Statutory annexation of covenants: A practical solution built on unstable foundations

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Article Title:

Statutory Annexation of Covenants: A Practical Solution Built on Unstable Foundations

Summary:

Controversial from its publication, *Federated Homes v Mills Lodge* has received support for its creation of 'statutory annexation', and strong criticism for the theoretical foundation provided. This article seeks to interrogate the theoretical foundations of *Federated Homes,* before identifying its subsequent judicial treatment and whether there are policy justifications supporting statutory annexation's existence.

Article:

Of all the Law of Property Act 1925's 209 sections, s78 has proven - although admittedly rather belatedly - to be one of its most controversial. Indeed, s78, through its various scholarly and judicial interpretations, has gone to heart of the Law of Property Act 1925 (LPA 1925) and its amendments to English land law.

S78 LPA 1925, along with its non-identical twin s79 LPA 1925, concern freehold covenants and the attempts by Parliament to try and simplify their enforcement by successors in title. S78 was for a long period uncontroversial; seen merely as a means for implying an intention for the benefit of a covenant to run at common law, and even more simply as a word-saving provision[1]. However, as any student or practitioner of land law will be aware, this simplicity and lack of controversy was abruptly disturbed by Brightman LJ's unexpected lead judgment in *Federated Homes v Mill Lodge Properties*[2], which brought into existence the doctrine of statutory annexation. This doctrine states that provided a restrictive covenant touches and concerns the land, the benefit of the covenant will run with the land for the benefit of successors in title. A controversial judgment from the get-go[3], Newsom was bluntest about its position, commenting "…it involves a radical departure from the previous orthodoxy in regard to the methods by which the benefit of a covenant can become annexed to the land of the covenantee so as to devolve with it"[4]. Newsom also rightly questioned Brightman LJ's use of s78 to achieve this aim, noting that "most, and indeed nearly all, practitioners had hitherto"[5] only recognised the provision as merely being a word saving provision – "conveyancing shorthand, in fact."[6]

As with most interpretations of ambiguous statutory provisions, it can be said that the debate surrounding s78 can be separated in two schools of opinion. The first is those in favour of Brightman LJ's interpretation, including Wade[7] (who proposed such an interpretation roughly a decade before Brightman LJ's judgment), George[8], Hurst[9] and Gray[10]. This school argues

[1] Burn EH and Cartwright J, *Cheshire and Burn's Modern Law of Real Property,* 8th edn (Oxford: OUP, 2011) at 745; Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 34; *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 185
[2] [1980] 1 WLR 594
[3] Clark S and Greer S, *Land Law,* 7th edn (Oxford: OUP, 2020); Bevan C, *Land Law,* 2nd edn (Oxford: OUP, 2020)
[4] Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 32
[5] Ibid, at 34
[6] Ibid, at 34
[7] Wade, *Covenants – A 'Broad and Reasonable View'* [1972] CLJ 157
[8] George M and Layard A, *Thompson's Modern Land Law,* 7th edn (Oxford: OUP 2019) at 478
[9] Hurst D.J, *The Transmission of Restrictive Covenants,* (1982) 2 Legal Stud 53 at 53 – although Hurst concludes that Brightman LJ's decision was correct, the reasoning adopted was defective and founded up incorrect foundations
[10] Gray K and Gray S, *Elements of Land Law,* 5th edn (OxfordL OUP, 2009) at 276

that *Federated Homes* simplifies the means of annexing the benefit of a restrictive covenant, and that such an interpretation is apparent from the wording of the provision. In the second school, including Newsom[11], Todd[12], Snape[13], and Burn[14], it is however contended that *Federated Homes* is a "heterodoxy"[15] that fits neither into the express statutory language, nor the historical position of s78's statutory predecessors. A starker contrast in two schools of opinion concerning statutory interpretation of a single provision is hard to imagine.

The cause of these two polar opposite schools of opinion is statutory interpretation, and as is analysed below, the lack of clarity provided by s78 itself. This article argues the ambiguity of s78 is problematic as it obscures the rights that owners have in regard to land, and adds layers of complexity and uncertainty to the conveyancing process. In adding this uncertainty, s78 creates obstacles to the sale and purchase of land, and also adds to potential discord between owners of neighbouring land should it be established that the benefit has or has not passed to covenants that have a profound impact upon the usage of the land. This article argues that a clear need for reform to s78 exists, and that this reform can only be achieved through further and clarifying legislation to the Law of Property Act 1925 along similar, but not identical, lines to previous proposals made by the Law Commission in 1967 and endorsed by Hayton[16]. Owing to the fundamental flaws in the existing case law, the entrenched nature of the existing authorities, and the explicit limitations of s78's statutory wording, this issue cannot be resolved by clarification from the Supreme Court.

Indeed, what is required to evidence the need for reform is a complete investigation of the s78 LPA 1925. This article will therefore interrogate the theoretical underpinnings of statutory annexation set out in the *Federated Homes* judgment, consider s78's legislative history, analyse the judicial reception that *Federated Homes* has had, before finally proposing why further legislative reform may be desirable. This will offer a resolution to the differing schools of opinion is provided, and it is concluded that the second school, populated by Newson, Snape and others, is the preferable interpretation of *Federated Homes*, but it goes further than the second school and it is also concluded that facilitating statutory annexation via alternative means is desirable from a policy perspective. A novel interpretation, this will demonstrate that statutory annexation can be accommodated from both a doctrinal and historical perspective should such legislation be forthcoming, as well as give effect the pressing policy imperatives.

One issue that must be addressed prior to this article's interrogation of the theoretical underpinnings of *Federated Homes* is a precedent point raised by Newsom, echoed by Todd[17] and adopted by Sydenham[18]. In his article, Newsom proffered (although did not himself officially endorse) the proposition that Brightman LJ's judgment, in regard to the sections on s78, should be read as *obiter*, rather than the actual *ratio*[19]. This is owing to the fact that the claimant in *Federated Homes* owned two plots of land – one plot that had an uncontroversial chain of assignment of the benefit of the covenant, and the other that did not have this chain of express assignment – thereby meaning that the claimant had no practical difficulties in enforcing the covenant. However, sustaining such an argument that the Court's comments on

[11] Newsom G, *Universal Annexation*, (1981) 97 LQR 32
[12] Todd PN, *Annexation after Federated Homes*, [1985] Conv 177 at 177, 183
[13] Snape J, *The Benefit and Burden of Covenants – Now Where are We?*, (1994) 3 Nott LJ 68
[14] Burn EH and Cartwright J, *Cheshire and Burn's Modern Law of Real Property,* 8th edn (Oxford: OUP, 2011) at 749-750
[15] Snape J, *The Benefit and Burden of Covenants – Now Where are We?*, (1994) 3 Nott LJ 68 at 68
[16] Hayton D, *Revolution in Restrictive Covenants?*, (1980) 43 Mod L Rev 445
[17] Todd PN, *Annexation after Federated Homes*, [1985] Conv 177 at 184
[18] Sydenham A, *Federated Homes v Mill Lodge* [1980] Conv 216 at 217, though they do not elaborate on this conclusion
[19] Newsom G, *Universal Annexation*, (1981) 97 LQR 32 at 34

the controversial piece of land are *obiter*, given the interpretations adopted by both subsequent authorities[20] and the scholarly commentary[21] that Brightman LJ's comments were part of the *ratio*, and the time gap now involved[22], seems improbable if not impossible. Indeed Todd proposes resolving the issue by concluding that *Federated Homes* contains a 'double ratio', and addresses both the issue of s78 LPA 1925 and assignment[23]. Given the subsequent treatment of *Federated Homes*, coupled with the possibility that it contains a double ratio, Sydenham's conclusion that Brightman LJ's judgment is mere *obiter* must be be rejected, thereby meaning that this dispute between the two schools of opinion cannot be resolved simply by relying on the doctrine of precedent.

