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Special Issue:

**DONOR RESTRICTIONS ON
GALLERIES AND MUSEUMS**

guest-edited by

Elena Cooper and Steph Scholten



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DONOR RESTRICTIONS ON GALLERIES AND MUSEUMS

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Cover image: James Abbott McNeill Whistler (1834-1903), *The Black Hat – Miss Rosalind Birnie Philip*, 1900-1902, oil on canvas, GLAHA:46383.

Image courtesy of The Hunterian, University of Glasgow.

LIMITATIONS ON ART COLLECTIONS: RETHINKING DONOR RESTRICTIONS ON GALLERIES AND MUSEUMS

Elena Cooper* and Steph Scholten†

In 2021, The Hunterian, Glasgow, staged a major new exhibition of the work of James McNeill Whistler (1834-1903): *Whistler: Art and Legacy*.¹ The Hunterian, part of the University of Glasgow, is the oldest public museum and largest university museum in Scotland, and the home to one of the world's largest collections of Whistler's work.² Whistler was an American-born painter, printmaker, aesthete, dandy and wit. His night-time views of London and the Thames, striking full-length portraits, innovative etchings, and his progressive views about art, challenged the artistic establishment of his time and laid important foundations for twentieth-century abstraction. In showcasing a large number of items from the University's remarkable collection, *Whistler: Art and Legacy* cast new light on Whistler's artistic practice and highlighted the role that Glasgow played in supporting Whistler and forming his artistic legacy. The exhibition displayed well-known works alongside lesser-known material that can only be seen in Glasgow due to the terms of their donation to the University. While *Whistler: Art and Legacy* was an exhibition of undoubted art-historical importance, by including works that can be shown only in Glasgow, the reach of the exhibition was geographically confined: the exhibition could not travel.

How did the University of Glasgow, despite the fact that Whistler never set foot in Glasgow, become the permanent home of its globally important Whistler Collection? Further, why is it that a large portion of the Collection cannot travel, and can be displayed only within the University? The answer lies with the decisions of Whistler's executrix: Whistler's Glasgow-based sister-in-law Rosalind Birnie Philip (1873-1958), whose portrait, as depicted by Whistler in *The Black Hat (Miss Rosalind Birnie Philip)* (1900/1902), appears on the front cover of this Special Issue. Birnie Philip donated a large part of the artist's estate to the University of Glasgow in 1935, 1954 and 1958 respectively.³ ⁴ Birnie Philip's first donation, in 1935, came with the restriction that "The

1 <www.gla.ac.uk/hunterian/visit/exhibitions/exhibitionarchive/whistlerartandlegacy/>

2 <www.gla.ac.uk/hunterian/>.

3 The Hunterian's Whistler Collection comprises 80 oil paintings, several hundred drawings, watercolours and pastels, and over 1,500 impressions of his etchings and lithographs, as well as extensive holdings of his artist's materials, including brushes, etching plates and printmaking tools. In addition, in 1954 Miss Philip presented the University with an important archive of over 4,000 letters as well as catalogues, press cuttings, photographs, books and memorabilia. This unrivalled archive is housed in the Special Collections Department of the University Library. Important additions have since been made to both holdings.

4 <www.whistler.arts.gla.ac.uk/correspondence/>, <<https://etchings.arts.gla.ac.uk/>>, <www.whistlerpaintings.gla.ac.uk/>.

* Senior Research Fellow, School of Law, University of Glasgow. This research was funded by The Leverhulme Trust, Early Career Fellowship.

† Director of The Hunterian Art Gallery at the University of Glasgow.

Scheduled property shall never be removed from the buildings of the said University.”⁵ Artworks gifted in 1954 and 1958 came without restrictions,⁶ creating the somewhat strange situation that some of The Hunterian’s Whistlers travel the world on a very regular basis, and others have never left Glasgow after 1935, even when works are very close in their provenance or are part of the same series.

Thanks to Birnie Philip, The Hunterian is also home to the principal holding of the work of Whistler’s wife, Beatrix Philip (1857-1896).⁷ These collections are a major resource for the study of Whistler’s life and times and are largely published through the University’s online projects of the 21st century: the edition of Whistler’s correspondence and the *catalogues raisonnés* of Whistler’s etchings and paintings

The Hunterian collection also contains Whistler’s oil painting *Brown and Gold: Portrait of Lady Eden* (1894-5),⁸ that has become a *cause célèbre* in intellectual property law circles. As readers of *Art Antiquity and Law* may know, the painting was the subject of a late nineteenth-century French legal case – *Eden v. Whistler* (1897) – today seen as key to the development of the author’s moral rights under French law. Less well known today, is that Birnie Philip gifted *Portrait of Lady Eden* to the University of Glasgow subject to special restrictions – the University is forbidden by the terms of Birnie Philip’s donation, to exhibit or part with this painting – and, at The Hunterian, this restriction is understood to be a consequence of the ruling in *Eden v. Whistler*. Consequently, *Portrait of Lady Eden* has never been publicly exhibited since it was displayed in the Paris law courts in the final years of the nineteenth century.

