any part thereof in any way, nor allow the same to be done and that he will be responsible for the breakage of all glass in the said premises, and agrees to replace the same without delay, regardless of how the same was broken, and that he will repair all damage to premises and or furnishings without delay at his own expense.
Fire Hazard.	TENTH.—Tenant covenants that he will do and/or will permit to be done no act which will increase the fire hazard or rate of fire insurance on demised premises, or any property thereon; that he will obey all State and municipal laws and regulations relating to fire hazards, fire protection and sanitation, and that he will commit no nuisance on the said demised premises.
Damages by Fire to Premises.	ELEVENTH.—If, during the term the demised premises shall be damaged by fire, they shall be repaired by the lessor with all reasonable diligence; and in case they shall be so badly damaged that they cannot be repaired with such diligence so as to be fit for occupancy within thirty days from such damage, the rent shall cease from the date of the damage until they shall be so repaired, and the tenancy shall not be terminated unless such repairs shall require more than 30 days, in which case owner shall have the right to cancel this lease, or the tenant shall have the option of vacating the premises, provided always, that there shall be no cessation of rent if the damages shall have been the result of the negligence, default, or wilful act of the tenant or his agents or employees.
Expiration of Lease and Termination	TWELFTH.—A written notice of sixty days prior to the expiration of the lease shall be required by either party to terminate an annual rental. But in default of such notice this lease shall continue upon the same terms and conditions as are herein contained for a further period of one year and so on from year to year until terminated by either party hereto. Lessor agrees to release Tenant from any unexpired balance of a term if Tenant is a member of the Armed Forces of the United States and receive orders changing his permanent duty station to another station more than twenty-five miles from Norfolk, provided, however, that Tenant shall give written notice to Lessor and said notice to vacate shall be effective 30 days thereafter, and such orders must be exhibited to Lessor or Agent. If the lessor shall have given at least 60 days' notice in writing previous to the expiration of said term (or any extension or renewal thereof as above), of his intention to change the terms or conditions of this lease, and tenant shall have over into another term, he shall be considered a tenant under the terms and conditions mentioned in such notice for another similar term, and until the lease is again terminated by notice as herein above provided.
Utilities	THIRTEENTH.—The tenant shall pay all charges lawfully assessed or imposed during the said term upon premises for water, sewerage disposal charges (if any), telephone, electricity, heating fuel and gas. If Tenant is to pay the same he agrees to make such deposits as may be required by the authorities furnishing same, and if all charges are not so paid, the owner may, if he so elects, pay the same, and the amount so paid shall be considered as additional rent of said premises and payable forthwith.
Examination of Showing Premises. To-Let Sign.	FOURTEENTH.—The tenant agrees to allow the lessor or his representatives or prospective purchaser, at any reasonable hour to enter the said premises for the purpose of inspecting the same, for making any repairs that they may deem necessary or desirable or for showing the premises to any parties; andnext preceding the expiration of said term, will allow a usual notice of "To-Let" to be placed on the front walls or doorways of said demised premises, and at any time during the term a like notice of "For Sale", and remain thereon without hindrance or molestation.
Tenant Representation.	FIFTEENTH.—That to secure this lease tenant represents that he is of good moral character and not engaged in any illegal or immoral business, the untruth of which shall be grounds for terminating this lease, as shall also engaging in or permitting any unlawful business whatever on said premises.
Quiet Enjoyment	SIXTEENTH.—The lessor covenants for the tenant's quiet enjoyment of the premises for the term.
Garbage Disposal and Ordinances	SEVENTEENTH.—The tenant hereby agrees to conform with the Ordinances of the City or County wherein property is located as they relate to the disposal of garbage and trash as they are presently constituted or as they may be hereafter amended and the tenant assumes full responsibility for failure to conform and the tenant covenants that he will, during the term hereof, comply with all federal, state and local laws and ordinances relating to the demised premises.
Heirs, Executors.	EIGHTEENTH.—All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to their heirs, executors, administrators, successors, and so far as same is assignable by the terms hereof, to the assignees of such parties.
Commission.	NINETEENTH.—The Lessor hereby agrees to pay the agent a commission as agreed.
Nuisance	TWENTIETH.—Lessee covenants that he will not allow said premises to be used for any illegal or immoral purpose, and that he will not do, or suffer to be done, in or about said premises any act or thing which may be a nuisance, annoyance, inconvenience or damage to Lessor, Lessor's tenants, the occupants of adjoining property, or the neighborhood.
Pets	TWENTY-FIRST.—Tenant agrees to keep no dogs, cats or other pets upon the demised premises without the express consent of Lessor or his Agent and agrees further that in the event permission is requested and granted that he will be responsible for all damages done by said pets to the demised premises and payment of any charges incident to the extermination of fleas, ticks or other vermin upon surrender of the premises and/or termination of the lease.
Parking	TWENTY-TWO.—The Tenant agrees to conform to the parking regulations Not to park in the fire lane and no-parking are so marked, and not to park in other than his own assigned parking space, and to require his guests to conform to the same regulations.

Deposit

TWENTY-THREE.—The Tenant agrees to deposit with the Lessor the sum of \$ as security, damage and cleaning deposit, to be held by the Lessor during the term of the lease, or any extension thereof. Any amount not used for the above purpose is to be returned to Tenant within a reasonable time after vacating premises.

Please mail all checks to - Mrs. Jack Osmond
 1345 Carolyn Drive
 Va Beach, Va., 23451
 428-0719

Note

The Kitchen broiler is burned in several places. After the 5th day of each month, there will be a 20% late charge.

WITNESS the following signatures and seals:

Mr. Jack Osmond Owner (Seal)
 By: none Agents (Seal)
 [Signature] (Seal)
 [Signature] (Seal)
 [Signature] (Seal)

A fee will be charged whenever a lease is transferred.

\$

LEASE

—TO—

Property..... 6501 Atlantic Line

Begins..... Sept 1, 1981

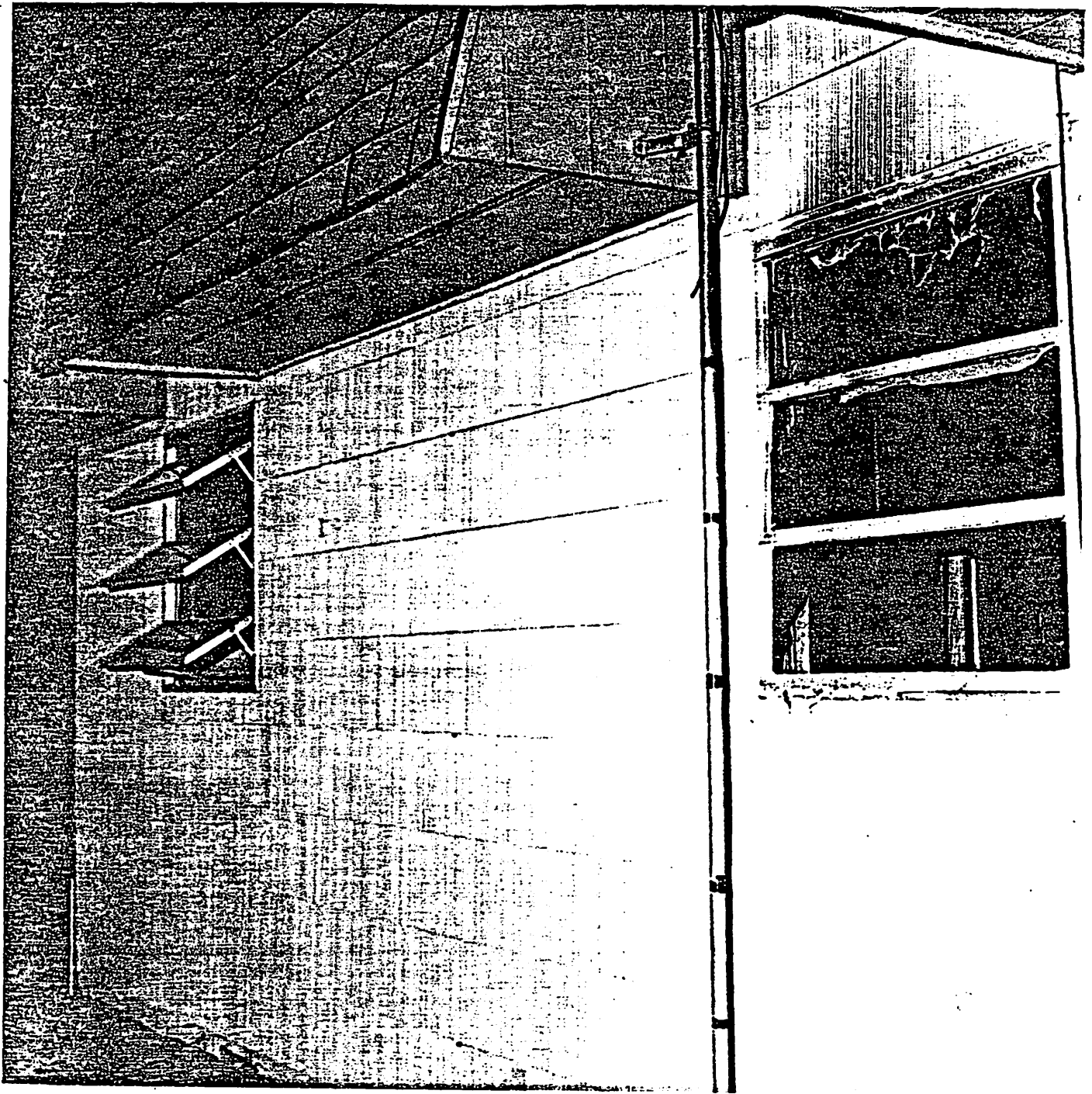
Expires..... Aug 31, 1982

Payable..... monthly - \$450.00

Rent per month, \$..... 450

PAID 300.00
 8/12/81
 8/16/81

430.00
 225.00
 205.00
 1/2 Mo. Rent
 450.00 Deposit Required



PLT 2 DFFD EXHIBIT

DATES 12/9/82 VS

L

PHOTO FILE NO. 30600

Location 65th + 41st Street

Photograph PM

Date _____

428-7025 EXT 100 or 499/248

VS
DATES 12/5/81 to 10

1 Nationwide - Hugh Branes
from: J. Cook

Ref: 6501 ATLANTIC AVE, VA Beach. L
file - ~~Sept~~ 27th - Home owners
or "renters" loss