Section 1: The Underpinnings of *Federated Homes*

The facts of *Federated Homes* have been well documented in previous publications, and so will only be briefly summarised presently. The case itself concerned several plots of land that had been divided and labelled for the purposes of developing them into residential properties. The defendant purchased one of the plots – labelled as the 'blue' land – and covenanted not to build more than 300 homes. The purpose behind the covenant was to enable the developers of the other plots to exploit their economic potential and build substantially more homes, whilst also abiding by the density restrictions imposed by the granted planning permission. The defendant then acquired additional planning permission to build 332 homes (thereby exceeding the density restrictions), and whilst the 'green' land had been expressly assigned the benefit of the restrictive covenant, the 'red' land had not received such an assignment. Hence, the owners of the 'red' land could not easily enforce the benefit of the covenant against the owners of the 'blue' land in their position as 'red' landowners.

In addressing the issue of whether the 'red' land had the benefit of the covenant, Brightman LJ held that the benefit had been annexed to the land as a consequence of s78 LPA 1925[24]. Such a conclusion rejected the interpretation adopted by the trial judge John Mills QC, who had expressly dismissed the possibility of s78 annexing the benefit of a covenant to the land[25]. Indeed, the trial judge concluded "It [s78] is simply a statutory shorthand for the shortening of conveyances…"[26] – the traditional interpretation of s78 that had been adopted by conveyancing practitioners and identified by Newsom above, and meant that Brightman LJ's judgment was intentionally challenging the traditional orthodoxy.

Notwithstanding this final conclusion, Brightman LJ acknowledged that there were three interpretations open to himself and the Court of Appeal in regard s78 LPA 1925[27]. The first of these, the 'Narrowest View' that had been adopted by the trial judge, interpreted s78 as merely statutory shorthand. This was rejected for it "seems to me [Brightman LJ] to fly in the face of the wording of the section"[28]. Alternatively, under the 'Middle View', s78 could be viewed as merely achieving annexation of the benefit when an intention is expressed (impliedly or expressly) in covenant documents that the covenantee intended to annex the benefit. The third and final interpretation, the 'Expansive View', was that s78 achieved annexation whenever the

[20] *Roake v Chadha* [1984] 1 WLR 40; *Crest Nicholson v McAllister* [2004] EWCA Civ 410
[21] See Gray and Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009); Burn E and Cartwright J, *Cheshire and Burn's Modern Law of Real Property,* 18th edn (Oxford: OUP, 2011); Snape J, *The Benefit and Burden of Covenants – Now Where are We?*, (1994) 3 Nott LJ 68
[22] 42 years at the time of publication
[23] Todd PN, *Annexation after Federated Homes*, [1985] Conv 177 at 184
[24] *Federated Homes v Mill Lodge Properties* [1980] 1 WLR at 607
[25] Ibid, at 603
[26] Ibid, at 603
[27] Ibid, at 604
[28] Ibid, at 604

covenant touched and concerned, irrespective of the parties' intention. Although a preference between the second and third interpretations was not expressed[29], it is apparent that *Federated Homes* gave effect to third interpretation, meaning that s78 achieves annexation of the benefit of a restrictive covenant should it touch and concern the land.

Despite the relative clarity of Brightman LJ's judgment in terms of effect, His Lordship's reasoning for adopting the Expansive View, as noted most vociferously by Newsom, Snape, and Hayton[30], can prove to be problematic with a number of competing factors challenging the validity of s78 effecting statutory annexation. Given this controversy, these factors will be analysed within the context of the justifications provided by Brightman LJ to determine the solidity of Federated Homes' conclusions.

A) <u>That s78 is 'Significantly Different from what Went Before'</u>

The first of the several justifications provided for s78 LPA 1925 effecting annexation was that it is "significantly different from went before"[31] – the before being its predecessor, s58 Conveyancing Act 1881 (CA 1881). According to Brightman LJ[32], the key distinguishing feature was that s58 CA 1881 did not refer to (and thereby include) the covenantee's successors in title or persons deriving title under him, and instead only referred to the covenantee, his heirs and assigns. Consequently, it was concluded that s78 LPA 1925's reference to a broader group of successors meant that unlike the more restrictive s58 CA 1881, it was intended to apply not only to the covenantee, but also all their successors. S58 CA 1881 itself stated:

> "(1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.
> (2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.
> (3) This section applies only to covenants made after the commencement of this Act."

This is compared to s78 LPA 1925, which states:

> "(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
> For the purposes of this subsection in connexion with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

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[29] Ibid, at 604
[30] Hayton D, *Revolution in Restrictive Covenants?*, (1980) 43 Mod L Rev 445 at 445 – "Unfortunately, the Court of Appeal (Megaw, Browne and Brightman L.JJ.), like real revolutionaries, did not take time for a considered reserved judgment and have left much scope for argument that the position is, as yet, by no means finally settled."
[31] Ibid, at 604
[32] Ibid, at 604-605

> (2) This section applies to covenants made after the commencement of this Act, but the repeal of section fifty-eight of the Conveyancing Act, 1881, does not affect the operation of covenants to which that section applied."

Brightman LJ's broader interpretation built upon the previous suggestions of Wade, who was categorical that s78 LPA 1925 should be interpreted in a much more expansive manner[33]. In addition to expressing befuddlement that the courts had not noticed s78 LPA 1925's possibilities[34], Wade proffered that s78 was capable of effecting annexation, owing to the fact that it presumed that the benefit of a covenant was intended to run with the land[35], and that annexation was in "all probability…precisely for which [it (s78) was] designed."[36]

However, despite Wade's effusiveness for s78 bringing about annexation, one limitation of their analysis was that it did not fully consider the changes between s58 CA 1881 and s78 LPA 1925 – analysis that was thoroughly undertaken by Newsom[37]. In rejecting Wade's conclusions, Newsom began by establishing the effect of s58 CA 1881. He concluded that rather than achieving annexation, as with the traditional interpretation of s78 LPA 1925, it was merely statutory shorthand that deemed that the covenant should be made with the covenantee, his executors, administrators and assigns[38]. As such, no court, including in *Miles v Easter*[39], came close to suggesting s58 CA 1881 achieved annexation during its period of applicability. Indeed, *Miles v Easter* found that s58 CA 1881 "had no perceptible effect at all"[40], and this was reaffirmed in *J Sainsbury plc v Enfield LBC*[41], where Morritt J concluded there "are not words in section 58 capable by themselves of effecting annexation…"

More importantly, however, given the apparent but subtle differences between the two provisions[42], is the legislative history of the Law of Property Act 1925 generally. As noted by Lord Upjohn in *Beswick v Beswick*[43], the LPA 1925 was a consolidation act, bringing about cohesion to the reforms of Lord Birkenhead that were themselves brought about through the epochal Law of Property Act 1922 and Law of Property (Amendment) Act 1924. As also noted in *Beswick*, the presumption (albeit it only being a rebuttable presumption) is that consolidation acts do not amend the law. Given that neither the Law of Property Act 1922 nor the Law of Property (Amendment) Act 1924 amended the purpose of s58 CA 1881, "the court ought only presume that section 78 of the 1925 Act did not introduce anything [ie annexation] that was not there already"[44] – a conclusion echoed by Hayton, who notes that the relevant

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[33] H W R Wade, *Covenants - A Broad and Reasonable View*, (1972) 31 Cambridge LJ 157

[34] Ibid, at 171 – "The informal annexation of the benefit of a covenant, which judges are now encouraging, might be greatly assisted by invoking section 78 of the Law of Property Act 1925, formerly section 58 of the Conveyancing and Law of Property Act 1881. Why the decided cases make no reference to this legislation is a mystery. It seems to be assumed that it is inapplicable, but such reasons as can be found for this assumption are far from convincing."