The context of *Whistler: Art and Legacy* – a major exhibition that could not travel due to the terms of donation – prompted Steph Scholten, Director of The Hunterian (and a guest co-editor of this Special Issue) to convene a roundtable discussion to reflect publicly on historical restrictions on the use of museum collections today, in general, and the Whistler collections in Glasgow, in particular. The event, *Limitations on Collections: Whistler, Wallace and Burrell*, hosted by The Hunterian and held on-line on 19 October 2021, comprised contributions from a panel of art experts on the legal, ethical and practical challenges raised by donor restrictions.⁹ This included presentations from two directors of major art collections who have overseen the legal process of varying restrictions in recent times: Dr Xavier Bray (Director of the Wallace Collection) spoke about the varying of donor terms, under English law, long understood to restrict the Wallace Collection from lending to other institutions, and Duncan Dornan (Head of Museums and Collections at Glasgow Life) explained the two-stage process by which donor restrictions concerning the Burrell Collection, Glasgow, were successfully lifted under Scots law procedures. Further, the panel included contributions from two University of Glasgow academics: the art historian and lawyer, Dr Grischka Petri, Honorary Research Fellow, School

5 Memorandum of Gift from Rosalind Birnie Philip to the University of Glasgow, 3 June 1935 cl. 4, Archives of The Hunterian, University of Glasgow.

6 The 1954 gift did, however, restrict physical movement of letters, books and photographs. See the contribution by Alicia Hughes in this Special Issue.

7 Numbering nearly 300 items, including oils, etchings, drawings and watercolours.

8 Accession Number: GLAHA 46356.

9 <www.eventbrite.co.uk/e/limitations-on-collections-whistler-wallace-and-burrell-tickets-189842723697>. See also: <www.create.ac.uk/blog/2021/10/14/hunterian-event-limitations-on-collections-whistler-wallace-and-burrell-led-by-hunterian-director-steph-scholten/>.

of Culture & Creative Arts who has in-depth knowledge of the Whistler collection as a co-author of *James McNeill Whistler: The Paintings, a Catalogue Raisonné*,¹⁰ and Dr Elena Cooper (also a guest co-editor of this Special Issue) the author of *Art and Modern Copyright*¹¹ and a copyright history specialist at CREATE, the University's copyright law research centre. As the event could barely scratch the surface of the complexities of the case studies that were discussed, it was proposed to the Institute of Art and Law to devote a Special Issue of *Art Antiquity and Law* to these questions. This is that issue.

The Content of this Issue of *Art Antiquity and Law*

This volume comprises two general case studies of donor restrictions at particular collections (by Alicia Hughes and Duncan Dornan), one contextualising article (by Grischka Petri) and, last but not least, a legal reappraisal of a specific restriction on the exhibition of a particular painting: *Portrait of Lady Eden* (by Elena Cooper).

In "*A Scheme of My Protection*": *Rosalind Birnie Philip (1873-1958) and the History of the James McNeill and Beatrix Whistler Collection at the University of Glasgow*, the art historian Alicia Hughes (a Project Curator at the British Museum and formerly Curatorial Assistant at The Hunterian for *Whistler: Art and Legacy*) draws on extensive original archival work in providing the first in-depth account of the totality of Birnie Philip's donations to the University of Glasgow. This article is the first scholarly account of the University of Glasgow's Whistler collection that places Birnie Philip centre-stage. As Hughes shows, to date Birnie Philip's role has been obscured by an art-historical record that instead focuses on Whistler. More than a mere donor, Hughes presents Birnie Philip as the Whistler collection's 'first curator'; Birnie Philip drew on her own extensive knowledge and experience of the collection, in stipulating what Philip herself called, in 1953, "a scheme of my protection". Hughes' article is the first to bring to the fore a voice for Birnie Philip, that is distinct from, and sometimes at odds with, Whistler's, and this article will undoubtedly become a central reference point for future understanding of Birnie Philip's gifts to the University.

In *Legacy of the Burrell Lending Code*, Duncan Dornan draws on his extensive experience in administering the recently re-opened Burrell Collection comprising a diverse array of cultural objects, including paintings by Old Masters and French Impressionists, stained glass, arms and armour, fine tapestries and the most significant UK holding of Chinese Art.¹² When the collection was gifted to the City of Glasgow in 1944 by the shipping magnate Sir William Burrell and his wife Lady Constance Burrell, it was one of the largest, if not the largest, single donation of a collection to a public body of its time. It came with a number of restrictions, of which the ban on international loans was considered the most challenging. Dornan's article outlines the process by which the City of Glasgow has, in more recent times, successfully taken legal steps to lift lending restrictions for that collection: first in 1997 and then in 2013.

