award costs (the counter argument that an application to the court for leave should not be regarded as a proceedings for the purposes of section 51(1) seem to this commentator to be very artificial), there is justification for being more willing to exercise that discretion in the case of section 289 applications for leave; though whether this is sufficient for there to be a general rule that the applicant who is refused leave should normally have to pay a respondent is more arguable. After all the court is given a discretion whether to award costs and in practice such a general rule has a tendency to harden into a strict norm. Also while matters of fact are more important in enforcement appeals than in most judicial review applications, it does seem strange that there should be no provision for leave to be determined on paper without an oral hearing in open court.

Enforcement notice—steps required for compliance—part of site Scheduled Ancient Monument—allegation that notice was a nullity—requirement to carry out works in breach of section 2 of the Ancient Monuments and Archaeological Areas Act 1979—criminal liability—non compliance with notice also minimal—was Inspector entitled to vary the notice—test for nullity in Miller—Mead applied—recipient of the Notice must be able to understand with reasonable certainty the steps which are required of him. Also the steps must in reality be capable of being carried out, and if the recipient is required to do something unlawful he cannot reasonably be said to be able to carry out the requirements—the notice was a nullity.

McKay v. Secretary of State for the Environment, Cornwall County Council and Penwith District Council (Queen's Bench Division, Mr Nigel McLeod, Q.C. sitting as a Deputy Judge, March 12, 1993)[2]

The case concerned two separate parcels of land at Numphra, St Just, Cornwall regarding which two enforcement notices were served. Only one of those notices, notice A, was subjected to the appeal.

Notice A read:

> "WHEREAS:—
> (1) It appears to the Cornwall County Council ('the council') being the local planning authority for the purposes of Section 87 of the Town and Country Planning Act 1971 ('the Act') in this matter, that there has been a breach of planning control after the end of 1963 on the land or premises ('the land') described in Schedule 1 below.
> (2) The breach of planning control which appears to have taken place consists in the carrying out of development by the making of the material change in the use of the land described in Schedule 2 below, without the grant of planning permission required for that development."

Schedule 2 read:

> "Alleged breach of planning control. Use of the said land for the deposit of waste materials."

Then paragraph (3) of the enforcement notice read:

> "(3) The Council consider it expedient, having regard to the provisions of the development plan and to all other material considerations, to issue this enforcement Notice, in exercise of their powers contained in the said Section 87, for the reasons set out in the annex to this Notice.
>
> NOTICE IS HEREBY GIVEN that the Council require that the steps specified in Schedule 3 below be taken in order to remedy the breach within the period specified in respect of each step in that Schedule."

Schedule 3 was divided into two columns: on the left-hand side, "Steps to be taken", and on the right, "Period in which required steps must be taken". The steps, with the relevant periods, were:

[2] *Mr R. Fookes* (Messrs Foot & Bowden, Plymouth, Devon PL4). *Mr I. Ashford-Thom* (the Treasury Solicitor, London SW1).

"(1) To cease and to cease to permit the deposit of waste materials on the said land—One Day.
(2) To remove from the said land, all loose waste materials and objects now on the surface of the tip or the tip sides—One Month.
(3) Grade the tipped area to a smooth profile with the same gradient as the adjoining gully sides—Six weeks.
(4) Cover the tipped area with an even depth of not less than 250mm (10 inches) of sub-soil and then cover with not less than 100 mm (4 inches) of top-soil to an even depth—Six weeks.
(5) Grass seed the area with a Festuca-based conservation mix at the rate of 180kg/hectare—First available grass growing season."

The statement of reasons for taking the enforcement action read:

"The unauthorised development is obtrusive being within an area identified as an area of outstanding natural beauty, area of great historic value and a scheduled ancient monument on the key diagram accompanying the first alteration of the County structure plan. Development of this nature is contrary to structure plan policies 13C, 13M and 13L respectively.

The Authority consider the cessation of tipping and works to mitigate the effects of the unauthorised development to be of very high priority in this sensitive area and in the interests of proper planning control."