[35] The traditional interpretation adopted by the House of Lords in *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 185

[36] H W R Wade, *Covenants - A Broad and Reasonable View*, (1972) 31 Cambridge LJ 157, at 175

[37] Newsom G, *Universal Annexation*, (1981) 97 LQR 32

[38] Ibid, at 38

[39] *Miles v Easter; Forster v Elvet Colliery Co Ltd* [1908] 1 KB 629 (C.A).

[40] Newsom G, *Universal Annexation*, (1981) 97 LQR 32 at 39

[41] [1989] 1 WLR 590 at 601 D-E. It should be noted, however, that Morritt J did concur with Brightman LJ in *Federated Homes* that s78 LPA 1925 was 'radically' different from s58 CA 1881. However, Morritt J did not provide any justification or analysis for this conclusion, and so must be seen (from the perspective of analysing s78 LPA 1925) as a typical application of a Court of Appeal judgment by the Chancery Division – much like *Roake v Chadha* [1984] 1 WLR 40.

[42] See immediately above.

[43] [1968] AC, 58, at 104, 105

[44] Newsom G, *Universal Annexation*, (1981) 97 LQR 32 at 39 at 42

Parliamentary committee certified that no alteration to the law was being made[45]. Such is the limited change, the key distinction between s58 CA 1881 and s78 LPA 1925 – the reference to 'successors in title' in the latter as opposed to 'heirs and assigns' in the former – can be ascribed to reflecting the broader changes to the law of inheritance, by doing away with land of inheritance, rather than a change to the law of covenants[46]. It is therefore conclusive that the presumption that the LPA 1925 did not amend S58 CA 1881 is raised and applicable to s78.

Snape has, however, rightly acknowledged that although the presumption concerning a consolidation act is that they do not amend the law[47], this is not an irrebuttable presumption, and can be rebutted should there be evidence as to a contrary intention. This evidence must, though, 'be clear'. As Snape also proffers, given the opportunity Parliament had through the Birkenhead reforms generally – not to mention three opportunities with three different acts in close succession – to make its reformist intentions apparent, it is a formidable challenge to suggest that Parliament has been clear in its intentions to bring about reform to the rules on passing the benefit of covenants. Such a challenge is made all the more daunting by the wording of s96(3) LPA 1922, which evidently intended to achieve conveyancing shorthand by removing the need for the word 'heirs' to be incorporated into the covenant. S78 LPA 1925, by contrast, has no such clear amendments – making a rebuttal of the presumption unworkable given the lack of a clear intention expressed by Parliament.

Given the above – the limited changes between ss58 CA 1881 and s78 LPA 1925, the presumption against reform, and the lack of clear Parliamentary intention to instigate change despite having ample opportunity – Brightman LJ's statement that s78 LPA 1925 is 'significantly different from the wording of its predecessor' is unsustainable and cannot be utilised in justifying s78 achieving statutory annexation.

B) *Smith and Snipes Hall Farm v River Douglas Catchment Board*

The second justification proffered by Brightman LJ for his conclusion was the Court of Appeal's previous judgment in *Smith and Snipes Hall Farm v River Douglas Catchment Board*[48]. This concerned the River Douglas Catchment Board agreeing with a number of landowners to maintain certain waterways if a contribution to the costs was made by the landowners. The owners covenanted to pay the contributions, but in 1944 a waterway burst it banks and flooded some farmland. The primary issue issue concerning the Court of Appeal was whether the current occupant of the land, not being an original covenantee and instead occupying the land as an agricultural tenant, could enforce the benefit of the covenant.

In analysing *Smith and Snipes*, Brightman LJ found the fact that the covenant had not been expressed for the benefit of successors in title, nor had the benefit been assigned, as being highly pertinent. It was therefore concluded that as the members of the Court of Appeal had referred to s78 LPA 1925 in their judgments, and the Court concluded that the tenant could enforce the benefit, "that that conclusion can only have been reached on the basis that section 78 had the effect of causing the benefit of the agreement to run with the land so as to be capable

[45] Hayton D, *Revolution in Restrictive Covenants?,* (1980) 43 Mod L Rev 445 at 446
[46] Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 39 at 43
[47] Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68 at 84; see also Hayton D, *Revolution in Restrictive Covenants?,* (1980) 43 Mod L Rev 445 at 446-447, who notes that "There is also the presumption that statute is presumed to oust common law and equitable principles as little as possible and that Parliament does not make considerable changes in the law in an obscure fashion but expresses such changes in clear terms." See also Hurst DJ, *The Transmission of Restrictive Covenants,* (1982) 2 Legal Stud 53 at 65
[48] [1949] 2 All ER 185

of being sued upon by the tenant." [49] No further analysis or justification for reaching this interpretation of *Smith and Snipes* was provided, and unlike with the first justification outlined above, there was no previous academic support for such an interpretation, with much of the subsequent literature following suit and also failing to analyse the judgment in depth at all[50]. Such was the depth of His Lordship's analysis of *Smith and Snipes* that he introduced it as being "the construction of s78 which appeals to me…"[51], rather than a coherent, objective, and detailed interpretation - an obvious unfortunate occurrence.

Sustaining this interpretation of *Smith and Snipes,* given the limited reasoning proffered by Brightman LJ, is made almost impossible by even a simple reading of the authority, which makes it evident that the Court of Appeal neither adopted nor proffered s78 LPA 1925 as effecting annexation[52] - this is despite *Smith and Snipes* being incompletely recorded, with sections of the judgment not being reported.

Within the reported sections, Tucker LJ dealt first with s78 LPA 1925, and his judgment does potentially, with a generous reading, give rise to the interpretation that annexation is effected by s78. His Lordship stated:

> "… and, further, that by virtue of s.78(1) of the Law of Property Act, 1925, it can be enforced at the suit of the covenantee and her successors in title and the persons deriving title under her or them so that both the plaintiff Smith and the plaintiff company can sue in respect of the damage resulting to their respective interests therein by reason of the board's breach of covenant."[53]

However, although it is possible to generously interpret this statement as supporting Brightman LJ's proposition, in that it does refer to permitting successors in title to sue for breach of covenant, Tucker LJ is far from explicit that this is to be achieved through annexation[54]. Indeed, later in his judgment it is concluded that there existed an inferred intention for the benefit of the relevant covenant to run – a much more explicit and appropriate ground on which to base the conclusions of the Court of Appeal. Hence, given its vagueness and mere reference to allowing successors in title to sue, Tucker LJ's comments on s78 should be seen as endorsing Denning LJ's restrictive and orthodox interpretation[55] (set out below).

