istic attitude as the court did in the *Perryman Electric Co.* case.[28] It would seem, therefore, that the court should treat these actions, brought under Section 65 of the Corporation Act in the same manner as other equity actions and permit, as a matter of course, consent discontinuances prior to decree.[29]

ENFORCEMENT OF ZONING ORDINANCE IN EQUITY—In *Srager* v. *Mintz*[1] the New Jersey Court of Errors and Appeals has laid down the rule that a court of equity will not, at the suit of a private complainant, enforce a municipal zoning ordinance unless the violation complained of shall in itself constitute a common law nuisance, without regard to the ordinance. While it must be admitted that the decisions, within New Jersey and in other jurisdictions, are not in accord, the very marked tendency of the courts throughout the country—and in New Jersey as well,—has been to sustain the jurisdiction of equity.

Thus in *Gaston* v. *Ackerman*[2] it was held that an owner of land in a residential zone had a sufficient status to review the action of a board of appeals in granting a permit to erect an apartment house on the same street and in the same zone on the ground that "the prosecutor has such a *property interest*[3] as entitled him to raise the question as to the right of the board of appeals to grant the building permit."

Again in *Stokes* v. *Jenkins*[4] the court held in a case where side-line provisions of a zoning ordinance had been violated, that a neighboring property owner might have recourse to equity to enjoin a breach of the zoning ordinance. The opinion emphasized the reciprocal liabilities and privileges set up by the ordinance, referred to the injunctive relief provided in the zoning enabling act[5] in respect of municipalities and reasoned from general principles already well established to the effect that legislation which altered the relations between individual members of the community might give rise to new individual rights though pri-

---

[28] It is of interest to note that subsequent to the finding in the reported Perryman Electric Co. case to the effect that the corporation was not insolvent, a suit was instituted by another creditor, receivers appointed, and a condition of hopeless insolvency discovered. This matter is still pending, and it is now clear that creditors will receive only a small percentage of their claims. Engineering Co., a corporation, v. Perryman Electric Co., Chancery Docket 86-615.

[29] There certainly can be no urgent public policy in the commencement of these actions. Chap. 221, Laws of 1931 restricts stockholders in the commencement of an action of this nature. A stockholder or stockholders commencing the suit must have at least ten per cent of the outstanding stock. Our courts have frequently held that in the exercise of their discretion, decrees adjudicating insolvency and appointing receivers should not be entered, except in very clear cases. Greenbaum v. Lafayette & Broad Realty Corp., 96 N.J.Eq. 317, 124 Atl. 775 (E&A 1924); Kelly v. Kelly-Springfield Tire Co., 106 N.J.Eq. 545, 152 Atl. 166, (Ch. 1930).

[1] 109 N.J.Eq. 544 (E.&A. 1932).

[2] 6 N.J. Misc. 696, 142 Atl. 546 (Sup. Ct. 1928).

[3] Italics ours.

[4] 107 N.J.Eq. 318 (Ch. 1930).

[5] P.L. 1928, 696.

marily of public implication[6]. *Stokes* v. *Jenkins* was cited with approval in *Conway* v. *Atlantic City*[7].

Similarly in *Maplewood* v. *Margolis*[8] Vice Chancellor Backes, in denying relief on the ground that the ordinance in question had already been declared invalid by the State Supreme Court[9] stated his concept of the law as follows: "If an ordinance were authorized by law and the law provided no adequate remedy and protection, equity undoubtedly would lend aid."[10]

It is interesting to note that in the opinion of the Court of Errors and Appeals in *Srager* v. *Mintz,* no reference is made to these recent decisions, the only authorities cited being *Ocean City Association* v. *Schurch*[11] and *Ventnor City* v. *Fulmer*[12] in which the court refused an injunction at the suit of the municipality, to stay the violation of an ordinance concededly within the police powers as a fire prevention measure, providing for a set-back of a certain distance of all buildings located on a certain street.

This last mentioned case is interesting from two aspects, first in that it is doubtful whether it would now be considered as authoratative under the zoning enabling act, specifically providing for injunctive assistance to municipalities in enforcing zoning ordinances; and secondly

---

[6] Citing Fielders v. North Jersey etc. Co., 68 N.J.L. 343 (E.&A. 1902); Evers v. Davis, 86 N.J.L. 196 (E.&A. 1914), "The legislature must be assumed to know the law and if upon common law principles such a statute would affect private rights, it must have been passed in anticipation of that effect"; Weller v. McCormick, 52 N.J.L. 470 (Sup. Ct. 1880), "It is a general principle that where there rests upon a person a public duty * * * and that duty is due to the public considered as composed of individuals, and for their protection, each person specially injured by a breach of the obligation is entitled to a private action to recover compensation for his damage"; Gilbough v. West Side etc Co., 64 N.J.Eq. 27 (Ch. 1902); Gaston v. Ackerman, *supra* note 2.