The Inspector had varied the requirements, and the periods for compliance, of notice A, but otherwise he had dismissed the appeal.

The Inspector's variations were set out in his decision letter at paragraph 43. That was, in fact, a complete replacement of Schedule 3, that was to say the steps to be taken. Paragraph 43 read as follows:

"For the above reasons, and in exercise of the powers transferred to me: I hearby vary Notice A as follows:

1. I delete the contents of Schedule 3 of the notice and substitute therefor the following:

'(1) Within one day of the date on which this notice takes effect cease the use of the land for the deposit of waste materials.
(2) Within one month of the date on which this notice takes effect remove from the land hatched black on Plan A, attached to this letter, all loose waste materials and objects now on the surface or protruding through the surface.
(3) Subject to and within 6 months of the granting of Scheduled Monument Consent:
(a) reduce the level of the graded area within that part of the floor of the gully which is within the area hatched black on Plan A so as to etablish a minumum height to the northern gully side slope of 0.75m at all points along what formed the northern edge of the tin streamworking complex;
(b) grade the northern gully side within the area hatched black on Plan A to a gradient of 1:2.5;
(c) cover the gully side so formed with an even depth of not less than 250mm of sub-soil and then cover with not less than 100mm of top-soil to an even depth.
(4) Within 6 months of the completion of step (3) grass seed the area formed under that step with a Festuca based conservation mix at the rate of 180kg/ha.

> For the avoidance of doubt, in carrying out the above steps no work is to be undertaken which would cause disturbance to any remaining feature of the Ancient Monument within the area of the notice.' "

The appeal site itself was described by the Inspector at paragraph 7 of the decision letter:

> "The appeal site lies on the moorland slopes of Bartinney Down and some 1.3 ha of the site has been directly affected by the operations which have taken place prior to and after the service of the notice. The appeal site forms a substantial part of a Scheduled Ancient Monument known as the Numphra Common Tin Streamworking Complex. Prior to works carried out by the appellant it had the appearance of rough gorse and bracken clad moorland which showed the distinctive curved parallel dumps of spoil demonstrating the character and method of working. The excavation or gully which resulted from these workings, possibly dating from between the 13th and 18th centuries, was up to 6 metres deep and had a defined edge along much of its northern side. Save for the eastern 50 or so metres the appeal site has been largely levelled and graded with sub-soil and some topsoil, but it remains below the level of the adjoining fields, more so at the eastern end than the western end."

The use of the site was explained at paragraph 9.

> "Mr McKay [the appellant] has known the appeal site for about 13 years, while he has lived at Numphra Cottages. During this time he says the site has been regularly used for fly tipping of rubbish, farm waste and builders' rubble and his concern about this led him to start work on the land and later, to purchase it from the local farmer. Although he first felt there was a problem in about 1984/5 he says that throughout the 13 years people have been tipping on the site 2 or 3 times a week. He also submitted a number of pro-formas filled in by local people to show the number of years they have known the site to be 'a refuse tip where many local people disposed of unwanted lumber and rubbish'. Those who have lived in the area for more than 40 years generally indicated a period of between 30 to 50 years. Mr McKay considers that some of the materials he disturbed indicates a far longer use and heaps of rubbish were to be found all over the appeal site. Access was normally from higher up the hill and egress from behind his cottage, making use of the gradient."

At paragraph 15 of the decision letter the Inspector said:

> "I note that the condition of the site at the time of my visit was substantially different to the condition at the time of the issue of the notice; much of the Ancient Monument within the enforcement notice area has either been levelled or buried. Your client argues that this was not done as part of the waste disposal use but on the instructions of the County Council. I am not in a position to comment on his motives but he accepts the works did involve bringing a substantial amount of sub-soil onto the site and I consider it could be regarded as a continuation of the use to which the notice relates. Certainly I do not accept that, even if he misinterpreted the enforcement notices requirements, he was required to do that work at that time because the notice was in abeyance pending the outcome of his appeal which was, inter alia, on the grounds that the requirements were excessive and insufficient time had been given to comply. Nevertheless, I have had particular regard to the Council's photographic evidence of the site in September 1989, January 1990 and March 1990, rather than to these later changes, in considering whether a material change of use has taken place . . ."