	New	Age
1.) 1 white sofa 80"	490 ⁰⁰	2 yrs
2.) 1 floral sofa 76"	460 ⁰⁰	3 yrs.
3.) 1 leather wing back chair	325 ⁰⁰	1 yr
4.) 1 cocktail Table	310 ⁰⁰	1 yr.
5.) 1 octagon Table	160 ⁰⁰	1 yr
6.) 1 brass stand lamp	210 ⁰⁰	1 yr.
7.) 1 ginger lamp	125 ⁰⁰	1 yr.
8.) 1 queen box + mattress	489 ⁰⁰	1 yr
9.) 1 large hall full matelasy mirror	175 ⁰⁰	1 1/2 yrs.
10.) 1 quilt -	300 ⁰⁰	2 yrs
11.) 2 pillows	31 ⁰⁰ ea.	4 yrs.
12.) 2 shute gun	30 ⁰⁰ ea.	2 yrs.
13.) 1 9x12 Oriental rug	575 ⁰⁰	2 yrs.
14.) 1 screen	35 ⁰⁰	10 yrs all
	<u>3644.00</u>	

To be cleaned + refinished -

1- end Table

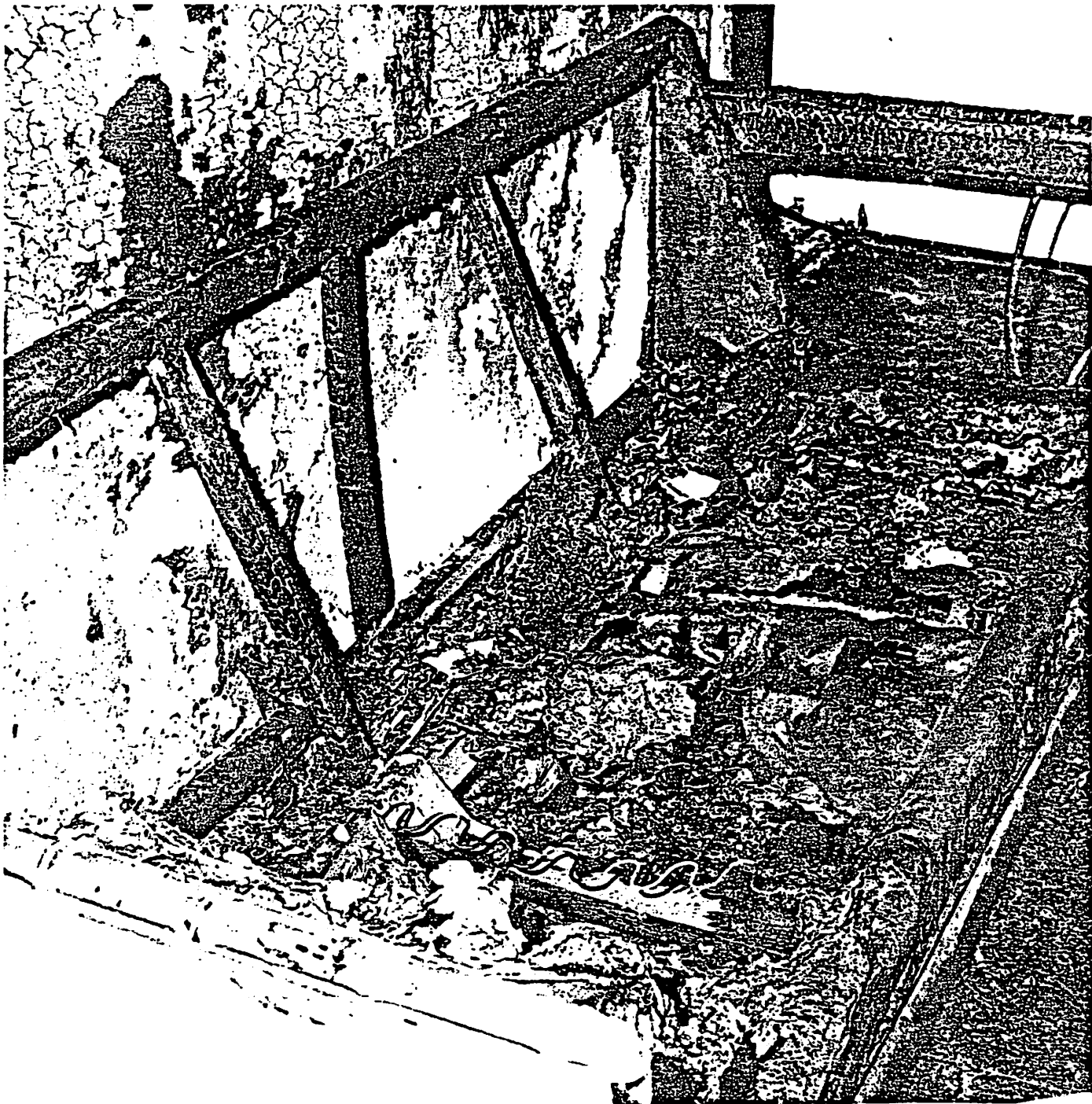
1- chest drawers

clean contents of chest drawers

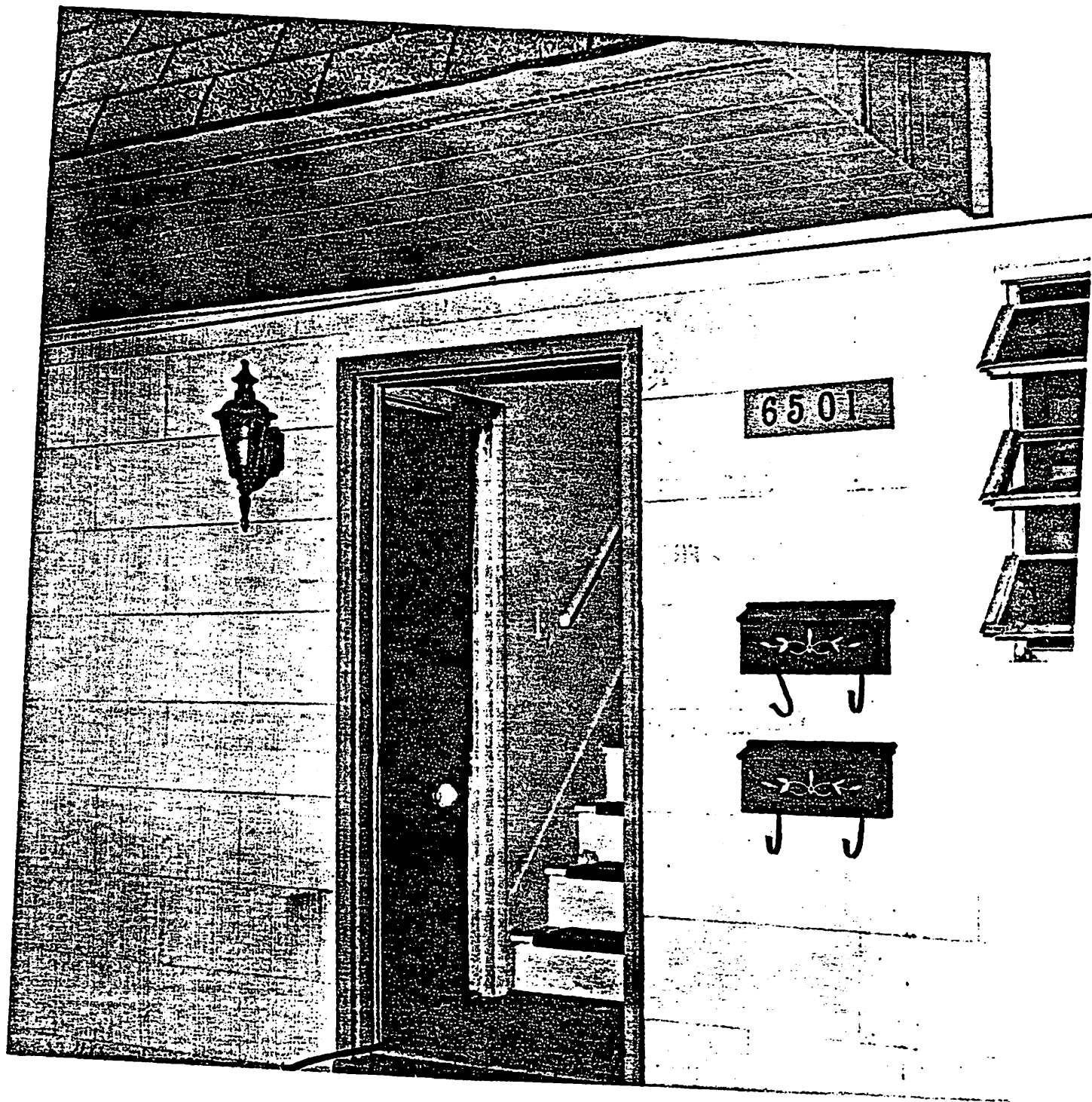
1- sofa to be recovered and

cleaned - 6 plants value unknown

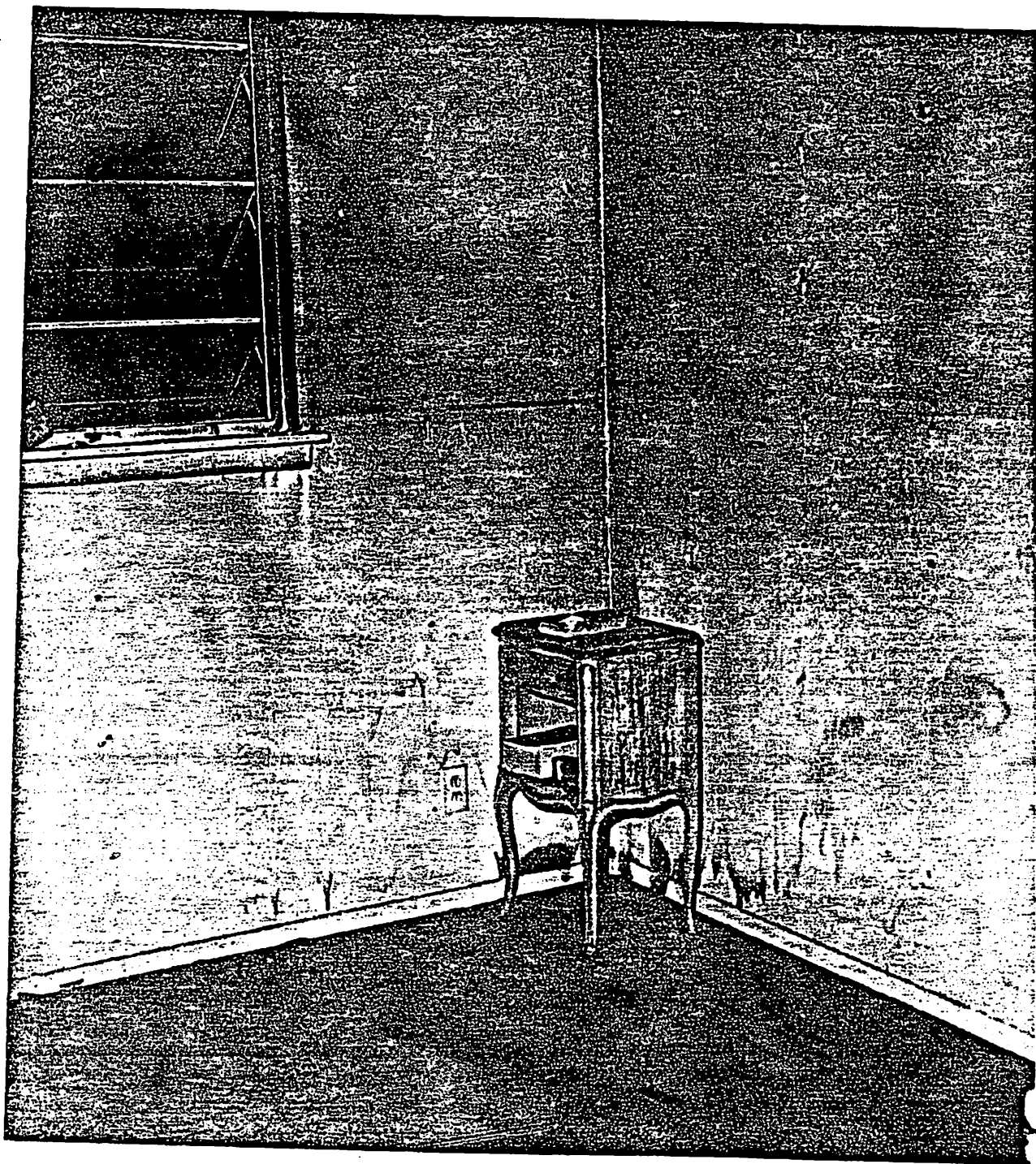
Missing are Two rifles - 1-22 gauge
rifle and case and one Twelve
gauge Remington pump -