10 Margaret F. MacDonald and Grischka Petri, *James McNeill Whistler: The Paintings, a Catalogue Raisonné*, (University of Glasgow, 2020), website at <<http://whistlerpaintings.gla.ac.uk>> accessed Oct. 2022.

11 Elena Cooper, *Art and Modern Copyright: The Contested Image*, (Cambridge University Press, 2018), reviewed by Simon Stokes, (2020) XXV *Art Antiquity and Law* 367.

12 <<https://burrellcollection.com/>>.

These case studies are contextualised by Grischka Petri's article: *An Archaeology of Intentions? The Rosalind Birnie Philip Gift at the University of Glasgow before a Horizon of Comparative Analysis from Turner to Barnes*. Petri uses the Whistler Collection at the University of Glasgow as a way into a comparative consideration of a number of other examples internationally where museums have been, and in some cases still are, dealing with restrictions, including the Freer Gallery of Art, Washington D.C., The Frick Collection, New York, the Barnes Foundation Philadelphia. The wide-view lens of Petri's article makes clear that it is not unusual for donations to be subject to restrictions; indeed, Petri contends that the lending restrictions imposed by the American industrialist, Charles Freer, on the collection that became the Freer Gallery of Art, may well have served as a model for the terms of Birnie Philip's later Whistler donation to the University of Glasgow. Petri also considers J.M.W. Turner's bequest of works to the British nation, which specified how certain of his works were to be hung. Turner sought to ensure the integrity of the context in which his work was to be displayed; while Turner's death preceded the introduction of the UK Fine Arts Copyright Act 1862 (which contained the first statutory protection for painting in the UK, together with an early forerunner to moral rights), his bequest sought to protect interests protected in other jurisdictions by the moral right of integrity. As a painting is more than a mere 'external thing' over which an owner has 'dominion' in William Blackstone's classic sense, Petri asks whether restrictions imposed by artists, should carry more moral weight than those stipulated by mere collectors.

Finally, Elena Cooper revisits the *Whistler v. Eden* case from 1897 and the conclusions drawn by first, Birnie Phillip and later, The Hunterian, never to exhibit Whistler's *Portrait of Lady Eden* in perpetuity. Combining original archival work, with a rereading of lesser-known passages of *Whistler v. Eden* placed in the context of legal historical change, Cooper argues for a 'more balanced interpretation' by The Hunterian today as regards the restriction on the exhibition of *Portrait of Lady Eden*. Cooper's article demonstrates the practical and real-world consequences of careful scholarly work: insights from legal history allow us to reappraise the way we understand donor intentions today. Accordingly, Cooper's analysis supports the relaxing of a restriction through the way it is interpreted, without the need for lengthy and expensive legal procedures for a restriction's formal variation.

Overturning Restrictions: Some Ethical and Practical Considerations

Many museums, especially art museums, have sought to overturn restrictions that applied to their collections, and most museums today no longer accept donations that come with open-ended restrictions. Some of the motivations are practical, the most common of which is the stipulation that certain works must always be on display. With evolving views on the quality and contemporary relevance of works, and the growth of collections competing for limited exhibition space, it is often undesirable to permanently allocate display space to anything but the best works in a collection. Other reasons can be pragmatic, when for instance a museum is considering moving to new premises when a collection is allocated to a specific venue. Petri's description of the move of the Barnes Collection to downtown Philadelphia may serve as a case in point.

Restrictions may prevent museums from attracting the income necessary for a sustainable operation: the restriction that no other works can be added to or shown in a venue, not even in the form of temporary exhibitions, can for instance discourage repeat visits and sponsor contributions. Both the Burrell and the Wallace Collections had to deal with this in one way or another.

Restrictions on the ability to lend works from collections to other museums nationally or internationally can have similar problematic effects, as Duncan Dornan states about the steadily declining visiting numbers to the Burrell. And even when a museum would be allowed to organise temporary exhibitions, especially in the highly competitive international art world, an embargo on lending works to other museums has a direct impact on the willingness of those other museums to partner, as there is no *quid pro quo*. Temporary exhibitions are often based on new research and insights that add scholarship and meaning, allowing (art)works to be seen and understood in different contexts.