In contrast with the ambiguity of Tucker LJ, Somerville LJ, in his judgment, was slightly more explicit, acknowledging the possibility of s78 achieving annexation:

> "Does the covenant run with the land so that the first plaintiff can sue on it? If the answer is 'Yes,' has s78 of the Law of Property Act, 1925, enabled the second plaintiff to sue in that that section covers not only successors in title of the covenantee but persons deriving under under successors in title?"[56]

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[49] *Federated Homes v Mill Lodge Properties* [1980] 1 WLR 594 at 605
[50] See however Hurst D.J, *The Transmission of Restrictive Covenants,* (1982) 2 Legal Stud 53 for a cursory analysis
[51] Ibid, at 605
[52] Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 45
[53] [1949] 2 All ER 179 at 185
[54] Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 47; Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68at 86
[55] Hurst DJ, *The Transmission of Restrictive Covenants,* (1982) 2 Legal Stud 53 at 63 even more, if not too far, forthright, and concludes that "Lord Tucker's judgment, so far from supporting the construction of Brightman LJ, positively militated against it."
[56] [1949] 2 All ER 179 at 186

In this formulation it is apparent that Somerville LJ was, at least, proffering the possibility that s78 effects annexation as if the "covenant does run with the land", it is s78 that achieves this outcome. As is also apparent from the above, though, Somerville LJ only proffers such an interpretation – ending the statement as a question – and then goes further by immediately recoiling from endorsing this hypothetical and noting that "We are concerned here with the question whether the benefit of a covenant runs with the land benefited as against the original covenantor." – that the Court of Appeal was not concerned with this issue, and should not provide even *obiter* comment. Given this reticence on passing comment, it is therefore again unsustainable to interpret Somerville LJ's judgment as endorsing s78 LPA 1925 effecting annexation.

It was Denning LJ (as he was then) who provided the most explicit and authoritative interpretation of s78 LPA 1925 - an interpretation long regarded as orthodox prior to *Federated Homes* and set out in the introduction to this article. Rather than considering the possibility of annexation, Denning LJ was much more restrictive, concluding:

> "The covenant was supposed to be made for the benefit of the owner and his successors in title, and not for the benefit of anyone else. This limitation, however, was, as is pointed out in SMITH'S LEADING CASES, p75, capable of being "productive of very serious and disagreeable consequences", and it has been removed by s78 of the Law of Property Act, 1925, which provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title "and the person deriving title under him or them" and shall have effect as is his such successors "and other persons" were expressed."[57]

Hence, Denning LJ held, and as was subsequently adopted by practitioners, that s78 removed an unhelpful conveyancing presumption and replaced it with the presumption that there was an intention that the covenant was made to benefit successors in title to the original covenantee – the statutory shorthand referenced in the introduction of this article. This is a much more conservative and faithful interpretation to the actual wording of s78 and its legislative history set out above, and moreover gives effect to a useful and workable feature of the conveyancing process. It should also be acknowledged that given it is Denning LJ – one of English Law's most infamous employers of expansive, imaginative statutory interpretations – who proposes the most restrictive interpretation, it is difficult to sustain the argument that *Smith and Snipes* does indeed provide a basis for s78 effecting statutory annexation. Consequently, *Smith and Snipes* must be rejected as providing support for *Federated Homes'* interpretation of S78, owing to the clarity of Denning LJ's conclusion that the provision merely removes a conveyancing presumption rather than effecting annexation and the ambiguity of the judgments handed down by the Court of Appeal.

C) S78's Differences to its Non-Identical Twin

In addition to providing fleeting justifications for s78 LPA 1925 effecting annexation, Brightman LJ also pre-emptively rejected several arguments that challenged his interpretation. The first of these were the supposed similarities between ss78 and 79 LPA 125 – s78's non-identical twin that deals with the passing of the burden of a covenant. Frustratingly, Brightman LJ was even briefer in his rejection of any similarity between the two statutory provisions than elaborating with his own justifications, commenting merely that "Section 79, in my view, involves quite different considerations and I do not think that it provides a helpful analogy."

[57] Ibid, at 189

Consequently, and problematically, the extreme brevity of this rebuttal means that it is unclear exactly on what grounds Brightman LJ felt that ss78 and 79 diverged.

The little assistance Brightman LJ did provide in justifying his position was a reference to *Earl of Sefton v Tophams Ltd*[58], in which the House of Lords analysed s79 LPA 1925. They concluded that it brought about 'statutory shorthand' and merely presumed that the covenant was made with the covenantor's successors in title in addition to the covenantor himself[59]. *Sefton* would subsequently be affirmed by *Rhone v Stephens*[60], and so s79 continues to be uncontroversially interpreted in a narrow manner to this day. However, neither judgment elaborated on s78 beyond restating Denning J's interpretation in *Smith v Snipes*[61].

In attempting to rationalise the divergent interpretations of the two statutory provisions it must be noted that unlike s78, which is set out above, s79 does have differing statutory language. It states that:

> "A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed."

The initial difference between the two provisions is their reference to successors in title[62]. For while s78 refers to the covenant being deemed to be made "with the covenantee and his successors in title and the persons deriving title under him or them", s79 refers to the covenant having been deemed to be made "on behalf of [the covenantor] and his successors in title and the persons deriving title under him or them". Despite, *prima facie,* the difference in wording appearing to corroborate Brightman LJ's conclusion that the sections must be treated differently, the meaning of the two alternative sets of phrases is almost identical. For although the covenant is made "with the covenantee and his successors" (meaning there is a presumption for the benefit to run with the land) under s78, it is made "on behalf of the covenantor and his successors in title" (again meaning there is an intention to run with the land, only this time referring to the burden) under s79 – resulting in both sections, despite their alternative phrasing[63], intending to achieve the same ends. Indeed, the differing terminology utilised – 'with'[64] and 'on behalf of'[65] - have almost identical meanings. This led Newsom to convincingly quip that under s79 "the wording is substantially identical, [meaning] it would be even more extraordinary if it were correct that it involves merely conveyancing shorthand (which is what the noble and learned Lord said of it), but that section 78, in substantially the same words only the other way round, has an automatic effect of creating and annexation irrespective of intention."[66]

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[58] [1967] 1 A.C. 50, 73 and 81
[59] See also *Re Royal Victorian Pavilion, Ramsgate* (1961) 1 Ch 581, at 589, where Pennycuick J viewed s79 LPA 1925 as mere statutory shorthand
[60] [1994] 2 AC 310
[61] Ibid, at 322
[62] Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68 at 71
[63] Alternatives that were never explained in the drafting process
[64] Defined as "in relation to" and "employed by" - Stevenson A and Waite S, *Concise Oxford English Dictionary,* 12th edn (Oxford: OUP, 2011)
[65] Defined as "in the interests of a person, group or principle" and "as a representative of" – Stevenson A and Waite S, *Concise Oxford English Dictionary,* 12th edn (Oxford: OUP, 2011)
[66] Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 48

One more substantive difference, however, is the relevance of an alternative intention. For s79 makes clear that its presumptive statutory shorthand is only effected "unless a contrary intention is expressed" – thereby ensuring that ultimately it is the parties themselves who have the final say over whether the presumption takes effect. S78, however, is silent on the issue of alternative intentions, making no reference to them at all. This thereby means that, according to the strict wording of the section, the parties should have no final say over the presumption's effect and that the provision should operate automatically irrespective of any expressed alternative intentions.

