Washington Law Review

Volume 42 | Number 4

6-1-1967

The Integrity of the Printed Judicial Decision

Charles E. Corker
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Courts Commons

Recommended Citation

Charles E. Corker, Lampadephoria, *The Integrity of the Printed Judicial Decision*, 42 Wash. L. Rev. 1065 (1967).
Available at: https://digitalcommons.law.uw.edu/wlr/vol42/iss4/5

This Lampadephoria is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

LAMPADEPHORIA†

THE INTEGRITY OF THE PRINTED JUDICIAL DECISION

CHARLES E. CORKER*

"Go . . . and unprint thyself."[1]

Ernest Hemingway employed that euphemistic metaphor in 1940 to suggest obscenity without using it. In 1967, it was no metaphor. West Publishing Company, at the request of the United States Court of Appeals for the Fifth Circuit, unprinted itself. The episode is here recorded to further a fervent hope that it will never be repeated.

Marsden v. Patane, 369 F.2d 439 (5th Cir. 1966) (2-1 decision), was decided December 13, 1966, and printed by West Publishing Company in advance sheet 369 F.2d No. 2, dated February 6, 1967. The court reversed summary judgment for plaintiff in a wrongful death action on the ground that under applicable Florida law running a stop sign is only prima facie evidence of negligence, and therefore should be considered by the jury along with evidence (1) of defendant's unfamiliarity with the area of the accident, (2) that a vehicle in front of the defendant has misled defendant by failing to stop, and (3) that another car had distracted defendant's attention.

When the bound and permanent volume identified as 369 F.2d appeared, *Marsden v. Patane* was missing. The space it had occupied in the February 6 advance sheet contains *In re Lenrick Sales, Inc.,* a bankruptcy case decided February 15, 1967, by the Court of Appeals for the Third Circuit. *Lenrick Sales* had first appeared in advance sheet 373 F.2d No. 3, dated April 24, 1967 (pages 361-536) which contains following page 536 a sheet labelled "APPENDIX." The appendix is *Lenrick Sales* with running head: "Cite as 369 F.2d 439 (1967)." The pages are numbered 439 through 443; the first and last pages are partially filled and the print position corresponds to *Marsden v. Patane* in advance sheet 369 F.2d No. 2.[2]

* Professor of Law, University of Washington. A.B., 1941, Stanford; LL.B. 1946, Harvard.

[1] FOR WHOM THE BELL TOLLS 45 (1940).

[2] If *Lenrick Sales* had been given its own citation in 373 F.2d No. 3, it would have appeared in the "Key Number Digest," the list of "Cases Reported," and "Statutes Construed" in that issue of the advance sheets. It did not. It has also been omitted from West's *General Digest* through Fourth Series, Volume 4, No. 1, dated June

Why? West Publishing Company replied to the writer's inquiry on May 9, 1967:

> After publication of the advance sheet, the court directed us to withhold the original opinion from publication in the permanent volume, and informed us that a new opinion would be written. Accordingly, the opinion was withdrawn, and another opinion, In re Lenrick Sales, Inc., was substituted for Marsden in the bound volume of 369 F.2d at page 439.
>
> A new opinion in Marsden has been received from the court, and will appear in an early issue of the Federal Second advance sheets. The original opinion in Marsden, having been withdrawn by the court, will of course not be carried forward into the permanent records.

When the "early issue" had not appeared by August 7, I inquired of the clerk of the court who promptly furnished a copy of a slip opinion. The new *Marsden* opinion is dated exactly five months later than the first opinion, and notes that the opinion originally rendered is hereby withdrawn, and this opinion entered, but it neither cites nor otherwise identifies the original.

The new opinion is written by the same judge, but reaches an opposite result: Summary judgment for plaintiff is affirmed because reasonable men could not reasonably infer that a prima facie showing of negligence from violation of a traffic law had been rebutted. A dissent to the original opinion disappeared; but a judge who originally joined the majority opinion now wrote a dissent to the new majority opinion.