A relatively new complication is the growing recognition that many museums in the Global North reflect the problematic power imbalances from past centuries. Museums are more and more often under pressure to become more inclusive, presenting more diverse viewpoints and layered interpretations for more diverse audiences, showcasing works and objects by those who have traditionally been underrepresented in museum collections and presentations. Also, many museums hold collections that are directly related to discredited practices, such as racially motivated science, colonial and exploitative efforts or have connections to, for instance, transatlantic slavery. The inability to fundamentally change or reinterpret would render some museums obsolete.

Turning back to Whistler in Glasgow, the existing restriction on lending large parts of the collections means that the relatively small group of lendable objects is in very heavy demand, limiting possibilities for use in The Hunterian and raising conservation concerns. This is occurring while very comparable works are sitting idly in the stores as The Hunterian will never be able to show all of its Whistlers at any given time.

Arguments to respect restrictions centre mostly on both the legal and moral obligations to abide by the donors' wishes, as they were accepted by the receiving institution when the collections were donated. It is simply the right thing to do and/or the legal aspects make it impossible to change. And some museums are very popular exactly because they are a time capsule of sorts, that never changes.

There is also the risk that future donors may perceive a museum that changes what it has agreed to in the past, as unreliable and therefore unfit to donate to. The reputational risk can be substantial.

Overturing Restrictions: Some Legal Considerations¹³

Donor restrictions are often framed to last in perpetuity. In what circumstances does the law allow a gallery, museum or other cultural institution to overturn donor restrictions? The precise answer depends on the institution. In the case of the National Gallery, the Tate and the National Portrait Gallery, for instance, the power to lend an object “in a

13 We thank Alexander Herman for his comments on an earlier draft of this section.

manner inconsistent with” a “trust or condition”, is expressly regulated by statute: under section 5(3) of the Museums and Galleries Act 1992, lending is permitted by these three institutions, where either (i) 50 years have elapsed since the vesting of property in the Board (or in any person through whom the Board derives title), or (ii) consent to the lending is given in writing by the person who first imposed the condition or that person’s personal representatives.

Most cultural institutions, however, are not subject to special statutory regulation in this way. Duncan Dornan’s article provides an example of the legal procedures involved in lifting donor restrictions under Scots law. In a previous article in *Art Antiquity and Law* published in 1998, the solicitors Ian McCulloch (who acted for Glasgow City Council in lifting the Burrell Collection restrictions in 1997) and Jessica Koravos, explained that the Burrell Collection is held by the Council of the City of Glasgow, on a Public Trust, and under Scots law a Public Trust can be varied only under the common law doctrine of *cy-près* where the intention of the truster of a charitable or public trust can no longer be carried out. Accordingly, petitioning the Scottish Parliament for private legislation, under the Private Legislation Procedure (Scotland) Act 1936, was “the only option”.¹⁴

By contrast, in England and Wales, most museums are charities regulated by the Charities Act 2011.¹⁵ It is a breach of trust for a museum or gallery trustee to act outside a charity’s powers, but those powers can be varied in certain circumstances: under section 69 of the Charities Act 2011, the Charity Commission may “by order” establish a “scheme for the administration of a charity”. Further, under section 105 of the Charities Act 2011, the Charity Commission can approve by order, any proposed or contemplated action by the trustees that is “expedient in the interests of the charity” and would not otherwise be within their powers. An example of the successful use of section 105, as regards donor conditions, is the application of the Wallace Collection, London, to the Charity Commission.

The Wallace Collection, located in Hertford House, a Grade II listed building in Manchester Square, Marylebone, is a rich private collection of Old Master paintings, sculpture, furniture, porcelain, arms, armoury, bronzes and goldsmiths’ work, all of international importance. The Collection is the result of around one hundred years of collecting on the part of four generations of Marquesses of Hertford, and by Sir Richard Wallace (the illegitimate son of the fourth Marquess, who lived in Hertford House).¹⁶ The Collection was gifted to the British Nation by Sir Richard’s widow, Lady Amélie Julie Charlotte Wallace (1819-1897), and was opened to the public on 22 June 1900. Lady Wallace’s will, dated 26 March 1897 states:

I bequeath to the British Nation my pictures porcelain bronzes artistic furniture

- 14 Ian McCulloch and Jessica Koravos, ‘The Burrell Showcase – The Public Interest and Compliance with Bequests’, (1998) III *Art Antiquity and Law*, 193-200, at p. 196.
- 15 New legislation on charities was passed in 2022 – the Charities Act 2022 – but the contentious provisions as regards museums, contained in sections 15 and 16, have not yet been implemented. The implications of the Charities Act 2022 for museums and galleries are fully considered by Alexander Herman, ‘Museums, Restitution and the New Charities Act’, (2022) XXVII *Art Antiquity and Law* 193-216.
- 16 See further, Trenchard Cox, *A Short Illustrated History of the Wallace Collection and its Founders* (Wallace Collection, London, 1936) and Suzanne Higgott, *The Most Fortunate Man of his Day: Sir Richard Wallace, Connoisseur, Collector and Philanthropist* (Wallace Collection, London, 2018).