Notwithstanding this much more substantive difference between the two provisions, and *Federated Homes* being silent on the issue, the courts have perplexingly interpreted s78 as including s79's proviso of alternative party intentions. In the subsequent case of *Roake v Chadha*[67], an early challenge to *Federated Homes*, Judge Paul Baker QC, although unwilling to countenance the overturning of *Federated Homes* owing to the doctrine of precedent[68], was willing to conclude that the annexation effected by s78 must involve "constru[ing] the covenant as a whole to see whether the benefit of the covenant is annexed" – in effect permitting the parties' intentions to be the determining factor. Little further reasoning for this conclusion was provided however – mirroring the lack of detailed analysis seen in *Federated Homes* and making the judgment unsound.

Despite Judge Paul Baker QC's conclusions, Chadwick LJ in *Crest Nicholson v McAllister*[69] acknowledged the submission made in this article – that the wording of s78 precludes the parties' intentions from negating annexation. His Lordship stated:

> "It was pointed out, correctly, that the words which I have emphasised [*unless a contrary intention is express*] are not found in section 78(1) of the Act. So, it was said, the legislature must have intended the provisions of section 78 (Benefit of covenants relating to land) to be mandatory; it must have intended that those provisions could not be excluded by a contrary intention, however clearly expressed."[70]

However, His Lordship then proceeded to reject this submission and agree with *Roake v Chadha*[71]. This agreement was founded, not on the actual wording of s78, but on two policy reasons. It was first stated that there was no policy justification for not allowing a covenantor "to limit the scope of the obligation he is undertaking; nor why a covenantee should not be able to accept a covenant for his own benefit on terms that the benefit does not pass automatically to all those to whom he sell on parts of his retained land". Secondly, it was stated that due to s78's reference to "successors in title", and these being defined as the owners and occupiers of the time being *of the land of the covenantee intended to be benefited*, that an intention negating annexation would be effective as it would "give full effect to the statute"[72]. These two factors, it was concluded, meant that Parliament 'did not need to' included a reference to contrary intentions as it was already implicit[73].

Irrespective of the appeal of Chadwick LJ's conclusion that s78's effect is implicitly negated by a contrary intention, it is difficult to marry with Parliament's drafting decisions. As

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[67] [1984] 1 WLR 40
[68] Ibid, at 45
[69] [2004] EWCA Civ 410
[70] Ibid, at 39
[71] Ibid, at 41
[72] Ibid, at 42
[73] Ibid, at 43

submitted above, ss 78 and 79 are almost identical in the language utilised, save for an imperceptible difference in the parties referred to – a difference that causes no change in meaning of interpretation. It is therefore impossible to imagine, given that the sections must have been drafted and considered together during the legislative process, that Parliament would expressly provide to the negation of one provision (s79) and leave the negation of the other to implication (s78) from wording that is almost identical to that used in s78[74]. To do so would amount to a massive oversight and poor proofreading – accusations that have not been levelled at the Law of Property Act 1925 in its almost 100-year existence. Hence, it is submitted that the far more plausible and realistic interpretation of s78, given the involvement of the same draftsman, is that it was intended to be mandatory and unaffected by contrary intentions[75].

Notwithstanding the theoretical controversies, it must be acknowledged, in challenge to Newsom, Snape and other members of the second school's conclusions, that Chadwick LJ's judgment that *Roake* is justified from a policy perspective is unarguable, and this is expanded on below. It can be seen that permitting a contrary intention under s78, as is already permissible under s79, is a reasonable evolution and a feature that should have been incorporated into s78 during its drafting. However, to achieve this by trampling over the express statutory language, given that the differences, although problematic, must have been known and thereby intentional, is not a submission that can be sustained. Moreover, it is a logical incongruity for it to be argued that s78 should interpreted differently from s79 owing to minimal differences in statutory language, but be interpreted *identically* to s79 when clear elements of the latter provision are not intentionally included in s78 at all. Consequently, to achieve congruent logic, s78 must either be interpreted as being completely unique to s79 and not be affected by a contrary intention – thereby giving effect to *Federated Homes* – or be treated as being directly related to s79 and affected by a contrary intention, and consequently not effecting annexation. Unfortunately, the courts have not, as seen above, adopted these interpretations proffered in this article and have instead embarked on a much more theoretically precarious and incongruent course of interpretation that cannot be sustained.

Section 2: Subsequent Treatment of *Federated Homes*

The subsequent authorities to *Federated Homes* that tackle the issue of how s78 LPA 1925 should be interpreted – primarily the High Court decision in *Roake v Chadha* and the Court of Appeal decision in *Crest Nicholson v McAllister* – have refused to overturn the doctrine notwithstanding the pre-existing and contemporary criticisms of Snape and Newsom, and instead have sought to, if slightly counterintuitively, impose limits upon its utilisation. Snape and Newsom's analysis, owing to their publication prior to *Roake* or *Crest Nicholson*, do not consider these authorities and the contemporaneous reception of *Federated Homes*.

This treatment of *Federated Homes* is most apparent in *Roake v Chadha.* In somewhat similar, although not identical, circumstances to *Federated Homes,* land had been set out in plots subject to a covenant that the land only be used to build a single dwelling house and that the plans for the house be submitted for approval. The defendants purchased a plot upon which they intended to build an additional dwelling house, and the claimants, although owning several other plots close to the defendants, had acquired them without receiving the express assignment of the benefit of the covenant. Even more problematic for the claimant, the covenant expressly

[74] See Hayton D, *Revolution in Restrictive Covenants?,* (1980) 43 Mod L Rev 445 at 448

[75] See also Hurst DJ, *The Transmission of Restrictive Covenants,* (1982) 2 Legal Stud 53 at 75, who also concludes that the distinction between sss78 and 78 was an intentional decision by the draftsmen, although Hurst adopts an interpretation of s78 that it is submitted is incorrect owing to its conclusion that s78 should be interpreted as always annexing the benefit of the covenant – something this article has submitted above is impossible under the current wording of the provision

excluded annexation and did not meet the requirements for a building scheme. The claimants therefore submitted, relying on Brightman LJ's lack of reference to contrary intentions, that s78 effected annexation irrespective of any expressed contrary intentions, as Parliament must have intended s78 to be mandatory. This was in contrast with s79 LPA 1925, which as noted above, is only effective should there be no contrary intention.

In dealing with this literal interpretation, Paul Baker QC first of all refused to countenance discussion of rejecting *Federated Homes.* His Honour Judge indeed commented that "Sitting here as a judge of the Chancery Division, I do not consider it to be my place either, to criticise or to defend the decisions of the Court of Appeal. I conceive it my clear duty to accept the decision of the Court of Appeal as binding on me and apply it as best I can to the facts I find here."[76]

In discountenancing the refutation of *Federated Homes,* Paul Baker QC made clear that s78 LPA 1925 did achieve annexation. Although not a contentious conclusion owing to the doctrine of precedence, the remainder of the judgement, as acknowledged above, is much more problematic. For it was further rejected that s78 LPA 1925 achieved annexation irrespective of a contrary intention[77]. In rejecting the mandatory nature of s78, His Honour Judge relied primarily on a footnote in a 1946 textbook, which commented that "but it is thought that, as a covenant must be construed as a whole, the court would give due effect to words excluding or modifying the operation of the section . . . "[78]. Notwithstanding the evident limited support such a reference provides, more problematic is the clear contradiction with Brightman LJ's reasoning for s78 effecting annexation – the clear differences between ss78 and 79 and the apparent wording of s78. As outlined above, should a contrary intention be permitted, given the glaring lack of reference to such an intention, this fundamentally undermines the Expansive View of s78 adopted in *Federated Homes,* and the existence of statutory annexation itself.