There is something Orwellian, but not sinister, about the episode. Furthermore it is wholly objectionable. Published judicial opinions invite people to rely, subject to well understood possibilities of reversal, overruling, or modification, which can be discovered in subsequent history. Unprinting, as in *Marsden v. Patane,* is quite different because it affords almost no opportunity for discovery.

Shepard's Federal Reporter Citations for July, 1967 is prefaced by information that it contains citations through 373 F.2d 536, but it has no notation to 369 F.2d 439. This says as clearly as words that 369 F.2d 439 has not been superseded through 373 F.2d 536. However, in fact it was superseded no later than April 24, 1967, when 373 F.2d No. 3 was issued with its *Lenrick Sales* appendix.

Shepard, which identifies cases by numbers and not names, has not

---

1967, which is the last received by the University of Washington Law Library as of August 15, 1967. Companion cases reported in 373 F.2d No. 3 are in West's *General Digest,* Fourth Series, Volume 3, No. 2, March 1967.

developed a procedure to cite two cases both identified as 369 F.2d 439, except when both cases appear simultaneously on the same page. Furthermore, it does not have an abbreviation for "Unprinted." All it has is "S (superseded)—Substitution for former opinion." But West Publishing Company has not yet [August 7, 1967] published advice that *Marsden* is superseded, or provided Shepard with anything to cite as evidence thereof.

A judge, unable to find *Marsden v. Patane,* 369 F.2d 439, cited in a lawyer's brief, might call the lawyer to account for citing a nonexistent opinion. If the library, following usual practice, had destroyed 369 F.2d advance sheets on receipt of a permanent volume, the lawyer might be unable to prove—even to himself—that he was not the victim of hallucination. He might, having already misinvested his client's money, fire his secretary or junior associate, or kick his dog.[3]

The conclusion is patent. A judicial opinion, once printed, should never be unprinted. So long as the practice exists libraries are put to an impossible choice: (1) to permanently retain vast quantities of space consuming advance sheets; or (2) to expose all their users to the hazard of undetectable rewriting of judicial records between the dates of original and permanent publication.

When a court supersedes its published opinion it should unfailingly cite the superseded opinion. This may be at the cost of embarrassment to a court which changes its mind, and at a cost to libraries of permanent preservation of two opinions, although only the superseding opinion is authoritative. Such costs are small indeed when compared to the utterly unacceptable alternative in the case of *Marsden v. Patane,* 369 F.2d 439.

Furthermore the first opinion is useful in understanding the second. To what extent was the second decision influenced by a Florida case not cited in the first opinion? If this was controlling, then the second

[3] If he recalled the appropriate headnotes, the lawyer might prove from West Publishing Company books that Marsden v. Patane, 369 F.2d 439 (5th Cir. 1966), once existed. West's *General Digest,* Fourth Series, Volume 3, No. 2, March 1967, cites it under these headnotes: "Autos 171 (11); Death 104 (4); Fed. Civ. Proc. 2515, 2541." Subsequent issues through Volume 4, No. 1, June 1967 (the last received by the University of Washington Library as of August 15, 1967) indicates no correction, or that 369 F.2d 439 has become a citation to *In re Lenrick Sales.*

We have discovered two published sources for the original opinion: 10 FED. RULES SERV. 2d 56c.41, Case 8 (where it is cited "369 F.2d 439"), and CCH AUTO. NEG. CAS. 1966-2, No. 13, 181. The former is an edited version.

It has been reported that West is reluctant to permit its authors—even judges—to cite sources for opinions other than West publications, even when West has not reported an opinion. *See* Vestal, *A Survey of Federal District Court Opinions: West Publishing Company Reports,* 20 SW. L.J. 63, 74-76 (1966).

opinion is of interest primarily with respect to the court's views of Florida law. If, however, the second decision was influenced by a changed view of reasonable inferences which a jury might draw from undisputed facts, then the decision is helpful in construing Federal Rule 56(c).[4]

"Unprint thyself" should be restored to the exclusive domain of literary metaphor. As a literal practice, it invites literal obscenity from a generation less Victorian than Hemingway's.

[4] FED. R. CIV. P. 56(c):
The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.... (emphasis added).