At paragraphs 29–32 the Inspector had dealt with the appeal under section 174(2)(g) of the 1990 Town and Country Planning Act which was the ground that the steps required by the notice to be taken exceeded what was necessary to remedy any breach of planning control. Those paragraphs explained why the Inspector had replaced Schedule 3 in the notice.

> "29. In the light of the extensive works carried out by your client after the issue of the notice it is clear that the original requirements are no longer appropriate. The County Archaeologist does not recommend any attempt be made to uncover what might remain of the Ancient Monument. You accept that it would be within my powers to substitute the requirements now suggested by the Council and that there would be no injustice to your client in doing so.
>
> 30. Subject to some minor rewording and the incorporation of a plan to show the area recently disturbed, for clarity, the requirements seem to me in the notice. Those requirements will no longer apply. I see no reason why the use of the land for the deposit of waste material should not cease within one day, as originally required. The works requiring Scheduled Monument Consent could reasonably be carried out within 6 months of the grant of that consent and the grass sowing within a further 6 months. There appears to be no reason why that consent should not be forthcoming reasonably quickly and the timing I propose would allow the works to be completed after the winter rains with the grass to be sown during the following sowing season. You raised no objection to this."

The Inspector dismissed the appellant's appeal and the appellant appealed to the High Court.

MR. NIGEL MCLEOD, Q.C. said that Mr Fookes had argued that the appeal should succeed on two grounds. The first was that notice A was a nullity and incapable of variation.

It was argued that it was a nullity because it had required the appellant to carry out works necessarily in breach of section 2 of the Ancient Monuments and Archaeological Areas Act 1979, namely works resulting in the demolition, destruction or damage to a scheduled monument; removing, repairing, altering, or adding to a scheduled monument; and, a tipping operation on land on which there was a scheduled monument. The requirement to carry out such work, he said, was a requirement to carry out a criminal offence.

Sections 2(1) and (2) of the 1979 Act read as follows:

> "(1) If any person executes or causes or permits to be executed any works to which this section applies he shall be guilty of an offence unless the works are authorised under this Part of this Act.
> (2) This section applies to any of the following works, that is to say—
> (a) any works resulting in the demolition or destruction of or any damage to a scheduled monument;
> (b) any works for the purpose of removing or repairing a scheduled monument or any part of it or of making any alterations or additions thereto: and
> (c) any flooding or tipping operations on land in, on or under which there is a scheduled monument."

Mr Fookes continued his argument that in order to comply with the terms of the notice as originally

issued the appellant would have had to carry out works which would have given rise to criminal liability under the Act unless Scheduled Monument Consent was first obtained. But he said that there would be no guarantee that such consent would be forthcoming and the notice had taken no account of the need to get such consent in formulating its period for compliance. On the other hand, a failure to comply with the notice within the relevant period for compliance was an offence under section 179 of the Town and Country Planning Act 1990. So, Mr Fookes argued, whether the appellant chose to act or not to act, he would attract criminal liability.

He said that as the notice was a nullity, it was of no legal effect, and there was no power to amend as there was, in effect, no notice. The Inspector was therefore in error in amending rather than declaring the notice a nullity.

Mr Fookes drew attention to the test for nullity of an enforcement notice as set out by Upjohn L.J. in *Miller-Mead v. Minister of Housing and Local Government and Another* [1963] 2 Q.B. 196 at 232 which is in these terms:

> "... does the notice tell him fairly what he has done wrong and what he must do to remedy it?"

Attention was also drawn to p. 224 of that judgment. Upjohn L.J. stated:

> "[The recipient of the notice] is entitled to say that he must find out from within the four corners of the document exactly what he is required to do or abstain from doing."

