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Article 70

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## Petition to Compel Mayor to Fill Judicial Vacancies Denied

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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*,<sup>275</sup> 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,<sup>276</sup> election laws<sup>277</sup> and common-law nuisances on public highways,<sup>278</sup> which are justified as in the interest of the general public.<sup>279</sup> 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.<sup>280</sup> In the *Blaikie* case, the relevant statutes required only that vacancies be filled as they arose.<sup>281</sup> The court found these provisions to be directory rather than mandatory and thus, that mandamus did not lie. This construction has full statutory support<sup>282</sup> 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,<sup>283</sup> 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

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

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

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

<sup>278</sup> *People ex rel. Pumpysky v. Keating*, 168 N.Y. 390, 61 N.E. 637 (1901).

<sup>279</sup> *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. Pumpysky 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).

<sup>280</sup> 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).

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

<sup>282</sup> See N.Y. CONSOL. LAWS, STATUTES §§ 172, 177.

<sup>283</sup> *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).