armour miniatures snuff boxes and works of art... on the express condition that the Government for the time being shall agree to give a site in a central part of London And build thereon a special Museum to contain the said collection *which shall always be kept together unmixed with other objects of art* and shall be styled ‘The Wallace collection’...¹⁷

Lady Wallace’s will does not expressly prohibit lending items in the Collection. However, for many generations, the Wallace Collection trustees considered that to be the consequence of the condition that the Collection be “kept together unmixed with other objects of art”. In recent years, the Trustees and Director of the Wallace Collection sought legal clarification on this point.

How is the Wallace Collection regulated? It falls within the ambit of the Museums and Galleries Act 1992 – its Board is appointed under section 1(1)(d) – but there is no mention of the Wallace Collection in section 5(3) which, as noted above, regulates lending by the National Gallery, the Tate and the National Portrait Gallery. Accordingly, as the Wallace Collection is a charity under the Charities Act 2011, it applied to the Charity Commission for an Order allowing it to make temporary loans. This was granted in 2019. The particular factors considered were the long-term survival of the Collection and the art-historical importance of facilitating connections between the Wallace Collection and other museums, such that particular works of art can be viewed together. Particularly, as both Sir Richard and Lady Wallace had frequently loaned works to other institutions, in Paris and London, temporary loans were seen as in keeping with the intentions of the collecting family.¹⁸

The example of the Wallace Collection, then, illustrates how ethical, practical and legal aspects can become intertwined in an in-depth inquiry into what a donor really intended. Determining donor intentions, in turn, rests on a close reading of archival sources, itself the province of scholars. Scholarship, then, has a valuable role to play in rethinking the ethical, practical and legal facets of donor restrictions and we trust that the articles in this Special Issue, both individually and taken together, constitute an important contribution in this regard. Finally, we are grateful to the Institute of Art and Law, particularly Ruth Redmond-Cooper, for inviting us to be guest co-editors for this Special Issue, and in so doing, providing us with the perfect platform to present a fantastic array of interdisciplinary scholarship.

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17 Will of Lady Wallace, dated 26 March 1897, emphasis added.

18 ‘The Wallace Collection to Lend Works for the First Time’, Press Release from the Wallace Collection, dated 24 Sept. 2019. A full list of the many loans made by Sir Richard and Lady Wallace during their lifetimes is set out in Higgott, above, note 15 at pp. 383-4.

A “SCHEME OF MY PROTECTION”: ROSALIND BIRNIE PHILIP (1873-1958) AND THE HISTORY OF THE JAMES MCNEILL AND BEATRIX WHISTLER COLLECTION AT THE UNIVERSITY OF GLASGOW¹

Alicia Hughes*

Introduction

The Whistler Collection, held at the University of Glasgow, is one of the most important collections related to the nineteenth-century American artist James McNeill Whistler (1834-1903) in the world. It was established in the mid-1930s by the artist’s sister-in-law Rosalind Birnie Philip (1873-1958) who donated the Whistler Estate to the University through two gifts in 1935 and 1954, and one bequest – a gift made after her death – in 1958. The gifted collection is substantial and contains paintings, prints, drawings, porcelain, jewellery, furniture, letters, books, artistic tools and personal items of Whistler and his artist wife Beatrix Whistler, who was Birnie Philip’s older sister (1857-1896). The Whistler Estate is at the core of the University of Glasgow’s Whistler Collection, which is held between The Hunterian and the Library Archives and Special Collections, and which has continued to grow through many subsequent acquisitions of Whistleriana. As Whistler’s heir and the executrix of his estate, Birnie Philip chose the University of Glasgow to, as she herself describes, “take my trust” and the “best part” of the Whistler Estate, but the context in which her acts of generosity took place and the specifics of what Birnie Philip termed “the scheme of my protection” for the gifted collection have received no scholarly attention.² While Whistler scholars have noted that Birnie Philip “guarded the treasures of JW’s estate from dealers, collectors, writers and cataloguers”, her management of the Whistler Estate, and her ability to negotiate and make decisions regarding its future have not been adequately appreciated or studied with a dedicated focus.³ This article is the first study to focus on Birnie Philip and offers an

1 The phrase a “scheme of my protection” is taken from correspondence between Rosalind Birnie Philip and Professor John Walton, 29 Dec. 1953. MS Whistler P726, University of Glasgow Library Archives and Special Collections. Unless otherwise stated, all original archive material cited in this article is housed in the Manuscript collection of University of Glasgow Library Archives and Special Collections. Thank you to staff in UG ASC, including Emma Gilmartin, Sarah Gillies and Samantha Gilchrist, for their assistance in accessing this material. I am grateful to Margaret MacDonald, Patricia De Montfort and Clare Willsdon for sharing their knowledge of the collection and its institutional history, and for their helpful comments on earlier drafts of this article.