It was appropriate to draw attention to Upjohn L.J.'s distinction between invalidity and nullity which were set out at pp. 226 to 227 of the judgment:

> "Now, I think, is the time to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found that no permission is required or that, contrary to the allegation in the notice, it is established that in fact the conditions in the planning permission have been complied with, then the notice may be quashed under section 23(4)(a). The notice is invalid: it is not a nullity because on the face of it it appears to be good and it is only on proof of facts aliunde that the notice is shown to be bad: the notice is invalid and, therefore, it may be quashed. But supposing the notice on the face of it fails to specify some period required by subsection (2) or (3). On the face of it the notice does not comply with the section; it is a nullity and is so much waste paper. No power was given to the justices to quash in such circumstances, for it was quite unnecessary. The notice on its face is bad. Supposing then upon its true construction the notice was hopelessly ambiguous and uncertain, so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or in what respect it was alleged that he failed to comply with a condition or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches. The notice would be bad on its face and a nullity, the justices had no jurisdiction to quash it, for it was unnecessary to give them that power, but this court could, upon application to it, declare that the notice was a nullity. That to my mind is the distinction between invalidity and nullity."

Mr Fookes argued that a notice which, subject to an indeterminate prospect of obtaining consent, inevitably led the recipient into a position of criminality was not a notice which fairly told him what he

had to do to remedy the wrong, whether "fairly" meant "equitably" or "with clarity". The practical result was that the recipient was in a dilemma which was not wholly within his own powers to resolve.

Mr Fookes made two further points. He said that the procedure for obtaining consent was a lengthy process as it necessarily involved a public inquiry or a hearing. The outcome of such a hearing was self-evidently uncertain. That was to be seen in the 1979 Ancient Monuments and Archaeological Areas Act at Schedule 1, Pt. 1, para. 3 which was in these terms:

> "(1) The Secretary of State may grant scheduled monument consent in respect of all or any part of the works to which an application for scheduled monument consent relates.
>
> (2) Before determining whether or not to grant scheduled monument consent on any application therefor, the Secretary of State shall either—
>
> (a) cause a public local inquiry to be held; or
>
> (b) afford to the applicant, and to any other person to whom it appears to the Secretary of State expedient to afford it, an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
>
> (3) Before determining whether or not to grant scheduled monument consent on any application therefor the Secretary of State—
>
> (a) shall in every case consider any representations made by any person with respect to that application before the time when he considers his decision thereon (whether in consequence of any notice given to that person in accordance with any requirements of regulations made by virtue of paragraph 2 above or of any publicity given to the application by the Secretary of State, or otherwise); and
>
> (b) shall also, if any inquiry or hearing has been held in accordance with sub-paragraph (2) above, consider the report of the person who held it.
>
> (4) The Secretary of State shall serve notice of his decision with respect to the application on the applicant and on every person who has made representations to him with respect to the application."

Mr Fookes said that a notice which entailed such a feature could not be fair within Upjohn L.J.'s test. He also drew attention to the situation that the Inspector had recognised the difficulty and had not sought to defend the original decision notice. In that respect Mr Fookes referred to the decision letter at paragraphs 30 and 31. At the end of paragraph 30 the Inspector had said:

> "I agree that it is appropriate to create a defined side where the edge of the gully has been lost so that a feature to signify the extent of the streamworking site remains . . ."

Then in paragraph 31 the Inspector said:

> "The Council also wish to make clear that the steps are not to be carried out so as to cause disturbance to any remaining features of the Ancient Monument. It appears likely that the formation of the former gully side would require Scheduled Monument Consent."

Then the last sentence of that paragraph reads:

> "There would then be nothing in the steps which your client could not carry out, they would be clear and precise and he would be under no misunderstanding as to what was required of him by the enforcement notice."

Mr Fookes said that when that was read as a whole it was indicated that there was a difficulty with the original notice even though part of what the Inspector was dealing with was how he would vary the notice. Mr Fookes said the Inspector should have been alerted to the fact that the notice was so unclear that he should have considered his own jurisdiction.

