

## UNVERIFIED PETITION HELD CURABLE BY AMENDMENT

*Hunt v. Rohrbaugh Enterprises, Inc.*  
171 Ohio St. 92, 169 N.E.2d 483 (1960)

In an action for personal injuries alleged to have resulted from defendant's negligence on June 21, 1956, plaintiff filed an unverified petition in Common Pleas Court on June 20, 1958, and service of summons was made thereon. On September 3, 1958, defendant, appearing specially, moved to set aside service of summons because the purported petition did not contain a verification as required by statute.<sup>1</sup> Plaintiff requested leave to amend on September 9, 1958, after the two-year statute of limitations had expired. Defendant's motion was granted and plaintiff's request for leave to amend was denied. The Ohio Supreme Court, in reversing the lower courts, held that although a motion to set aside the summons properly questioned the sufficiency of the petition, the defect may be cured by an amendment adding a verification.<sup>2</sup>

Every pleading of fact in Ohio must be verified by an affidavit of the party or his agent or attorney.<sup>3</sup> Originally, this requirement was thought to prevent "unjust demands" while, at the same time, not hindering the litigation of "honest suitors."<sup>4</sup> Furthermore, verification was desired because it "would tend to abridge the pleadings . . ." and "dispense with proof, litigation and costs." The Ohio courts have generally followed a logical, formalistic approach in regard to omissions of, or defects in, verifications to pleadings. Some cases have permitted amendments to cure *defective verifications* without requiring issuance of new summons.<sup>5</sup> Thus, a defectively verified petition is still a petition sufficient to commence an action. These cases contain strong dicta that even an *unverified* petition could be amended without new summons being issued.<sup>6</sup> The cases actually deciding that issue,<sup>7</sup> however, have generally held that an unverified petition is a nullity and, therefore, there is nothing which could be amended.<sup>8</sup> Two courts have permitted amendment, but have required new summons to issue.<sup>9</sup> Under this strict approach, failure to verify renders a petition insuf-

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<sup>1</sup> Ohio Rev. Code § 2309.46 (1953).

<sup>2</sup> *Hunt v. Rohrbaugh Enterprises, Inc.*, 171 Ohio St. 92, 169 N.E.2d 483 (1960).

<sup>3</sup> Ohio Rev. Code § 2309.46 (1953).

<sup>4</sup> Report of the Commissioners on Practice and Pleadings—Code of Civil Procedure, p. 64 (1853).

<sup>5</sup> *Hoytville v. Hoytville Bank Co.*, 18 Ohio L. Abs. 191 (Ct. App. 1934); *Bantz v. Rover*, 14 Ohio C.C.R. (n.s.) 218, 24 Ohio C.C. Dec. 201 (1911); *Meade v. Thorne*, 2 Ohio Dec. Reprint 289 (C.P. 1859).

<sup>6</sup> *Supra*, note 7; also see, *Dunaway v. Torline*, 90 Ohio App. 516, 105 N.E.2d 75 (1951) (if petition had contained no verification, it would still be a petition).

<sup>7</sup> By permitting an amendment to be made, the decision in the principal case, in effect, abolishes this distinction.

<sup>8</sup> *White v. Freese*, 13 Ohio Dec. Reprint 749 (C.P. 1870); *Kern v. Roberts*, 2 Ohio Dec. Reprint 537 (C.P. 1861).

<sup>9</sup> *Sellers v. Williams*, 105 Ohio App. 332 (1957); *Boyles v. Hoyt*, 2 Ohio Dec. Reprint 376 (D. Ct. 1860); *Stevens v. White*, 2 Ohio Dec. Reprint 107 (C.P. 1859).

ficient to commence an action. Furthermore, if the statute of limitations had expired, an amendment could not cure the defect. Curiously, however, amendments have been permitted to cure other *omissions* or *defects* in pleadings as errors in the caption,<sup>10</sup> failure to subscribe,<sup>11</sup> and the omission of a notarization<sup>12</sup> were corrected upon leave of court.

The three opinions in the principal case reflect the different approaches followed by the lower courts. The first paragraph of the syllabus established the propriety of a motion to set aside summons to question the sufficiency of an unverified petition. The second paragraph interprets Ohio Revised Code section 2309.58<sup>13</sup> to permit amendment adding a verification upon plaintiff's request. Judge Herbert, the only member of the court to concur in both paragraphs of the syllabus,<sup>14</sup> thought omission of a verification made a petition defective, but not a nullity. Yet, he held a motion to set aside summons is proper. Before defendant's motion is ruled upon, however, the court should grant plaintiff leave to amend under the broad language of section 2309.58.<sup>15</sup> This liberal interpretation of the statute was justified by its prior application in similar circumstances.<sup>16</sup> In *Kokolaksis v. Paris*,<sup>17</sup> a petition to contest a will was filed by a foreign consul and decedent's brothers and sister. The petition was verified only by the consul who was later held not a proper party. An amended petition, properly verified, was filed after the statute of limitations had expired. The court granted defendant's motion to quash. Upon review, the appellate court, in reversing, held that the omission of, or defect in, a verification did not destroy the sufficiency of the original petition. Judge Herbert cites the decision with approval and suggests that the original petition in *Kokolaksis* was actually not verified. Technically, it might be argued that a petition verified by one who is not a party is only defective. This distinction seems dubious, however, and the effect of the court's ruling in the principal case has eliminated that distinction.