The divergence instigated by *Roake v Chadha* has been accentuated by *Crest Nicholson.* In reviewing the previous authorities, Chadwick LJ did not consider the reasoning adopted in *Federated Homes,* and alternatively merely acknowledged that s78 LPA 1925 effects annexation. Instead, His Lordship focused on issues he felt had remained unresolved; whether there was still a need for the covenant to identify the benefited land, and the effect of a contrary intention.

In regard the first unresolved issue, Chadwick LJ held that *Federated Homes* had not done away with the requirement set in *Marquess of Zetland v Driver*[79] that the land must be identifiable. An eminently reasonable requirement, unlike with the conclusion reached in *Roake,* this is necessary for the actual functioning of annexation in any form[80]. For if the land is unidentified, then it is not possible to determine the limitations and applicability of the covenant[81]. This is seen mostly demonstrably in relation to large tenements, where the courts have struggled to identify the land that is to benefit from the annexation[82]. Moreover, the requirement does not contradict the wording of s78, nor does it contradict the reasoning adopted in *Federated Homes.*

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[76] [1984] 1 WLR 40, at 45
[77] Ibid, at 46
[78] Elphinstone L, *Covenants Affecting Land*, (London: Solicitors Law Stationary Society, 1946) at 17
[79] [1939] CH 1
[80] Gray K and Gray S, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009) at 274; Burn E and Cartwright J, *Cheshire and Burn's Modern Law of Real Property,* 18th edn (Oxford: OUP, 2011) at 748
[81] Newsom G.L and Paton E, *Preston and Newsom: Restrictive Covenants Affecting Freehold Land,* 11th edn (London: Sweet & Maxwell, 2020 at 39-47
[82] *Re Ballard's Conveyance* [1937] Ch 473

In regard the second issue of contrary intentions, however, Chadwick LJ did not adopt such an uncontentious approach. Reviewing *Roake,* His Lordship endorsed the reasoning of Paul Baker QC[83], and also concluded that the lack of reference to contrary intention by s78 LPA 1925 did not preclude such an intention. This was due to its reference to "successors in title" – which should be read as "the land of the covenantee intended to be benefited"[84], given the definition provided in s78(1) LPA 1925. With all respect to such an interpretation, although s78(1) does refer to the intention – in that it is 'the land that is intended to be benefited' – this does not countenance the possibility of a contrary intention affecting the application of s78. Instead, this is merely a definition of the land to include the land that the section applies to, and for a contrary intention to have any bearing, an express reference to contrary intention as in s79 is required.

Consequently, the two most in-depth judicial appraisals of *Federated Homes* have side-stepped interrogating its theoretical foundations, and have instead elected, through their silence, to accept Brightman LJ's justifications for s78 LPA 1925 effecting annexation. Unfortunate though this is, for it would have been preferrable for judicial comment, the two authorities have alternatively sought to focus on issues such as alternative intentions not addressed by *Federated Homes* – addresses that have undermined the reasoning of Brightman LJ, and do not in themselves fit within the statutory language. Indeed, speaking in an extra-judicial capacity, Neuberger LJ (as he was then) commented in 2005 when reviewing the subsequent position of *Federated Homes,* that "there do seem to be pretty formidable arguments…for doubting the correctness of the decision in *Federated Homes*"[85] – strongly intimating that neither judgment has assisted in rectifying the position of *Federated Homes,* and that debate continues to rage even within the senior echelons of the judiciary as to its correctness.

Exacerbating the problems associated with *Roake* and *Crest Nicholson,* subsequent courts have again been reticent to address the underlying reasoning of *Federated Homes* or the requirements of statutory annexation. In cases such as *Bath Rugby v Greenwood*[86], *University of East London v London Borough of Barking and Dagenham*[87], *Norwich City College v McQuillan*[88], *Sugarman v Porter*[89] and *Rees v Peters*[90], the discussion has been limited to application of, rather than analysis of, the doctrine. Both *Norwich City College v McQuillan* and *Sugarman v Porter* saw claims for effective statutory annexation rejected owing to the existence of a negating intention. This has meant that the heterodoxy of *Federated Homes,* as expanded by *Roake* and *Crest Nicholson,* has still gone unchallenged and even been expanded upon.

This treatment by subsequent courts has also been, asymmetrically, reflected in the recent academic literature on the topics. Of the academic literature published dealing with *Crest Nicholson* and *Roake,* the majority have been case notes focussing on the practical rather than theoretical consequences of the decisions' impact[91], whilst other attempts at looking at freehold covenants have adopted a macro and policy centric approach[92] and not analysed or interrogated

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[83] *Crest Nicholson v McAllister* [2004] EWCA Civ at 41
[84] Ibid, at 43
[85] Neuberger D, 30th Anniversary Blundell Lecture, 27th June 2005
[86] [2020] EWHC 2662 (Ch)
[87] [2004] EWHC 2710 (Ch)
[88] [2009] EWHC 1496 (Ch)
[89] [2006] EWHC 331 (Ch)
[90] [2011] EWCA Civ 836
[91] Case Comment, *Restrictive Covenants*, (2013) 16(6) JHL 132; Howell J, *The Annexation of the Benefit of Covenants to Land,* (2004) Con 507; Clark P, *The Benefit of Freehold Covenants*, (2012) 2 Conv 145; Kenny P, *Conveyancer's Notebook (January/February),* (2006) Conv 1
[92] Cash A, *Freehold Covenants and the Potential Flaws in the Law Commission's 2011 Reform Proposals*, (2017) 3 Conv 212

the foundations of statutory annexation as undertaken above. There has thus been limited theoretical analysis of these subsequent judgments.

This is not to say that there has been no development whatsoever with regards the doctrine, though, with one evidential development being encapsulated in *Holland Park v Hicks*[93]. The relevant covenants – as with many of the reported cases – concerned the requirement to submit building plans for approval by the covenantee. The actual wording of the covenant, which was fundamental to determining its applicability, stated that it had been entered into 'so as to bind the land hereby transferred and to benefit the vendor's property.' The High Court held that this wording contained nothing that indicated a contrary intention to s78 LPA 1925 operating, and so the covenant benefited the land. *Holland Park v Hicks* therefore indicates that from an evidential perspective, s78 LPA 1925, following *Federated Homes,* has reversed the burden of proof in determining whether there was a contrary intention preventing its effect[94]. Indeed, it now appears that it is for the covenantor to prove that annexation was not intended, with a failure to prove such an intention resulting in s78 effecting annexation. Although *Holland Park* does not address the requirements or theory underlying s78 LPA 1925, it does illustrate the continuing difficulties associated with its utilisation and the courts' willingness to accept *Federated Homes'* interpretation, and that effecting statutory annexation remains problematic to this day.

The post *Federated Homes* evolution of s78 LPA 1925 has therefore seen restrictions imposed upon statutory annexation of freehold covenants, and an undermining of the Expansive View adopted by Brightman LJ. First of all, *Roake* has (controversially) rejected the mandatory nature of s78, and permitted contrary intentions to preclude annexation. Secondly, *Crest Nicholson* has (uncontroversially) imposed the requirement that the land must be identifiable. Finally, *Holland Park v Hicks* has clarified that a reversal of the burden of proof has occurred, and that it is the covenantor who must prove that annexation was not intended. More pertinent, however, is that the 41 years following *Federated Homes* has seen the judiciary consistently refuse to even consider, let alone analyse, the justifications provided by Brightman LJ for s78 effecting annexation. Thereby, in refusing to do so, the heterodoxy has been perpetuated and gone unchallenged – resulting in statutory annexation having fundamentally flawed theoretical foundations that, in the cold light of day, cannot properly support the doctrine.