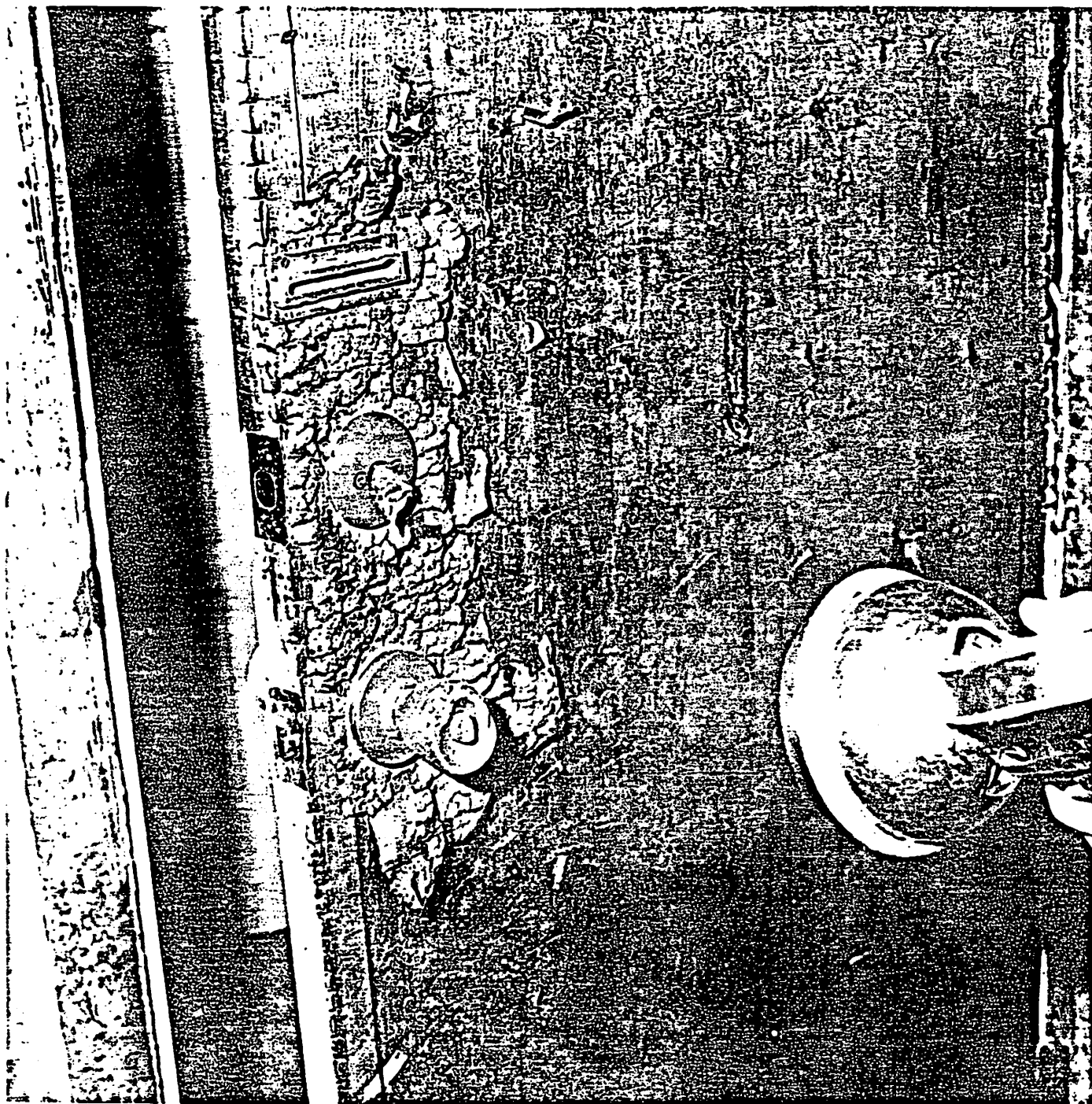


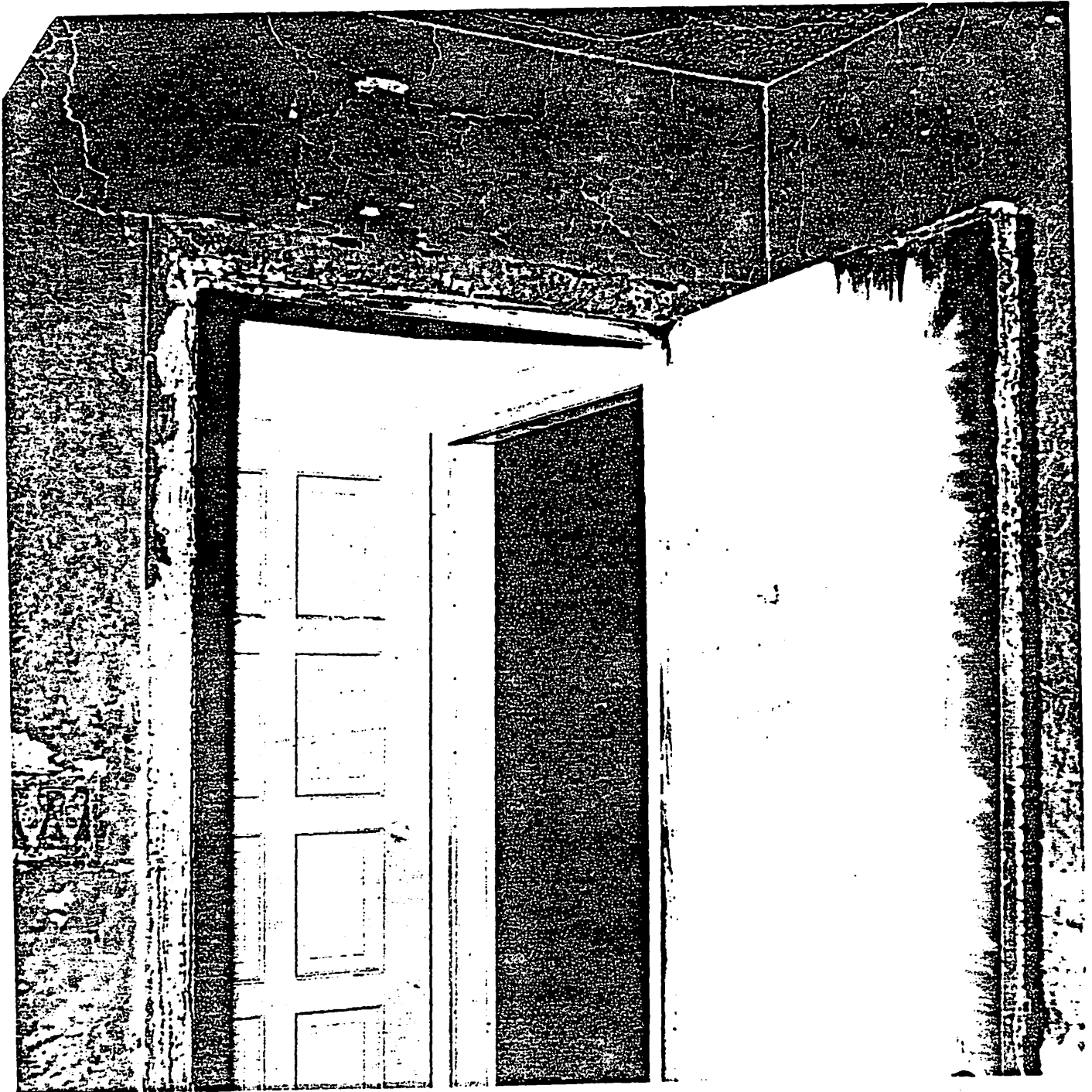


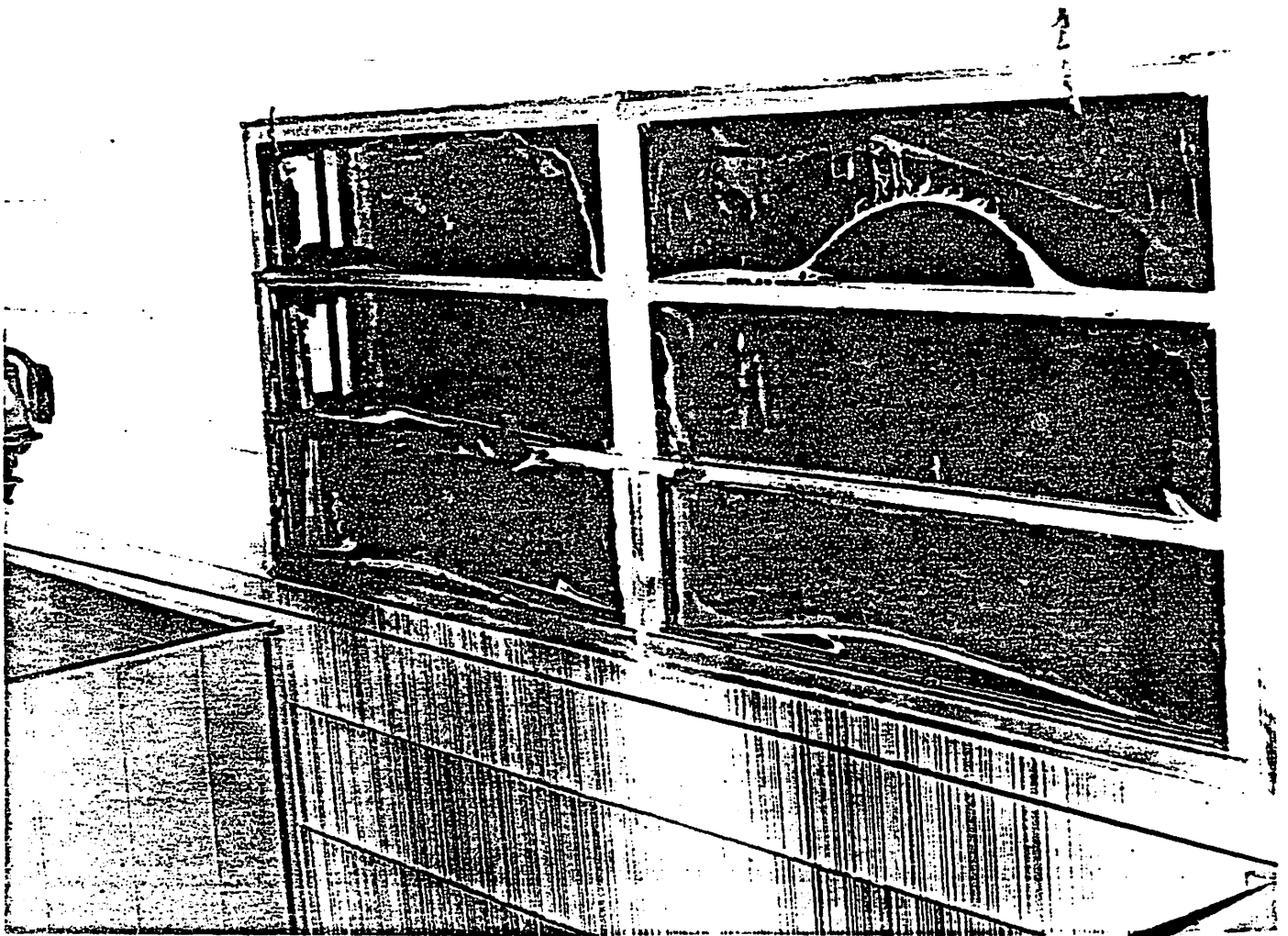