Mr Fookes' submissions were persuasive. They had an additional attraction of being in accord with common sense. He (the Deputy Judge) was not however persuaded that step 2 of the original notice would require Scheduled Monument Consent, but that was not material, as, correctly, it was not in dispute that steps 3 and 4 would require such consent, and so Mr Fookes' argument remained sufficiently founded.

Mr Ashford-Thom for the first respondent made a number of submissions in response. He argued that the nullity point had not been made to the Inspector who could not therefore be criticised.

The evidence that the point was taken below was indeed unclear. Such evidence as there was indicated that it was unlikely that it was taken below in the way argued by Mr Fookes. In that respect he drew attention to two matters. There was an exhibit to the affidavit of the appellant at p. 62 which was a note or memorandum. It said at paragraph 3:

> "During examination and cross-examination he [the Inspector]:
>
> ...
>
> d. stopped examination of the steps required to be taken by the Notice under appeal as being
> 1. contrary to law and
> 2. incomprehensible
> because the steps had been overtaken by events."

At p. 67, paragraph 7, where the Inspector stated in his affidavit:

> "Therefore in essence the invalidity argument being pursued by Mr McKay was that the notice was defective because the requirements were not sufficiently clear."

He (the Deputy Judge) took the view that it was unclear that the point was taken in the way argued by Mr Fookes, because Mr McKay, at that passage had given the reasons why the notice was contrary to law and incomprehensible as being because the steps had been overtaken by events, which was perhaps a different point. However, there clearly was an issue dealing with invalidity in some way or another, but it really was quite uncertain as to what form that issue had been taken at the inquiry. It was quite uncertain that it had taken the form which Mr Fookes had argued before the court. The question then arose as to whether the failure to take the point below mattered because the point in issue was one of law.

Mr Ashford-Thom said that it did matter. He said that even if it was a point of law, if it was not taken before the Inspector, it should not be argued in the Appeal Court. He relied upon three cases: *London Parachuting Ltd v. Secretary of State for the Environment and South Cambridgeshire District Council* [1986] J.P.L. 428 at p. 429, *Miller-Mead v. Minister of Housing and Local Government and Another* [1963] 2 Q.B. 196 at 217, 222, 234 and 242, and *Angur Begum and Others v. Secretary of State for the Home Department* [1990] Imm A.R. 1 at 4 and 5.

In his (the Deputy Judge's) judgment, those cases could be distinguished from the present as involving new points of law which required investigation of the facts, or related to situations where there were statutory appeal routes which were not taken.

Those could be distinguished from a point of law on which there was not such right of appeal, for

example, to the Secretary of State. Nullity did not have any such special route, nor did it require any further facts to be found.

Further assistance on the matter was derived from *London County Council v. Farren* [1956] 3 All E.R. 401 which related to the validity of a Landlord and Tenant Act 1954 Notice. He turned first to the headnote in that case where it said, under point (ii):

> "the case would not be remitted to the magistrate for evidence to be given to show that T. was authorised to give the notice to quit because (a) the question of the validity of the notice under the Landlord and Tenant Act 1954, had not been taken before the magistrate, (b) it was doubtful whether it was a question of law 'arising on' the Case Stated by the magistrate within s. 6 of the Summary Jurisdiction Act 1857, and (c), even if there was power to remit the case, the application to remit it, being an application for the admission of evidence made for the first time to the Court of Appeal, ought not to be granted."