Section 3: Is There a Policy Need for Statutory Annexation?

In tandem with the above theoretical analysis of s78 LPA 1925 that Brightman LJ's conclusions in *Federated Homes* are theoretically flawed and are heterodoxic, as acknowledged above, there is also a case for suggesting that despite its flaws, statutory annexation of restrictive covenants in some form can be justified on policy grounds.

Policy arguments in favour of s78 LPA 1925 effecting annexation centre on the simplification it offers for covenantees. It is forcefully proffered by Gray[95] that *Federated Homes* simplifies the process for restrictive covenantees seeking to enforce the benefit. They argue that by providing a statutory shorthand and presumption, s78 LPA 1925 removes levels of technicality that draftsmen – let alone the lay covenantees creating 'DIY' covenants – may be unable to

[93] [2013] EWHC 391 (Ch)
[94] Clark S and Greer S, *Land Law,* 7th edn (Oxford: OUP, 2020) at 391
[95] Gray and Gray, *Elements of Land Law,* 5th edn (Oxford: OUP, 2009) at 276; see also Megarry R and Wade H, *The Law of Real Property,* 5th edn (London: Stevens & Sons, 1984) at 786; Burn EH and Cartwright J, *Cheshire and Burn's Modern Law of Real Property,* 8th edn (Oxford: OUP, 2011) at 749; Gasztowicz S, *Scammel and Gasztowicz on Land Covenants,* 2nd edn (London: Bloomsbury, 2018) at 77

successfully navigate[96]. This is despite Hayton's view that the requirements of express annexation "seem reasonable enough, and indeed they are reasonable…"[97], for although they theoretically appear reasonable, their use in practice is problematic due to unduly complex formality requirements. This default annexation thereby achieves what the majority of coventees desire, without the need for utilising the finicky language necessary to effect express annexation[98] - the limitations associated with express annexation of course exemplified by *Renals v Cowlishaw*[99], where reference to "vendors and their heirs" was insufficient to effect express annexation.

Incongruously, although opposed to *Federated Homes* and statutory annexation entirely, Snape reinforces Gray's submission by recognising that Brightman LJ's judgment substantially simplifies the process of passing the benefit of a covenant. Snape notes that by effecting annexation by default, s78 LPA 1925 in effect – if not jurisprudentially – creates a singular form of annexation, and a form of annexation that is not founded upon the unclear requirements of express annexation[100].

Looked objectively at a distance from Brightman LJ's judgment, the observations of Gray and Snape do carry much weight. As any student or practitioner of freehold covenants will testify, to comment that the relevant law is convoluted greatly downplays the true legal position. Just as with the Daedalian law on easements, the law on passing the benefit of a covenant in Equity involves 6 potential and alternative means of achieving this outcome[101] - and this is not even considering the passing of the burden. Consequently, any means by which this process can be simplified is to be welcomed – particularly given that the primary alternative to statutory annexation, express annexation, is subject to the skills of draftsmen and is inherently unstable[102]. It was Wade, one of the first proponents of statutory annexation, who summarised the policy arguments most succinctly[103] – "Instead of leaving the successors at the mercy of the precise technical words used in earlier transactions, the Act more sensibly anchored their rights to the objective facts: if in fact the covenant benefited land of the covenantee, it should be presumed to be intended to run with it…"[104]. The policy need for some form of statutory annexation in order to provide a measure of coherence to this area of the law is therefore unmistakable.

Although providing benefits, this is not to say that statutory annexation does not also provide policy concerns. The overwhelming problem with utilising statutory annexation – particularly through the interpretation provided by Brightman LJ in *Federated Homes* – is that it is requires a substantial retrospective reinterpretation. Given the delayed interpretation of s78 LPA 1925 of achieving annexation by five and a half decades, there will be many who will have lost out in the interim. Indeed, given the restrictive interpretation applied to s78 LPA 1925 prior to

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[96] Ibid, at 276 – "Brightman LJ liberated the law of restrictive covenants from generations of needless technicality… in other words, section 78(1) supplies a statutory formula which effectively annexes covenanted benefits to the land of the covenantee provided that these covenants can genuinely be described as *relating to* that land."

[97] Hayton D, *Restrictive Covenants as Property Interests*, 87 LQR (1971) 539 at 553

[98] See *Rogers v Hosegood* [1900] 2 Ch 388; Hurst DJ, *The Transmission of Restrictive Covenants*, (1982) 2 Legal Stud 53 at 56

[99] (1879) 11 Ch. D 866

[100] Snape J, *The Benefit and Burden of Covenants – Now Where are We?*, (1994) 3 Nott LJ 68 at 72-73

[101] The relevant methods of passing the benefit include: passing the benefit under the common law; express, statutory and implied annexation; assignment; and the use of a building scheme.

[102] On a macro level, this is the same conclusion reached by Hurst DJ, *The Transmission of Restrictive Covenants*, (1982) 2 Legal Stud 53, although the reasoning behind the need for the law to be modified adopted by Hurst is substantially at odds with this article

[103] See also George M and Layard A, *Thompson's Modern Land Law,* 7th edn (Oxford: OUP 2019) at 478

[104] H W R Wade, *Covenants - A Broad and Reasonable View*, (1972) 31 Cambridge LJ 157 at 174

Federated Homes, thousands of covenantees will have lost out on the chance to enforce the benefit of the covenant, and insurance firms historically granted generous insurance terms on the understanding that many covenants would never be enforceable[105] – contracts that now potentially form substantial liabilities. Moreover, given the theoretical limitations of *Federated Homes* outlined above and the potential (if not likely prospect) of the Supreme Court overturning the interpretation given Parliament's evident lack of intention to effect annexation, it is difficult for covenantees to solely rely on the current authorities providing for statutory annexation. Consequently, utilising statutory annexation in its present form is not a foregone course of action for covenantees from a practical perspective and places many in a precarious position should they seek to utilise it.

An additional policy element that requires consideration are the societal developments and the changes in the use and value of land. It must be remembered that when the foundational requirements concerning the subsequent enforcement of covenants were developed, society was undergoing substantial and prolonged upheaval resulting from the Industrial Revolution[106]. With the newly acquired wealth of the Victorian middle and upper classes, ever greater numbers of individuals wished to possess comfortable lives with plentiful private space[107]. This consequently led to the development of larger sized, suburban housing that had substantial financial and development value[108]. Thereby, the commercially minded Victorian courts were concerned with ensuring that these increasingly important economic assets were not devalued by the actions of third parties – protections achieved through the use of covenants regulating the use of the land owing to the lack of centrally administered planning laws[109].