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<sup>10</sup> *Rayburn v. Strouth*, 170 N.E.2d 868 (Ohio C.P. 1960); *Roberts v. Sogg*, 30 Ohio L. Abs. 523 (Ct. Apps. 1939).

<sup>11</sup> *The Cincinnati, Hamilton, and Dayton Ry. Co. v. Bailey*, 70 Ohio St. 88, 70 N.E. 900 (1904); *Conn v. Rhodes*, 26 Ohio St. 644 (1875).

<sup>12</sup> *Venneman v. Sievering*, 9 Ohio Dec. Reprint 459 (Cin. Super. Ct. 1885).

<sup>13</sup> Ohio Rev. Code § 2309.58 (1953) provides that "the court may amend any pleading, process, or proceeding . . . by correcting a mistake" and "when an action or proceeding fails to conform to the laws governing civil procedure, the court may permit either to be made conformable by amendment."

<sup>14</sup> Judges Taft, Matthias, and Bell concur only in paragraph two of the syllabus, while Judges Zimmerman, Peck, and Weygandt, C.J., concur only in paragraph one.

<sup>15</sup> *Supra*, note 13.

<sup>16</sup> *Kokolaksis v. Paris*, Civil No. 35733, Ohio Sup. Ct., motion to certify denied, Nov. 26, 1958 (leave granted to permit remaining plaintiffs to verify after running of statute of limitations); *Cincinnati, Hamilton, and Dayton Ry. Co. v. Bailey*, 70 Ohio St. 88, 70 N.E. 900 (1904) (failure to subscribe curable by amendment); *Irwin v. Bank of Bellefontaine*, 6 Ohio St. 81 (1856) (amendment permitted to cure a substantially defective appeal bond).

<sup>17</sup> *Id.* note 16.

Dissenting from the judgment and the second paragraph of the syllabus, Judge Zimmerman follows the more strict approach of prior cases, *i.e.*, since the verification is required by statute, its omission renders the petition a nullity.<sup>18</sup> He asserts that the power to amend can only be implemented if the statutory thing to be amended exists,<sup>19</sup> and since there was no verification in the original petition, there was no pleading to amend. Arguably, the *petition* was defective, and the petition was there to amend. Furthermore, as the statute of limitations had expired, this strict approach would bar plaintiff's claim because he failed to comply with a technical requirement. The Ohio Supreme Court has itself stated that a prominent objective of the code of civil procedure was to avoid the harsh consequences which result from a strict interpretation of technical requirements.<sup>20</sup>

In his concurring opinion, Judge Taft agreed with Judge Herbert that an unverified petition was sufficient to justify issuance of summons and that the defect could be cured by amendment. He differed with Judge Herbert, however, on the propriety of a motion to set aside summons. This motion, reasoned Judge Taft, would not be proper since granting it would imply that the summons is a nullity. In his view failure to properly verify a petition does not affect the jurisdiction of the trial court, for such a defect may be waived.<sup>21</sup> Since an unsigned petition has been recognized as a petition,<sup>22</sup> he concluded that an unverified petition should be accorded similar treatment.

Although somewhat clouded by holding a motion to set aside summons proper in this case,<sup>23</sup> the opinion has clarified a disputed problem. The court's liberal interpretation of section 2309.58 recognizes the power of the trial courts to permit a verification to be added by amendment, thus freeing a plaintiff from the bar of the statute of limitations, and from difficulties sometimes involved in service of new summons. However, because of the first paragraph of the syllabus, if the defendant moves to set aside the service of summons, the plaintiff should promptly ask leave to amend. Although granting leave to amend is discretionary, the Supreme Court did not discuss the limits of this discretion. If the petition is not amended, this paragraph of the syllabus would seem to require that defendant's motion be sustained.

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<sup>18</sup> Ohio Rev. Code § 2309.46 (1953).

<sup>19</sup> See *Shamoken Bank v. Street*, 16 Ohio St. 1, at 10 (1864).

<sup>20</sup> *Irwin v. Bank of Bellefontaine*, *supra* note 16 (the court also states that the power to amend is limited only to cases where granting the request would not be in the furtherance of justice).

<sup>21</sup> *The Toledo, Bowling Green, and Southern Traction Co. v. Berden*, 89 Ohio St. 455 (1914); *First National Bank of Sydney v. Read*, 31 Ohio St. 435 (1877).

<sup>22</sup> *Conn v. Rhodes*, *supra* note 11.

<sup>23</sup> Following the view of Judge Taft, more appropriate motions would be a motion to strike the petition from the files or a motion to reform the petition. See, *Carpenter v. Traver*, 22 Ohio App. 249, 153 N.E. 520 (1926); *Jumet v. Baltimore and O.S.W. Ry.*, 15 Ohio Dec. 628 (1905); 43 Ohio Jur. 2d "Pleading" §§ 70, 250, 271 (1960).