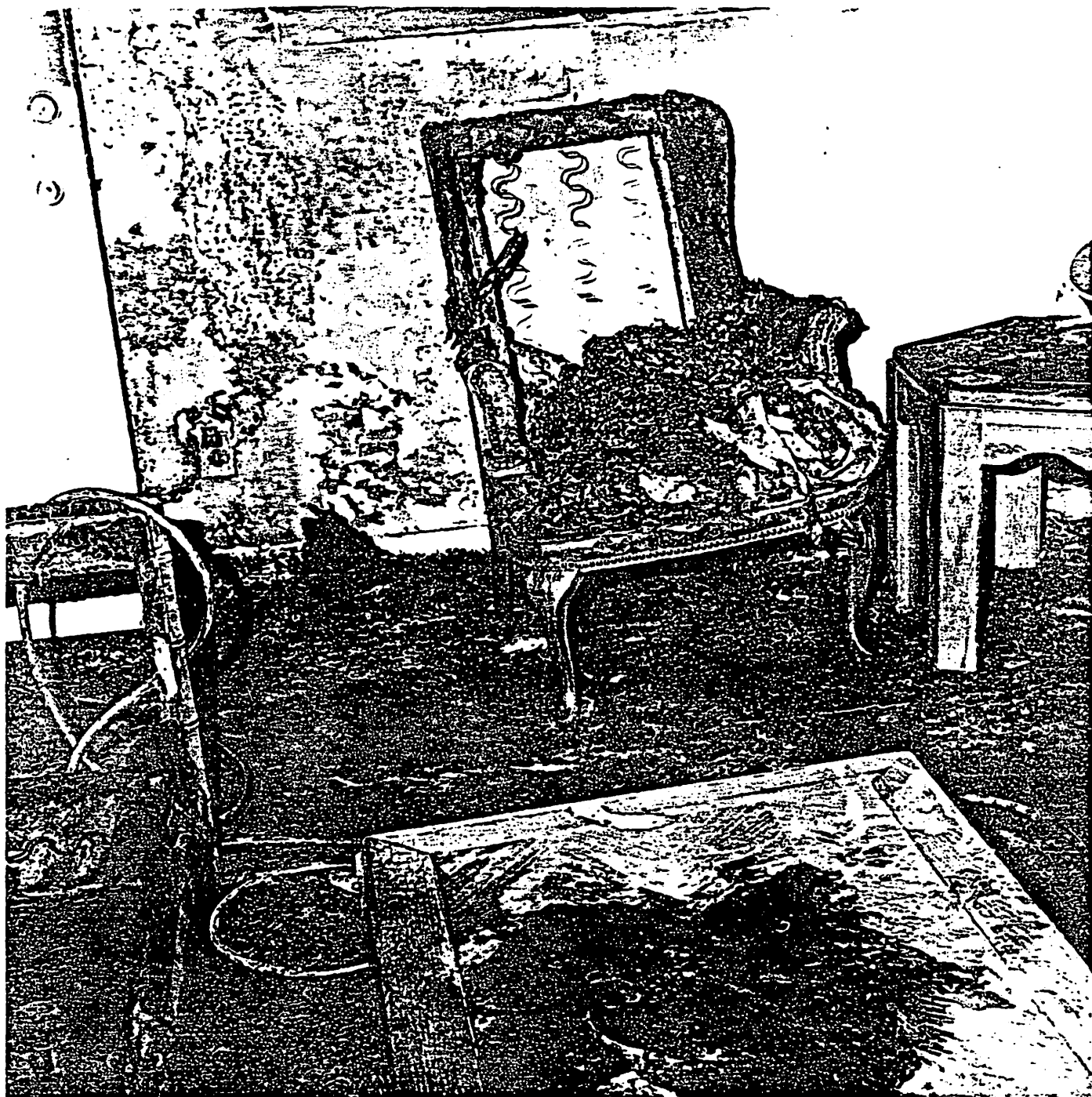




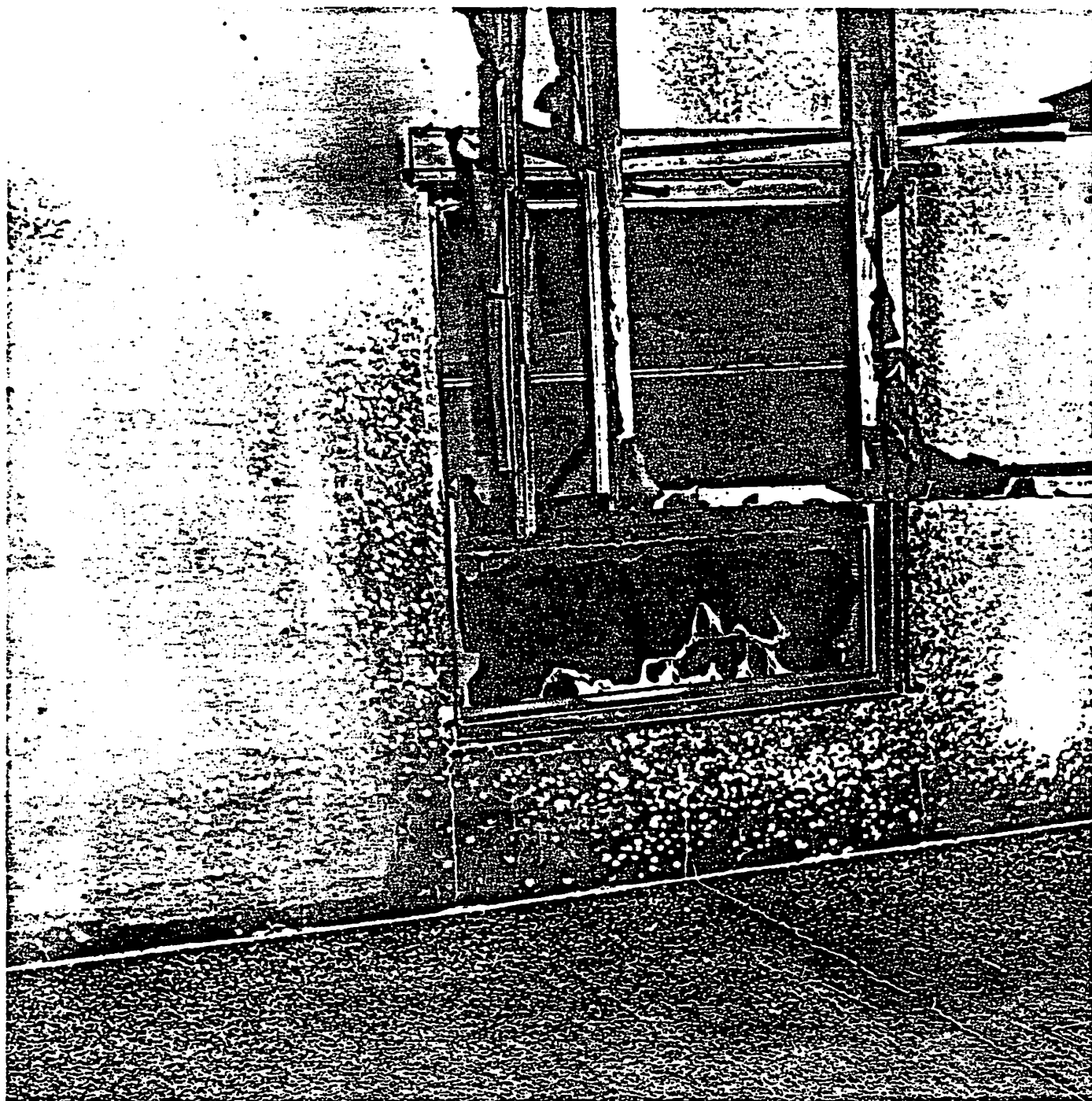


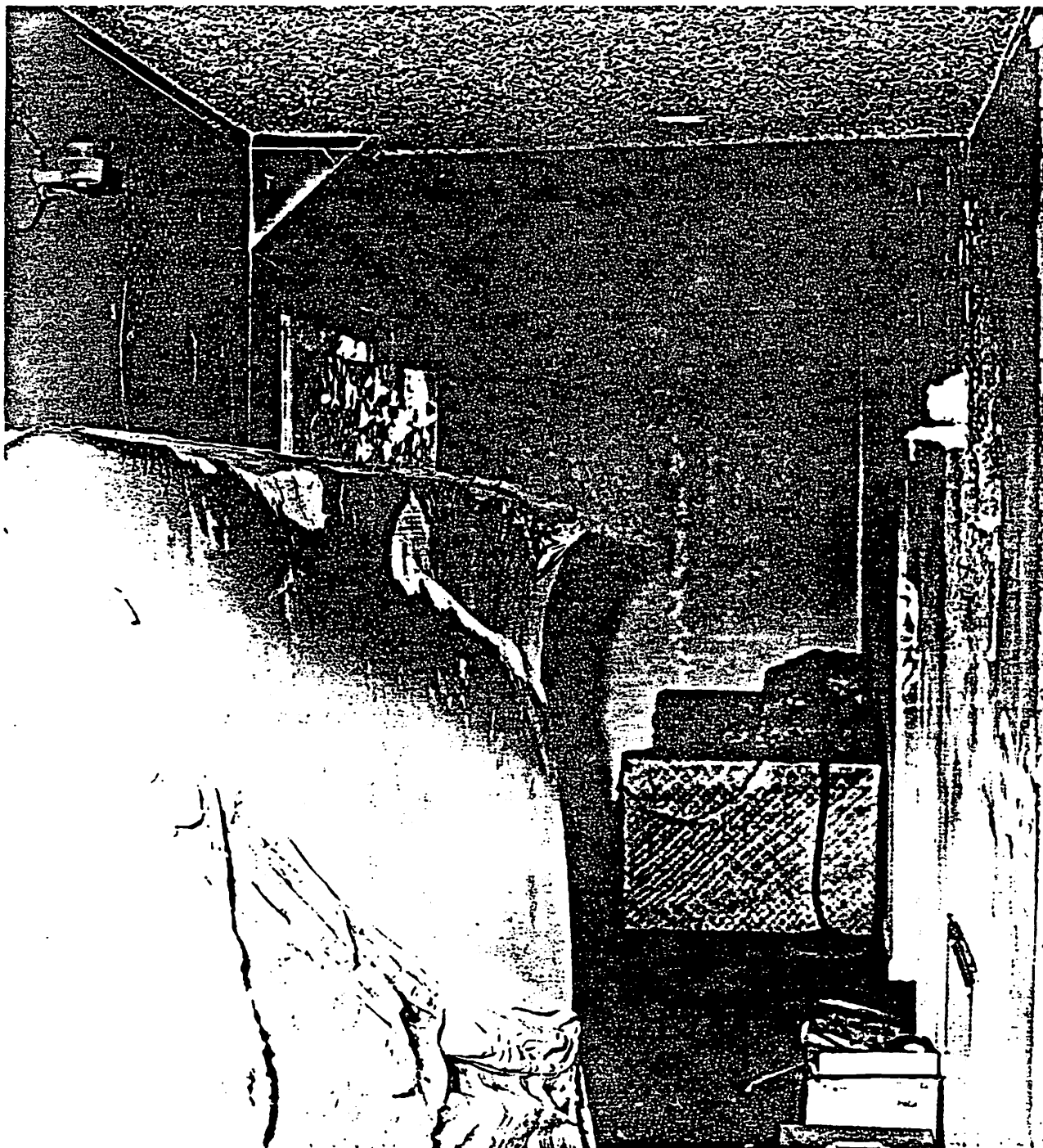