2 Birnie Philip to Arnott, 14 May 1942. Birnie Philip’s handwritten copy of her original letter to Scott Arnott. Whistler Archives, The Hunterian, University of Glasgow.

3 For brief biographies of Birnie Philip, see ‘Rosalind Birnie Philip, 1873-1958’ in Margaret F. MacDonald, Patricia de Montfort and Nigel Thorp (eds), *The Correspondence of James*

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in-depth examination and comparative analysis of all the conditions that she placed on all her gifts to the University of Glasgow and the historical context for those conditions.

Why did Birnie Philip gift the Whistler Estate to the University of Glasgow and how exactly did she do so? What were the terms and conditions of her gifts and bequest and why were they imposed? The most well-known of the conditions that Birnie Philip placed upon the donated collection relate to the objects in the 1935 gift. The conditions in question prohibit physical movement of objects – these objects cannot leave the University premises. The University is legally bound to reject frequent requests for loans of objects in this gift. But Birnie Philip's practice of placing conditions on her gifts was not restricted to the 1935 gift: physical movement of the 1954 gift (of letters, books and photographs) outside University premises is also prohibited. Furthermore, the conditions that Birnie Philip placed on her gifts are not only related to the physical movement of objects. While the 1958 bequest (including paintings, prints, drawings, porcelain, furniture, artistic tools and personal items) has no restrictions on physical movement (and thus these objects are frequently lent to national and international exhibitions), some objects (such as specific pieces of furniture) are identified as exempt from any future disposal. Other conditions in the three gifts relate to access, care and housing, and even the naming of the collection. Significantly, while some objects are singled out as to be held in perpetuity by the University, others are identified for possible future disposals in the cause of developing the gifted collection in its institutional home and raising money for a scholarship fund for University students. This article examines the vast and complex range of conditions to be found within the two gifts and the bequest as they are outlined in legal documentation (such as memoranda of agreement between Birnie Philip and the University, schedules of property and Birnie Philip's 1954 will and its 1957 codicil), but also through original archival evidence, such as correspondence.

This article is the first to place Birnie Philip herself at the centre of sustained scholarly attention, but it is not the first time that someone has sought to understand Birnie Philip and her wishes. The University considered there to be importance in understanding Birnie Philip's wishes even in 1935 so that they might be fully honoured. In 1936, following the completion of the first gift to the University, the honorary curator of the University's Art Collection, Professor John Walton, expressed his hope to learn more about the gifted collection so that, as he put it, Birnie Philip's "wishes may be interpreted in the spirit as well as in the letter."⁴ This article takes a similar approach and examines unpublished

McNeill Whistler, 1855-1903. On-line edition, University of Glasgow: <www.whistler.arts.gla.ac.uk/correspondence>; 'Rosalind Birnie Philip, 1873-1958' in Margaret F. MacDonald, Grischka Petri, Meg Hausberg and Joanna Meacock, *James McNeill Whistler: The Etchings, a Catalogue Raisonné*, (University of Glasgow, 2012), on-line website at <<http://etchings.arts.gla.ac.uk>>; and 'Rosalind Birnie Philip' in Margaret F. MacDonald, Grischka Petri, *James McNeill Whistler: The Paintings, a Catalogue Raisonné*, (University of Glasgow, 2020), <<http://whistlerpaintings.gla.ac.uk>>.

4 John Walton to Birnie Philip, 8 June 1936. MS Whistler W27. Although it has been supposed that the connection with the Walton family was key to Birnie Philip's gift, this letter indicates that the connection was not renewed until *after* the gift. Another example of an institution recognising the importance of understanding Birnie Philip's wishes outside their expression in legal documentation occurred in 1934 after Birnie Philip gifted a watercolour by Whistler to the Victoria & Albert Museum. A question around copyright ownership of a work arose and Birnie Philip's lawyer wrote on 16 Nov. 1934 to express that: "While Miss Birnie Philip imposes no conditions upon her assignment of her copyright, she is confident that you will

correspondence alongside legal documentation. This approach is crucial to understanding the general tone and wishes of a benefactor such as Birnie Philip: it is within unpublished correspondence that one finds evidence of Birnie Philips's motivations for gifting as well as her wishes as to the future of the collection in its institutional setting. The close examination of original archival evidence for the two gifts and the bequest necessitates a longer-length article, but this allows for the comparative (and arguably exhaustive) assessment of the nuances of the conditions placed upon the gifts and bequest in 1935, 1954 and 1958.