Singleton L.J. said at p. 407:

> "The Case stated by the magistrate is confined to the question whether or not the notice is a good notice, having regard to the fact that it was signed by the valuer only and not by two persons, as the tenant contended it ought to have been. The magistrate determined that case on the facts before him. It is now said on behalf of the London County Council that another case ought to be put before him, a case arising under s.24 and s.25 of the Landlord and Tenant Act 1954. That is not the case which was raised before the magistrate. He has stated a Case. The point raised in the Divisional court under the Landlord and Tenant Act 1954, is not something 'arising thereon', so it appears to me. That is what makes me doubt whether or not the case could properly be sent back, even if a wide interpretation ought to be given to the power under s. 6 of the Act of 1857. What is sought in this court is that this court shall remit the case to the magistrate for him to determine a question which was never before the magistrate and never considered by him. I very much doubt that such an order could be made.
>
> Counsel for the London County Council drew our attention to certain authorities which go to show that the Divisional Court in such a case may determine a question of law which is not raised by either party and which does not appear on the Case itself, if no further evidence is necessary. The last authority is *Kates v. Jeffery* ([1914] 3 K.B. 160). The headnote is:
>
> 'Upon the argument of an appeal from justices by way of Case Stated a point cannot be taken before the Divisional Court upon the facts stated which was not taken before the justices, except upon a question of law which no evidence could alter.'
>
> I do not think it necessary to read the facts. It is sufficient to read the judgment of Darling, J., with which Avory, J., and Rowlatt, J., agreed."

There was then an extract from the judgment of Darling J. which read at p. 408F.

> " 'In *Knight v. Halliwell* ((1874) L.R. 9 Q.B. 412) Blackburn, J., said, after referring to *Purkis v. Huxtable* ((1859) 1 E. & E. 780) and observing that if the point which was attempted to be raised before the Court of Queen's Bench in that case had been taken before the justices evidence with regard to it could have been supplied, "here a question of law, which no evidence could alter, arises on the statement of facts". I think that if Lord Alverstone, C.J., used the words attributed to

> him in the report in the Law Journal in *Gieblier v. Manning* ((1906) 75 L.J.K.B. 463)—"We have invariably taken the view in cases of this class, that where the particular point arises on the facts as found, even although it was not raised in the court below, we are entitled to give our judgment upon it"—and which have been quoted by Mr. Barrington-Ward, he must have been speaking in the same sense as Blackburn, J., did in *Knight v. Halliwell*, and that his language is equivalent to what Blackburn, J., laid down, namely, that a question of law arising on the facts stated by justices, but which was not taken before them, can only be taken before this court if it is one which no evidence could alter. In my judgment, if this court sees that a question of law arises upon the face of a Case stated by justices which no evidence could alter, this court is entitled to take the point and to deal with the question of law although the point was not taken before the justices. And this court cannot refuse to raise such a point merely because one of the parties has not taken it in the court below. For example, if a Case stated by the justices alleged that a lease for five years was an estate in fee simple, this court would not only be entitled but bound to take the point of law.' "

Kates v. Jeffery was applied in that case.

Bugg and Another v. Director of Public Prosecutions and Another; Director of Public Prosecutions v. Percy and Another [1993] 2 All E.R. 815 was also relevant. Woolf L.J. was there making a distinction between substantial invalidity and procedural invalidity. In the former no evidence was required to show the invalidity.

In the light of those authorities it was appropriate for the court to consider the point even if it was not taken below the presently argued terms. There was no difficulty for the court in considering it. Furthermore, if the matter was not specifically raised before the Inspector he had recognised the relevant difficulty in the notice when he had determined to vary it.

Mr Ashford-Thom also counselled caution in reliance upon the *Miller-Mead* test of Upjohn L.J. for nullity of an enforcement notice. He suggested that that judgment might not be the same today in the light of the legislation as it now was. He also suggested that there were reservations about the Upjohn L.J. test in the judgment of the other members of the court—Lord Denning M.R., at pp. 219–222 and Diplock L.J. at pp. 239–240. Mr Ashford-Thom argued that those reservations supported his submission that only the most glaring error on the face of the notice would offend against the provisions of the statute.

Mr Ashford-Thom's argument did not persuade him that he should depart from Upjohn L.J.'s long accepted test even if he were not bound by it. The recipient of a notice had to be able to understand with reasonable certainty the steps which were required of him, and that had to bear on the question of whether he could in reality carry out the requirements of the notice. If he had to do something unlawful or it was reasonable to anticipate that he had to do something unlawful then he could not reasonably be said to be able to carry out the requirements. Furthermore, it remained true that a person should not be put in peril by ambiguity.