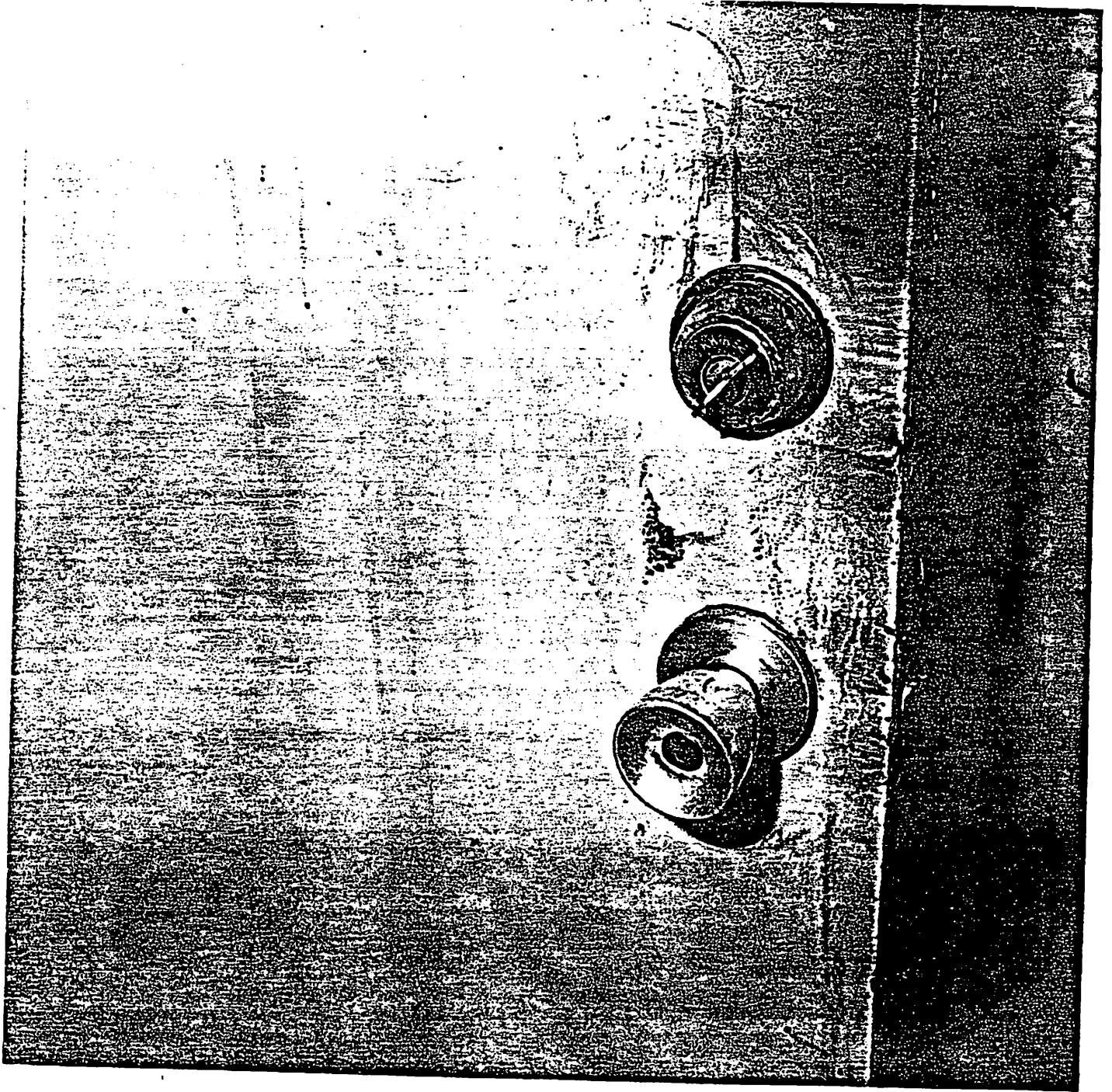






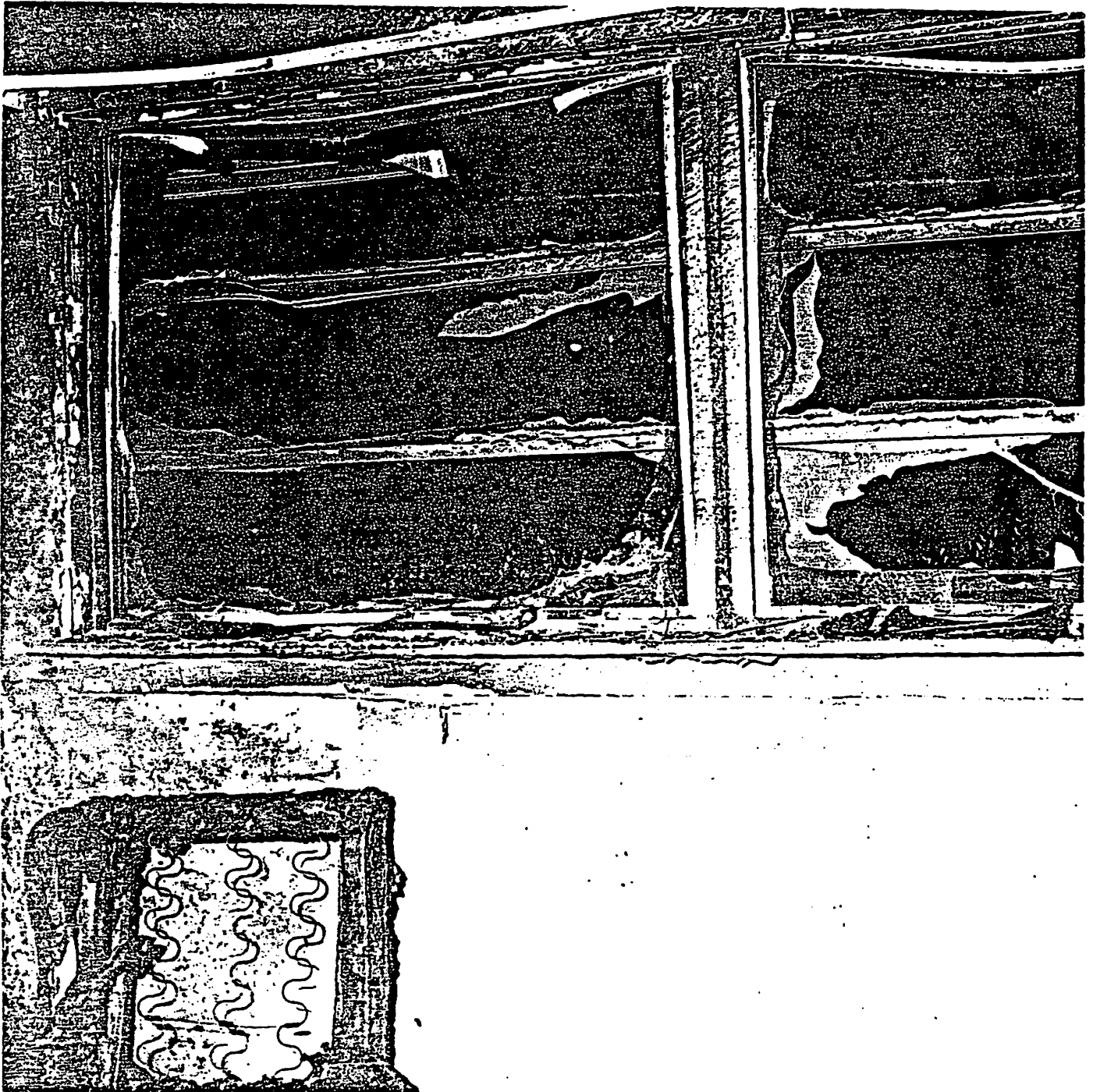


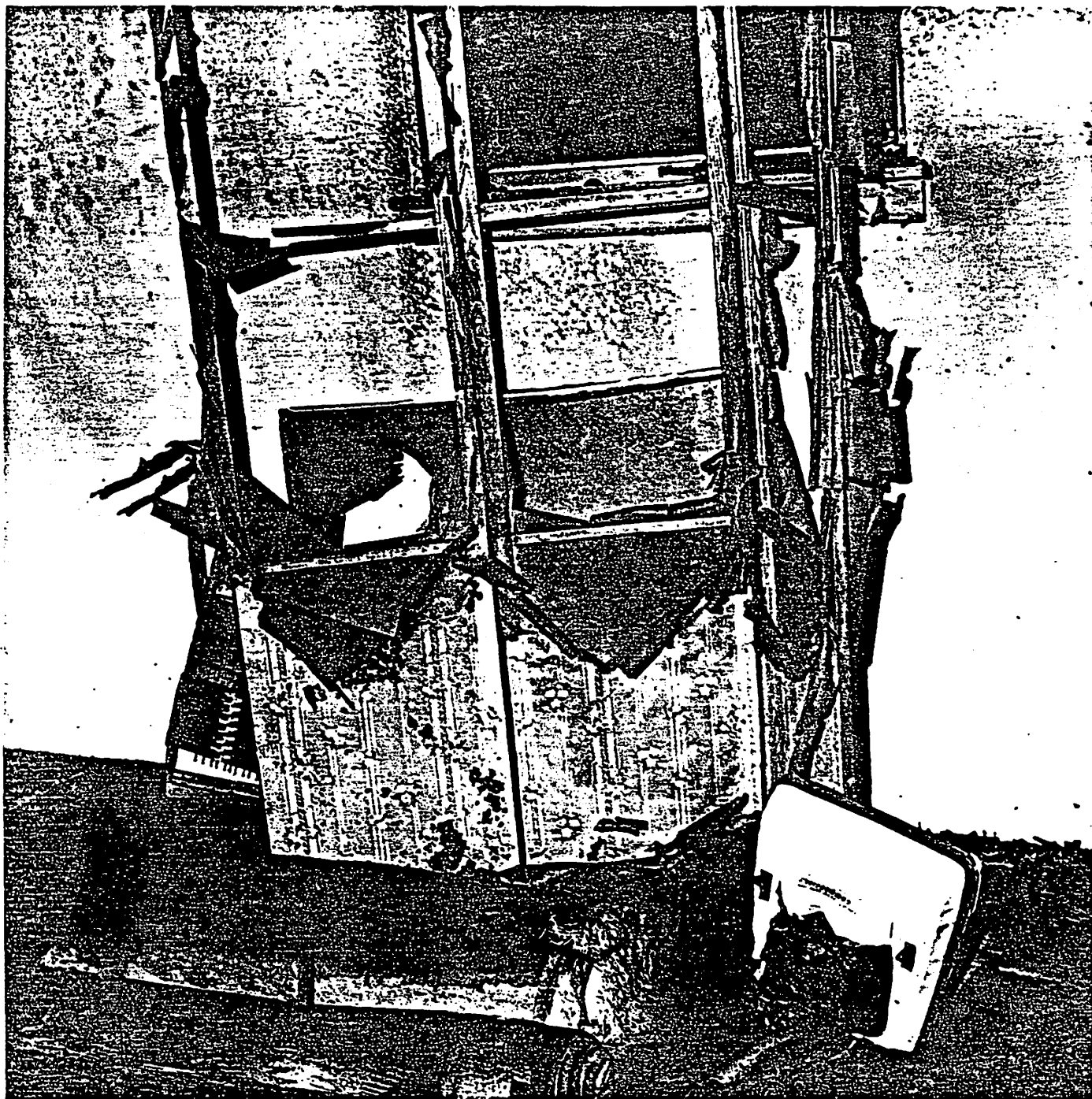