[7] 107 N.J.L. 404, 154 Atl. 6 (Sup. Ct. 1930), another case holding that an adjacent property owner had a status to review adverse action of zoning authorities; see also Schumacher v. Union City, 9 N.J. Misc. 492, 154 Atl. 406 (Sup. Ct. 1930).

[8] 101 N.J.Eq. 778, 138 Atl. 924 (E.&A. 1927), *certiorari* denied 48 SUP. CT. REP. 212 (U. S. Sup. Ct. 1928).

[9] 5 N.J. Misc. 131, 135 Atl. 662 (Sup. Ct. 1927).

[10] See also opinion of Berry, V. C., in National Skee-Ball Co., Inc., v. Seyfried, 110 N.J.Eq. 18 at page 23 (Ch. 1932): "The absence of precedent alone, however, would not deter me from granting relief if I were convinced that relief should be granted. 'The principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found, * * * it is no objection to the exercise of jurisdiction that, in the ever changing phases of social relations, a new case is presented and new features of wrong are involved. * * * While it is true that equity will make a precedent to fit a case novel in incident, yet in my judgment the facts of the case must come within some head of equity jurisprudence.'" Citing Walker, V. C., in Earle v. American Sugar Refining Co., 74 N.J.Eq. 751 at page 761 (1908).

[11] 57 N.J.Eq. 268, 41 Atl. 914 (Ch. 1898), a denial on the ground of laches, of an injunction to prevent violation of a covenant against Sunday selling, and a refusal to intervene because as alleged, the injunction would aid in the maintenance of the State's policy of Sabbath observation.

[12] 92 N.J.Eq. 478, 113 Atl. 488 (Ch. 1921), *aff'd* 93 N.J.Eq. 660, 117 Atl. 925 (E.&A. 1922).

because of the authorities, exclusively from foreign jurisdictions, cited in support[13]. The interest in the foreign citations lies in the fact that in two of the jurisdictions at least, New York and Wisconsin, the earlier position of the courts has been definitely overruled. Thus in *Cohen* v. *Rosevale Realty Co.*[14] it was held that owners of residential property suffered special damage by the erection of stores in a residential zone and might have injunctive relief in equity. In *Holzbauer* v. *Ritter*[15] not only was the construction of a store building in a residence zone in violation of the ordinance enjoined but the case of *Village of Waupun* v.*Moore*[16], relied upon in *Ventnor City* v. *Fulmer*[17] was definitely disapproved.

Briefly to mention other jurisdictions where the equity power has been sustained, we find Connecticut in the leading case of *Fitzgerald* v. *Merard Holding Co.*[18] granting relief to a private complainant against the erection of an apartment house in contravention of the zoning ordinance, the law being thus stated by Chief Justice Wheeler: "Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance or regulation *though they are not nuisance per se,*[19] if the person seeking such injunction shows that their erection will work special or irreparable injury to him and his property."

In *Pritz* v. *Messer*[20] the Ohio courts have similarly placed themselves on record in affording injunctive relief to private owners against the erection of a non-conforming apartment house, on the ground that the advantages of the zoning ordinance accrued not only to the municipality but to abutting property owners as well and that the plaintiff was in a position analogous to that of one for whose advantage a contract had been made by another, having so substantial an interest that equity would take cognizance of it.

Decisions, at first blush seeming to look the other way can as a whole be distinguished. Thus in *People* v. *Linabury*[21] the ordinance preventing the removal of sand from property within the district, was held to be invalid, the decision being thus similar to that in *Maplewood*

---

[13] Rochester v. Walters, 27 Ind. App. 194; 60 N.E. 1101 (1901); Mt. Vernon National Bank v. Sarlls, 129 Ind. 201; Kaufmann v. Stein, 138 Ind. 49; 37 N.E. 333, 46 Am. St. Rep. 368 (1894); Hudson v. Thorne, 7 Paige (N.Y.) 261 (1838); Manchester v. Smyth, 64 N.H. 380; 10 At. 700 (1887); Village of St. John v. McFarlan, 33 Mich. 72; 20 Am. Rep. 671 (1875); Village of Waupun v. Moore, 34 Wis. 450; 17 Am. Rep. 446 (1874). The ordinance in the last case sought to provide for enforcement by injunction.