Mr Ashford-Thom argued that Mr Fookes' submissions required the recipient to look outside the notice as he had to understand that the Ancient Monument Consent was required. The Deputy Judge did not find that convincing. It had to be assumed that the recipient would understand that he should carry out the directions of a notice in accordance with the law, and what the effects of that law were.

In his judgment, notice A was a nullity and was incapable of variation.

There was a discretion to refuse to remit the decision letter to the Secretary of State. Mr Ashford-Thom

said that it was an appropriate case to exercise that discretion and indicated that there would be no question of bringing enforcement proceedings within six months of the notice coming into effect. A letter of undertaking was produced from the Local Planning Authority, but its terms did not reflect Mr Ashford-Thom's indication; it was to be assumed that it was unfortunate drafting. Be that as it might, discretion was very rarely exercised and it was not a case for it in his view. The appellant remained in a very difficult position. There was an opportunity for the Ancient Monument procedures to be cleared before the very worthy objectives of the enforcement notice were sought again to be achieved. Meanwhile a simple prohibitory enforcement notice would keep the status quo. He did not propose to exercise discretion.

Accordingly, the appeal succeeded and the decision would be remitted to the Secretary of State for his redetermination.

Comment. The distinction, between an enforcement notice which is a nullity and an enforcement notice which is susceptible to being quashed because it is flawed by invalidity, is one which has survived in planning law when it is on the decline in other areas of administrative law. The importance of the distinction is illustrated well by the present case, as if the notice is not a nullity there is always the possibility of the invalidity being corrected on appeal and in that way the notice can be saved as long as the error can be corrected without injustice. This seems a commonsense approach and, if the concept of nullity is to be retained, this commentator considers that it should be restricted to cases where it is clear from the face of the document that the notice was beyond the powers of the Act. In this case the notice as originally drafted was perfectly valid on its face. It required knowledge of the fact that the works needed scheduled monument consent before it was clear that the notice was bad because it required the owner and the occupier to do something which could amount to a criminal act. The Deputy Judge rejected this argument on the grounds that it had to be assumed that the recipient would understand that he should carry out the directions in accordance with the law, and what the effects of the law were. This may be correct and certainly a recipient of such a notice would be placed in the difficult position between observing planning law or ancient monument law. However the solution to this dilemma is for the recipient is to appeal and either to have the notice quashed for invalidity or varied.

This kind of conflict between two separate statutory codes does occur from time to time. For example in *R. v. Stroud District Council, ex p. Goodenough* (1982) 43 P. & C.R. 59, the situation arose where an order was made by a magistrates court under section 58 of the Public Health Act 1936 which gave the owner the option of either making a pair of listed building safe or demolishing them. The position was different from the present circumstances as the owner was not required to demolish without obtaining listed building consent and, more importantly, the need urgently to repair the buildings for safety reasons provided a defence. There is a similar defence in the case of an offence of unauthorised works to scheduled monuments under section 2(9). The legislation has since the *Stroud* case been amended to make clear that the listed building control takes priority over orders made under the Building Act 1984 and the Housing Act 1985. Unfortunately the statutes give no guidance as to whether enforcement notices can require works to listed buildings and ancient monuments without the necessary consents being obtained. However the assumption must be that enforcement notices cannot require what amounts to a criminal offence and the existence of the notice in itself would be no defence to a criminal prosecution.

The solution proposed by the Inspector in the present case was to make the carrying out of the works conditional on the granting of Scheduled Ancient Monument consent. This seems a reasonable solution and would not have caused injustice to the recipient of the notice. On the other hand the way the Inspector had rewritten the requirements of the notice meant that there was actually no requirement to apply for ancient monument consent and so the appellant could presumably have postponed having to comply by failing to apply for consent. Also it is doubtful whether an enforcement notice could compel an owner to apply for consent. Therefore it would seem to follow that even if the notice was not considered to be a nullity there would have been no choice but to quash it for invalidity.