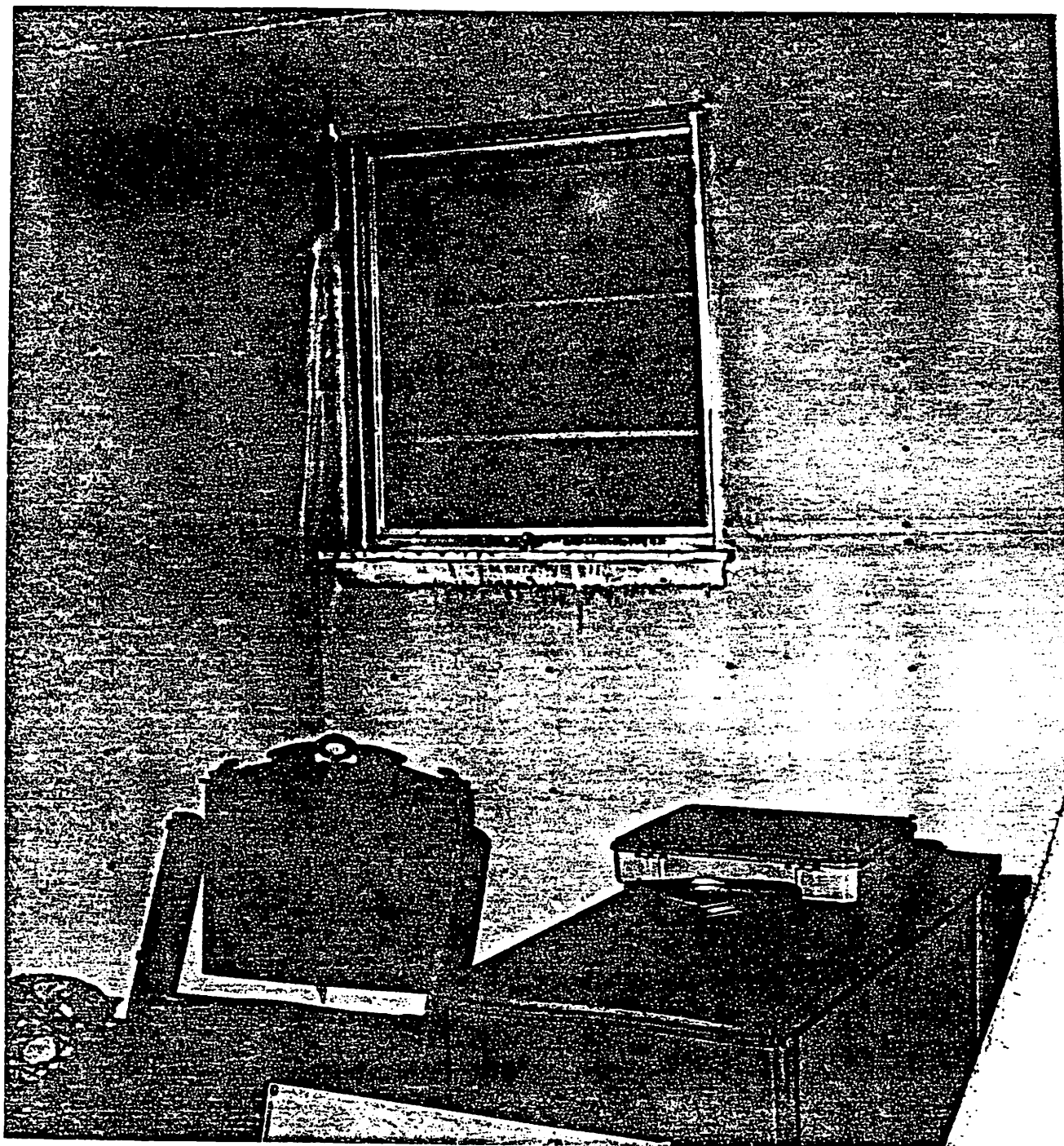


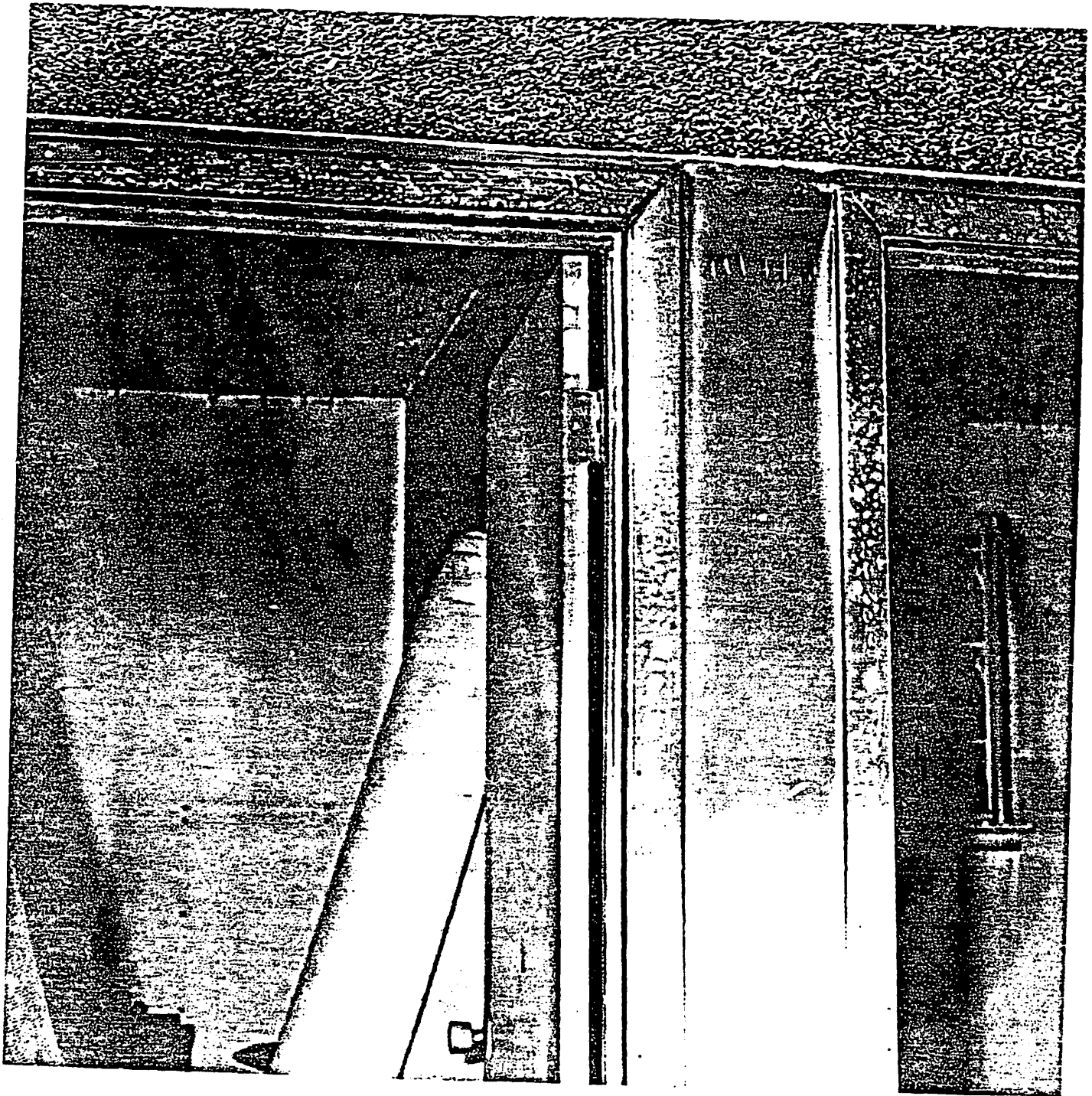














RO	SI	PR	POLICY/CLAIM NUMBER	LOSS DATE	NAME OF INSURED	POLICY NUMBER
5345			10660-324-1227-8	1-15-82	JAMES COOK	10660-321