[14] 120 Misc. 416, 199 N.Y. Supp. 4 (Sup. Ct. 1923); 206 App. Div. 681, 199 N.Y. Supp. 916 (1923); 121 Misc. 618, 202 N.Y. Supp. 95 (Sup. Ct. 1923); 211 App. Div. 812, 206 N.Y. Supp. 893 (1924).

[15] 184 Wis. 35, 198 N.W. 852 (Sup. Ct. 1924).

[16] Note 13, *supra.*

[17] Note 12, *supra.*

[18] 106 Conn. 475, 138 Atl. 485, 54 A.L.R. 361 (1927).

[19] Italics ours.

[20] 112 Ohio St. 628, 149 N.E. 30 (1923).

[21] 209 N.Y. Supp. 126 (Sup. Ct. 1924).

v. *Margolis*[22]. In *Irwin* v. *Lutece Baby and Novelty Shop*[23], relief was denied because of a pending suit to enjoin the enforcement of the ordinance, which involved the same question. In *Jardine* v. *Pasadena*[24] the ordinance sought to be enforced had been repealed.

Two cases seem difficult to reconcile. *Whitridge* v. *Park*[25] applies the nuisance rule laid down in *Srager* v. *Mintz*. In view however of the later decision in the same court[26] this doctrine would seem definitely overruled and the case to be another instance of the tendency of the courts to regard a zoning ordinance as a law establishing new relationships between the individual landowners. *O'Brien* v. *Turner*[27] would seem to place Massachusetts definitely in the class of jurisdictions limiting private relief to instances where the violation constitutes a nuisance, independent of the ordinance. The propriety of equitable relief, at the instance of the municipality, under a statutory provision is however definitely reasserted in accordance with the earlier decision in *Inspector of Building* v. *Stoklosa*[28]. Other jurisdictions seem in general accord as to the power of the legislature to extend this aid to municipalities in the enforcement of ordinances[29].

In the unreported decision of Vice Chancellor Buchanan in the court below, a further ground was suggested for denying relief, to wit, the alleged unconstitutionality of the zoning enabling act insofar as it seeks to give new vitality to zoning ordinances adopted prior to its enactment. This suggestion of the lower court would seem to be wholly gratuitous and the evasion of an answer to it by the higher court[30] unnecessary in view of the fact that the point must be considered as at rest in New Jersey. In at least three cases the Court of Errors and Appeals has settled the law.[31] In *Steinberg* v. *Board,* the court definately states that the "Statute validated pre-existing zoning ordinances passed by the various municipalities of the State."[32]

---

[22] Note 8, *supra.*

[23] 156 La. 740, 101 So. 125 (1924).

[24] 199 Cal. 64, 248 Pac. 225 (1926).

[25] 100 Misc. 367, 165 N.Y. Supp. 640 (1917) *aff'd* 179 App. Div. 884, 165 N.Y. Supp. 640 (1917).

[26] Cohen v. Rosedale Realty Co. Note 14, *supra.*

[27] 255 Mass. 84, 150 N.E. 886 (1926).

[28] 250 Mass. 52, 145 N.E. 262 (1924).

[29] Lincoln v. Foss, 230 N.W. 592 (Neb. 1930); Chicago v. Ripley, 249 Ill. 466, 94 N.E. 931 (1911); Stockton v. Frisbie, 270 Pac. 270 (Cal. App. 1928); Elizabeth City v. Aydlett, 200 N.C. 58, 156 S.E. 163 (N.C. 1930); Brookline v. McManus, 160 N.E. 887 (Mass. 1928).

[30] "We do not deem a consideration of the constitutional question necessary to a determination of the present appeal."

[31] Steinberg v. Board, 6 N.J. Misc. 597, 142 Atl. 431 (Sup. Ct. 1928); *aff'd* 106 N.J.L. 608, 146 Atl. 318 (E.&A. 1929); Paramount Realty Co. v. Irvington, 5 N.J. Misc. 282, 136 Atl. 349 (Sup. Ct. 1928); *aff'd* 106 N.J.L. 587, 146 Atl. 319 (E.&A. 1929); Marlyn Realty Co. v. West Orange, 5 N.J. Misc. 342, 136 Atl. 920 (Sup. Ct. 1928); *aff'd* 106 N.J.L. 573, 146 Atl. 320 (E.&A. 1929).

[32] See also Koplin v. South Orange, 6 N.J. Misc. 489, 142 Atl. 235, (Sup. Ct. 1928) *aff'd* 105 N.J.L. 492, 144 Atl. 920 (E.&A. 1929); Keiser v. Plainfield, 10 Misc. 496 (Sup. Ct. 1932), citing Frank J. Durkin Lumber Co. v. Fitzsimmons, 106 N.J.L. 183, 147 Atl. 555 (E.&A. 1929).