It is now well established that a challenge to the Secretary of State's determination of an enforcement appeal can generally only succeed if the point of law has been argued before the Inspector or the Minister. As well as the cases

cited to the deputy judge, in *Gwillim v. Secretary of State* [1988] J.P.L. 263. Graham Eyre Q.C. (as he then was) followed Mann J. in the *London Parachuting* case in holding that an appeal on a point of law cannot be made when the point being raised has not been put to or determined by the Secretary of State. However it is also clear that this is not an absolute rule. Thus in *Cotswold D.C. v. Secretary of State for the Environment* [1993] J.P.L. 1027, Nigel Macleod Q.C. (who was also the deputy judge in the present case) held that an Inspector had to consider the relevant statutory issues even if they were not expressly drawn to his attention. Also the recent decision of *Waterhouse Group PLC v. Secretary of State for the Environment and Rugby B.C.* [1994] J.P.L. B89 Laws J. held that the principle does not apply when the point could not have been put to the Inspector, as the error arose because of the Inspector's own misunderstanding of the scope of the appeal. In the present case Nigel Macleod also persuasively argues that the principle chiefly applies to cases involving new points of law which required investigation of the facts or related to situations where there were statutory routes which were not taken; there is no statutory ground of appeal that the steps required by the notice constitute criminal acts.

The fact that the notice was held to be a nullity raises special problems. Logically, as a notice which is a nullity is supposed to be the equivalent of wastepaper, there was nothing to found an appeal to the Secretary of State and thence to the court under section 289; the whole edifice is built on sand. However the courts have determined that the Secretary of State has jurisdiction on appeal to hold that a notice is nullity and that he has the power to set the enforcement notice aside as a nullity. However it has been held that such a decision can only be challenged by way of an application for judicial review and not by way of section 289; see *Rhymney Valley D.C. v. Secretary of State for the Environment* [1985] J.P.L. 27. On the other hand in *Dudley Bowers Amusements Enterprise Ltd v. Secretary of State for the Environment* [1986] J.P.L. 689. David Widdicombe Q.C., sitting as a deputy judge, indicated that he disagreed with the approach taken in *Rhymney* and held that the Court did have jurisdiction under section 246 (now section 289) to consider whether the Minister had erred in law in not holding that a notice was a nullity. This conflict illustrates the level of technicality that can flow from the distinction between notices which are nullities and those which are just invalid. Woolf L.J.'s judgment in *Bugg* further complicates the position by making a distinction between substantive and procedural invalidity though he significantly avoids using the term nullity. What does seem appropriate is that the more fundamental the error of law that has been made, the less it should matter that the argument has not been made at the stage when the Secretary of State was determining the appeal.

Definitive Map—Modification Order—section 53(2)(b) of the Wildlife and Countryside Act 1981—Schedule 15—paragraph 12(3)—availability of judicial review pending confirmation of the Order—Jurisdiction of the High Court—effect of oyster clause on challenge to validity of the order.

R. v. Cornwall County Council, ex p. Huntington et al.

R. v. Devon County Council, ex p. Isaac et al. (Court of Appeal, Sir Stephen Brown, Simon Brown L.J., Peter Gibson L.J., April 26, 1993)[3]

The case involved two separate appeals against mofication orders made to the definitive maps by Cornwall County Council and Devon County Council respectively under section 53(2)(b) of the Wildlife and Countryside Act 1981.

Cornwall County Council had made a public right of way order relating to a footpath running across the farm owned by Mr and Mrs Huntington. Devon County Council had made an order relating to a track across land owned by Isaac defining it as a by-way open to all traffic.

[3] Mr and Mrs Huntington appeared in person. *Richard Gordon* (Sharpe Pritchard, agents for G. K. Burgess, Truro). Maurice & Graham Isaac appeared in person. *Timothy Straker* (P. Jenkinson, Exeter).