NATIONWIDE INSURANCE
NATIONWIDE INSURANCE COMPANIES
VIRGINIA REGION • LYNCHBURG, VIRGINIA

DATE OF ISSUE: 1-15-82

AMOUNT: 3368.92

PAY TO THE ORDER OF: JAMES COOK
6001 BRIDGEWAY
VIA BEACH, VA 23045

1/21/82

CENTRAL FIDELITY BANK
LYNCHBURG, VIRGINIA

⑈53822610⑈ ⑈051400730⑈ ⑈0789992⑈ ⑈0000336809⑈

Not Negotiable 90 Days After Date of Issue
This is full payment unless otherwise indicated on stub.

ATTENTION MEDICAL PROVIDER

Under Section 6041 and Revenue Ruling 69-595 we are required to report certain payments to Doctors and other Medical Providers. Under Section 6109 we are required to request and you are required under penalty of law to furnish your taxpayer identification number, either EIN or SSN.

Employ. Ident. No. _____

Soc. Sec. No. _____

ENDORSEMENTS

James Cook

227-66-2643

05-31-83

10660-324-1227-8

VS 12/10/91

PLTF 28 OFFED EXHIBIT

PAY ANY BANKS B.O. 41300
FBI RICHMOND 41300
0510-0003-3

ALL Payees must endorse below exactly as written on face of check.
If Payee is a Company, the title of officer endorsing check must be shown.

INK. REC. JMO 103-3

CONTENTS INVENTORY

VS
DATES 12/10/82 Page 1 of 2

Insured		Location		INSTRUCTIONS: COLUMNS 1 THROUGH 6 SHOULD BE COMPLETED BY INSURED			
James E. Cook		6501 ATLANTIC AVE					
1. Description of item Year Make Model Serial No.	2. Where purchased Store City	3. Date purchased	4. Original Cost	5. Cost to replace	6. Cost to repair	7. Depreciation	8. Claim
81' UKN. COCKTAIL TABLE	J.L. Lemys Richmond	5-81'	310 ⁰⁰	269 ⁰⁰	X	18.53 74	250.17
81' UKN. OCTAGON TABLE	" " "	" "	160 ⁰⁰	285 ⁰⁰	X	22.23 72	268.77
81' END TABLE	" " "	" "	40 ⁰⁰	40 ⁰⁰	X	2.80 74	37.20
81' BRASS STAND LAMP	LAMPS LTD - WASH. DC	6-81	210 ⁰⁰	210 ⁰⁰	X	0%	210.00
81' GINGER JAR LAMP	LAMPS LTD. " "	6-81	125 ⁰⁰	125 ⁰⁰	X	8.72 92	116.25
79- BROOKHILL SOFA 80"	Syndor-Hundley-Rich	79'	490 ⁰⁰	450 545	X	12.72 92	468.70
78" UKN - 76" flexa / sofa	FULL TONE - Rich-Rich	78'	425 ⁰⁰	450 480	X	12.80 92	379.20
81' 144" ANTIQUE COGITANS	Thalhimers - Rich	5-81	160 ⁰⁰	160 ⁰⁰	X	10.80 92	144.00
81' COGITAN ROD - HANGERS	" "	5-81	35 ⁰⁰	35 ⁰⁰	X	1.38 92	33.25
80' WING BACK CHAIR	ETNA ALAN - Rich	2-81	325 ⁰⁰ (damaged)	UKN	X	45.80 92	279.50
80' HALL MIRROR	Friend - Rich	80'	175 ⁰⁰	175 ⁰⁰	X	17.00 92	157.50
80' QUILT - HAND MADE	Flea market - Rich	80'	130 ⁰⁰	UKN	X	0	130.00
77' - 2 PILLOWS	Thalhimers - Rich	77'	44 ⁰⁰	60 ⁰⁰ 80 ⁰⁰	X	14.40 92	65.60
80' 2 nd SHEETS (QUEEN)	" "	80'	40 ⁰⁰	48 ⁰⁰	X	4.80 92	43.20
80' QUEEN BOX-MATRESS	Syndor-Hundley-Rich	80'	450 ⁰⁰	450 ⁰⁰	X	4.00 92	40.50
80' 9x12 Rug ^{ORIENTAL}	AmCARPET - Rich	8/80'	400 ⁰⁰	UKN	X	0%	400.00
81' PICTURE FRAME	Frame Store - Rich	81'	65 ⁰⁰	65 ⁰⁰	X	3.25 92	61.75
77' SCREEN	Good Sale - Rich	72	35 ⁰⁰	UKN	X	0%	35.00
81' CON CABLE BOX	Va Beach, Va	81'	150 ⁰⁰	150 ⁰⁰	PENDING		
82' Nothing Cleaned	Pics Va Rich	82'	X	X	22 ⁰⁰	X	22.00
82' BEST DRAWERS	Refinish	82'	X	X	75 ⁰⁰	X	75.00

[illegible]

SWORN STATEMENT IN PROOF OF LOSS

8000
AMOUNT OF POLICY AT TIME OF LOSS
12-22-81
INCEPTION DATE
12-22-82
EXPIRATION DATE

PLTF 30 DFFD EXHIBIT

NP640-321
POLICY NUMBER
01
CLAIM NUMBER
3157
AGENT

VS
DATES 12/10/82

To the **NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, COLUMBUS, OHIO**

At time of loss, by the above indicated policy of insurance you insured JAMES E. COOK

against loss by FIRE to the property described under Schedule "A," according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

1. Time and Origin: A FIRE LOSS loss occurred about the hour of 9 o'clock P M.,
STATE KIND
on the 27 day of DECEMBER 81. The cause and origin of the said loss were:

2. Occupancy: The building described, or containing the property described, was occupied at the time of the loss as follows, and for no other purpose whatever: EXCEPT RESIDENCE FOR THE NAMED INSURED AND HIS ROOM-MATE NICKOL NATEL

3. Title and Interest: At the time of the loss the interest of your insured in the property described therein was OWNED BY THE NAMED INSURED. No other person or persons had any interest therein or incumbrance thereon, except: NONE

4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except: NONE

5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, \$ 8000, as more particularly specified in the apportionment attached under Schedule "C," besides which there was no policy or other contract of insurance, written or oral, valid or invalid.

6. The Actual Cash Value of said property at the time of the loss was	\$ <u>8000</u>
7. The Whole Loss and Damage was	\$ <u>3468.09</u>
8. Less Amount of Deductible or Coinsurance Penalty	\$ <u>100.00</u>
9. The Amount Claimed under the above numbered policy is	\$ <u>3368.09</u>

The said loss did not originate by any act, design or procurement on the part of your insured or this affiant. Any other information that may be required will be furnished and considered a part of this proof.

In consideration of any payment made pursuant to this proof the undersigned hereby assigns and transfers to the Nationwide Mutual Fire Insurance Company and agrees that said Company is subrogated to each and all claims and demands against any persons, firms or corporation arising from or connected with such loss or damage to the extent of the amount of such payment. The undersigned agrees he will assist the Company in the prosecution of such claims and will execute any and all papers necessary in effecting recovery.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of VIRGINIA

County of VA. BEACH, VA

James E Cook

Subscribed and sworn to before me this _____ day of _____ 19 _____

Notary Public

SCHEDULE "A" – POLICY FORM

Policy Form No. _____ Dated _____

Item 1. \$ _____ on _____

Item 2. \$ _____ on _____

Item 3. \$ _____ on _____

Item 4. \$ _____ on _____

Situated

Coinurance, Average, Distribution, or Deductible Clauses, if any _____

Loss, if any, payable to _____

SCHEDULE "B"
STATEMENT OF ACTUAL CASH VALUE AND LOSS AND DAMAGE

[illegible]

SCHEDULE "C" – APPORTIONMENT

POLICY NO.	EXPIRES	NAME OF COMPANY	ITEM NO. _____			ITEM NO. _____		
			INSURES	PAYS		INSURES	PAYS	
Totals:								

COLONIAL
PRINTERS/LITHOGRAPHERS

James E. Cook
Sales Representative

DIRECT MAILERS

(804) 499-1248

5041 Admiral Wright Road
Virginia Beach, Va. 23462