Through this examination, I offer a new historical understanding of the Whistler Estate collection and its restrictions at the University of Glasgow, which contributes to recent scholarship in the fields of history of art and collections. Such scholarship on restrictions on collections has been prompted by the desire of institutions to increase access to their collections, to develop knowledge through increased research opportunities, to derive financial income through loan opportunities (which in some cases offer opportunities for conservation of works that cannot otherwise be financially justified), and to further the visibility of the people who formed collections. Consideration of the way in which Birnie Philip interpreted and deviated from Whistler's wishes in her management of the Whistler Estate, will reveal the wider context in which she cared for and protected it as its curator. Ultimately, Birnie Philip played a crucial role in bringing the Whistler Estate collection to Glasgow and the way in which she did so demonstrates the depth of her curatorial knowledge and experience and her thoughtful dedication in safeguarding it for the future.

Rosalind Birnie Philip (1873-1958)

Who was Birnie Philip? She was the youngest of ten children born in London to the sculptor John Birnie Philip (1824-1875) and Frances Black (1826-1917).⁵ She grew up in an artistic household and would later assist her older sister Beatrix Whistler, who was also an artist, and she frequently travelled with the Whistlers and assisted with the day-to-day business of being an artist. In 1896, following the death of Beatrix Whistler to cancer, Birnie Philip (then only 22 years old) became Whistler's ward and, later, the executrix of his estate. Over the next eight years, Birnie Philip worked closely with Whistler managing his correspondence, assisting in the studio and occasionally posing for drawings, lithographs and paintings (see *The Black Hat* reproduced below at page 13). Through these roles, Birnie Philip formed her extensive knowledge of Whistler's work, his business dealings and legal cases (for example *Eden v. Whistler*, discussed by Elena Cooper at page 69 of this volume), his studio and, later on, his wishes concerning his estate. Whistler's nickname for Birnie Philip, with associations of West Point Military Academy where he studied in his youth, was the 'Major'; Whistler, of course, was the 'General'. Whistler was almost 40 years older than Birnie Philip (she would refer to herself later in life as his "adopted daughter") and these nicknames epitomise the relationship between artist and ward, pointing simultaneously to the power dynamics in their relationship, but also to the authority that Birnie Philip wielded as his assistant.⁶

take such steps as may be necessary to ensure that her wishes in regard to reproduction are carefully observed." See Freshfield, Leese & Munns to Victoria & Albert Museum, 16 Nov. 1934. Victoria & Albert Archive 4562.

5 For a brief biography of Birnie Philip, see 'Rosalind Birnie Philip, 1873-1958' in MacDonald, de Montfort and Thorp, above, note 3. See the photograph of Birnie Philip, reproduced below at p. 12.

6 Philip to Martin Hardie, 24 Feb. 1934. V&A Archives 4259.



Rosalind Birnie Philip, three quarter profile. Platinum print. W. & D. Downey, 61 Ebury St, London S.W. Between 1895 and 1917. MS Whistler PH2/3. Image courtesy of University of Glasgow Archives & Special Collections.



James Abbott McNeill Whistler (1834-1903), *The Black Hat – Miss Rosalind Birnie Philip*, 1900-1902, oil on canvas, GLAHA:46383. Image courtesy of The Hunterian, University of Glasgow.

Whistler scholars have noted that the artist's letters to Birnie Philip "are funny, furious, personal, possessive, and business-like".⁷ They reveal an immense amount about the artist, but "say little about Rosalind except as JW saw her".⁸ The Whistler correspondence project at the University of Glasgow transcribed Whistler's letters that were gifted by Birnie Philip in 1954 (and those related to Whistler in other institutions), but only up to the artist's death in 1903. The military-esque nicknames and the exclusion of the later correspondence from the digital correspondence project have obscured Birnie Philip's knowledge of the Whistler Estate and her agency in caring for it after the artist's death and ensuring its future within the institutional setting of the University of Glasgow (including the conditions she placed on the gifts). Previous Whistler scholars understood the University of Glasgow to have persuaded Birnie Philip to put her trust in it to provide a home for the rich estate collection. However, shifting the focus onto Birnie Philip herself significantly alters this understanding of the history of the collection.⁹

The 1935 Gift: Why Glasgow?

Why (32 years after Whistler's death) did Birnie Philip choose the University of Glasgow as a home for the extraordinary Whistler Estate collection and why did she stipulate that it should not leave the University premises? Were there other institutions competing for the collection? How was her concern for its physical safety informed by social and political events in the world?

