

Petition to Compel Mayor to Fill Judicial Vacancies Denied

St. John's Law Review

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Recommended Citation

St. John's Law Review (1965) "Petition to Compel Mayor to Fill Judicial Vacancies Denied," *St. John's Law Review*: Vol. 40 : No. 1 , Article 70.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol40/iss1/70>

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ARTICLE 78—PROCEEDINGS AGAINST BODY OR OFFICER

Petition to compel mayor to fill judicial vacancies denied.

In the case of *Blaikie v. Wagner*,²⁷⁵ petitioner sought to compel the Mayor of New York City to fill several long-standing judicial vacancies. Special term, in denying the petition, held that since petitioner was not "personally aggrieved" he had no standing to sue under Article 78. The court stated that there are only three recognized exceptions to this requirement, *i.e.*, in matters involving civil service,²⁷⁶ election laws²⁷⁷ and common-law nuisances on public highways,²⁷⁸ which are justified as in the interest of the general public.²⁷⁹ However, the court did not convincingly indicate why the filling of judicial vacancies was not in the general public interest. It would appear, moreover, that the court based its decision on other grounds. Mandamus is a highly discretionary form of relief. It is appropriately invoked only to compel positive and specifically defined behavior.²⁸⁰ In the *Blaikie* case, the relevant statutes required only that vacancies be filled as they arose.²⁸¹ The court found these provisions to be directory rather than mandatory and thus, that mandamus did not lie. This construction has full statutory support²⁸² and, when taken with the court's abhorrence to exercise a regulatory function over administrative affairs and a justified fear of the voluminous litigation that would ensue from a contrary result, the decision is more than tenable.

Article 78 appropriate remedy to annul administrative penalty previously served.

In a recent case,²⁸³ petitioner sought to annul a commissioner's determination which suspended his license to sell theater tickets. Respondent contended that since the penalty had been met, the

²⁷⁵ 46 Misc. 2d 441, 259 N.Y.S.2d 890 (Sup. Ct. N.Y. County 1965).

²⁷⁶ See *Cash v. Bates*, 301 N.Y. 258, 93 N.E.2d 835 (1950).

²⁷⁷ See *McCabe v. Voorhis*, 243 N.Y. 401, 153 N.E. 849 (1926).

²⁷⁸ *People ex rel. Pumpyansky v. Keating*, 168 N.Y. 390, 61 N.E. 637 (1901).

²⁷⁹ *Blaikie v. Wagner*, 46 Misc. 2d 441, 444, 259 N.Y.S.2d 890, 893 (Sup. Ct. N.Y. County 1965); see *People ex rel. Pumpyansky v. Keating*, *supra* note 278, at 393, 61 N.E. at 637; *United Press Ass'ns v. Valente*, 281 App. Div. 395, 400, 120 N.Y.S.2d 174, 180 (1st Dep't 1953).

²⁸⁰ 8 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 267, ¶7803.03; see CPA § 1284; *Walsh v. La Guardia*, 269 N.Y. 437, 441, 199 N.E. 652, 653 (1936).

²⁸¹ See, *e.g.*, N.Y. CONST. art. VI, §§ 13, 15, 21; CCA § 22(2).

²⁸² See N.Y. CONSOL. LAWS, STATUTES §§ 172, 177.

²⁸³ *Leo Newman's Theatre Ticket Office, Inc. v. DiCarlo*, 46 Misc. 2d 549, 260 N.Y.S.2d 221 (Sup. Ct. N.Y. County 1965).