However, balanced with the need to protect the existing economic value of land, was also the ability for parties to exploit the potential of undeveloped land, and thereby create new economic value. To achieve this goal, only the burden of restrictive covenants, which do not impose a direct financial burden on the covenantor, and not the burden of positive covenants, which do impose potentially substantial financial obligations on the covenantor, were allowed to run with the land[110]. This therefore meant that uses of the land could be restricted, whilst also ensuring that it did not become an economic burden in itself. Moreover, from a fairness perspective, it was also acknowledged in *Haywood v Brunswick*[111] by Lindley and Cotton LJJ that it was unacceptable to compel subsequent parties to endure financial expenditure for commitments they did not themselves agree to[112]. Restrictive covenants therefore played a pivotal role in shaping England's towns, cities and villages and continue to impact the use of land to this day as seen by the number of contemporary cases seen above.

Whilst these restrictions on the passing of the burden of positive covenants can be accepted as being eminently reasonable, Snape goes further and argues that there are societal reasons for rejecting statutory annexation of the benefit[113]. Although it must be noted that Snape was

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[105] Newsom G, *Universal Annexation,* (1981) 97 LQR 32 at 32

[106] Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68, at 75-76; Jessel C, *Positive Covenants and Freehold Land,* (London: Wildy, 2019) at 5-8

[107] Gardner S, *The Proprietary Effect of Contractual Obligations*, 98 LQR 279 at 319

[108] Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68, at 75-76

[109] Hayton D, *Restrictive Covenants as Property Interests,* 87 LQR 1971 539 at 539

[110] *Austerberry v Oldham Corporation* (1885) 29 Ch.D. 750; *Tulk v Moxhay* [1848] 41 ER 1143

[111] *Haywood v Brunswick Building Society* (1881) 8 QBD 403 - Cotton LJ commented that "The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length."

[112] These comments would be later echoed in *Rhone v Stephens* [1994] UHKL 3, per Lord Templeman – "Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it."

[113] Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68, at 77

writing in the early 1990s when England was experiencing the effects of that decade's recession, it was argued that falling property prices and declining house building meant that there was no need for default annexation. The contemporary state of the UK's housing market, at the time of writing, is radically different from the time that Snape was commenting however – in 1995 the average house price was £102,423[114], compared to £270,000 today[115]. This drastic increase in house prices, and a dramatic increase in the numbers of new homes being built[116], means that the context has radically shifted. It also means that protecting covenantees' rights to limit the use of the land, and prevent unwanted radical change to neighbourhoods, through the use of restrictive covenants is more important today than even in the Victorian 'boom' period. Alternatively, from a purely economic perspective, possessing the benefit to a covenant restricting what can be built is also potentially extremely valuable, by requiring developers to compensate for releasing the covenant. Notwithstanding questions of whether it is fair to allow landowners to 'gouge' or 'extort' developers for building much needed housing, for this is more of a question of planning law rather than the law of covenants, if a party has a proprietary right, they should be permitted to enforce it and extract any economic benefit they are able to obtain. Consequently, making it easier for parties to enforce the benefit of a restrictive covenant, given their high economic consideration and associated societal value, is a necessary feature the law requires - and as noted above, statutory annexation is an essential element to helping achieve this desired outcome.

It is therefore evident that from a policy perspective there is a good and arguable case for statutorily effecting the annexation of the benefit of a covenant. Although some have proffered that reform should take the form of 'tightening' the rules on express annexation to make them easier to utilise[117], it is submitted that such a reform does not go far enough and does not accord with the wishes of the overwhelming percentage of parties nor simplify the law sufficiently. However, it must be restated that whilst statutory annexation may be justifiable from a policy perspective, it must not be achieved by doing 'damage' to the current statutory wording of s78 LPA 1925 – wording that, as submitted above, does not allow for the annexation of covenants – and the author consequently submits that it should instead be achieved through new legislation. This legislation should be explicit in its effecting of annexation, and moreover, should also be explicit in recognising that alternative intentions negate the statutory presumption of annexation – such as already exists in s79 LPA 1925 and not s78. In doing so, the controversies set about above could easily be resolved, and clarity brought this area of the law, without doing damage to express legislative language.

A similar legislative reform was proposed by the Law Commission in 1967, in its *Report on Restrictive Covenants*[118]. Although the report deals broadly with the restrictive covenant, it also deals specifically with the issue of annexation, calling for default statutory annexation of restrictive covenants unless a negating intention is expressed[119]. Whilst the substance of the Proposition is inline with this article's call for statutory reform, this article is not calling (in this context at least) for a novel and wide-ranging statutory reform to the law on restrictive covenants as a whole. Instead, it is calling for much more restrained legislation that would simply amend the wording of s78 LPA 1925 to reflect the Law Commission's 4th Proposition

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[114] https://www.allagents.co.uk/house-prices-adjusted/
[115] Office of National Statistics, *UK House Price Index: September 2021,* *https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/housepriceindex/september2021/pdf*
[116] 244,000 were built between April 2019 and March 2020 - https://www.economist.com/britain/2021/07/15/england-is-building-more-homes-than-it-has-for-many-years
[117] Snape J, *The Benefit and Burden of Covenants – Now Where are We?,* (1994) 3 Nott LJ 68, at 89
[118] Law Commission, *Report on Restrictive Covenants,* No.11 (HMSO: 1967) at Part E
[119] Ibid, at p15 (Proposition 4)

– wording that makes it explicit that statutory annexation is effected but for an express negating intention, but that does not impact upon the wider law relating to restrictive covenants[120].

Conclusion:

In analysing *Federated Homes v Mill Lodge Properties* and the subsequent authorities, it has been proven that the theoretical foundations of annexation effected by s78 LPA 1925 are fundamentally flawed. It has been demonstrated that the justifications proffered by Brightman LJ – that s78 is fundamentally different from its legislative predecessors, that the Court of Appeal in *Smith and Snipes* reached the same conclusion, and that ss78 and 79 LPA 1925 differ radically from each other – do not stand up to sustained analysis, particularly given the brevity of reasoning provided in his Lordship's judgment. Furthermore, it has also been demonstrated that the subsequent authorities, namely *Roake v Chadha* and *Crest Nicholson v McAllister*, in permitting a negating intention to prevent annexation being effected by s78, have contradicted both the wording of the statutory provision and further undermined the interpretation adopted by Brightman LJ without reasonable justification.

Notwithstanding the conclusions reached in regard statutory annexation's flawed theoretical foundations, it must also be acknowledged that there is a policy justification for statutory annexation. Given the issues associated with express annexation, and the contemporary importance restrictive covenants can play in shaping a locality in tandem with their economy value, simplifying the process of passing the benefit of such covenants would fulfil a clear social utility. It would ensure that parties have clarity over the rights and obligations that exist over the land, and would also provide for a simplification of the conveyancing process by removing the need to consider express annexation, and instead focusing on the existence of negating intentions.

However, as also concluded, such a reform cannot be achieved by trampling over express statutory language, and instead a new statutory provision is required. Whilst the Law Commission, and tangentially Hayton, have proposed wide ranging and fundamental statutory reform to freehold covenants, this article argues for a more focussed and attainable reform through merely amending the wording of s78 – a workable reform that addresses this fundamental controversy, whilst leaving more macro considerations of freehold covenants to a subsequent and wider discussion. Such a focused reforming provision would be required to clearly state that it effects annexation of the benefit (something that s78, as demonstrated above, does not do) and that such an annexation is not effected should an contrary intention be expressed (something that s78, unlike s79, does not refer to). Should Parliament act in this limited and restrained manner, then the controversy associated with statutory annexation could be resolved and the utilisation of land greatly simplified.

[120] Whilst the Law Commission's proposals have much merit, a fully analysis of them or the benefits of wide ranging statutory reform of the restrictive covenant generally is beyond the scope of this article