In the years after Whistler's death, Birnie Philip astutely cared for the Whistler Estate and cautiously navigated the art market before choosing the University of Glasgow as the home for what she deemed the "best part" of the collection.¹⁰ Birnie Philip dealt with collectors such as the American industrialist Charles Freer (a great friend of Whistler's from the early 1890s) and she developed the Whistler Estate through acquisition of prints by Whistler and letters and literature about the artist. She commissioned the printing of limited editions of some of his etchings and lithographs before they were cancelled, using her own 'RBP' monogram on print runs of lithographs to indicate they were published posthumously with her authorisation.¹¹ She managed loans of works for national and international exhibitions in museums and exhibited and sold works via commercial galleries and dealers, such as P. & D. Colnaghi & Co. Her dedication and drive prompted the 1934 Whistler exhibition at the Victoria & Albert Museum in celebration of the centenary of the artist's birth, to which she loaned a significant number of works from the estate.¹² In addition to her significant gifts to the University of Glasgow, she also gifted

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 Birnie Philip to Arnott, 14 May 1942.

11 See Martin Hopkinson, 'Nathaniel Sparks's Printing of Whistler's Etchings' (1999) *Print Quarterly* 16, no. 4: 340-352; and Margaret F. MacDonald, 'Whistler's Lithographs' (1988) *Print Quarterly* 5, no. 1: 20-55. For a description of lifetime and posthumous stamps on lithographs, see 'Posthumous Edition' in Harriet K. Stratis, Martha Tedeschi, Nesta R. Spink, Katharine Jordan Lochnan, Nicholas Burry Smale, Thomas R. Way and James McNeill Whistler, *The Lithographs of James McNeill Whistler* (Chicago, Ill: Art Institute of Chicago in association with the Arie and Ida Crown Memorial, 1998), I: 21, II: 306.

12 For more on Birnie Philip's activities, see Alicia Hughes, 'From Executrix to Curator: Rosalind Birnie Philip (1873-1958) and the Whistler Estate Collection, 1903-1958' in *The Art*

works to other local and national institutions, including the Victoria & Albert Museum, Glasgow Museums, National Galleries of Scotland in Edinburgh, Chelsea Public Library in London, and the British Museum. The Rijksmuseum in Amsterdam, Boston Public Library, USA and the National Gallery of Victoria, Australia are among the international institutions to which she made gifts of works by Whistler.¹³ These gifts are explored elsewhere and were made on a smaller scale than those that went to the University of Glasgow, but it is important to recognise that Birnie Philip's gifts to the University took place within a broader programme of gifting and caring for the Whistler Estate and Whistler's legacy.¹⁴

Although Birnie Philip made the move to gift a significant portion of the collection within the Whistler Estate to the University between 1934 and 1936, a letter in University of Glasgow Library Special Collections (that will be discussed in more depth below) indicates that the University was a contender as a home for the collection as early as 1917. The traditional institutional narratives surrounding Birnie Philip's gifts to the University have highlighted Whistler's connections to Glasgow and Scotland, but it was in fact Birnie Philip's understanding and rationale of these connections that brought the Whistler Estate to the University.¹⁵ Writing to her lawyer seven years after her initial gift in 1935 (in part to justify why she sent the collection to Scotland), Birnie Philip cited Whistler's wish that it not remain in England (he famously said, "I will let things of mine go to Scotland or Ireland or America – I want no pictures or drawings of mine in England"¹⁶); the artist's Scottish heritage via his mother Anna McNeill Whistler; and his gratitude to the University of Glasgow for the honorary degree it conferred on him just prior to his death in 1903. She also articulated another reason that informed her gift to the University of Glasgow: Glasgow's historical connections with America, namely that the city was the first to start trading with the United States after the American War of Independence.¹⁷ Her 1942 letter to her lawyer Scott Arnott indicates that the University was not in fact a natural home for the Whistler Estate, but one that Birnie Philip determined through her own understanding of Whistler's biography and his wishes. Glasgow was not a popular choice at the time, as Birnie Philip reflected following correspondence with London-based art historians: "Evidently there is much ill feeling that I have chosen the Glasgow University to take my trust as "no one ever goes there"¹⁸. Writing from the London metropolis in 1942, this may have been the case, but today researchers from all over the world come to Glasgow to see the University's Whistler Collection, a consequence of the restrictions contained in the 1935 gift.

Market and Museums, ed. Frances Fowle and MaryKate Cleary (Bloomsbury, forthcoming 2023).

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 Whistler to Ernest George Brown, Aug. 1895. GUW 03613. MacDonald, de Montfort and Thorp, above, note 2. Whistler was bitter about English collectors reselling his works in the 1890s and profiting from their increased value.

17 For more on Birnie Philip's articulation of these connections with Scotland, see Hughes, above, note 12.

18 Birnie Philip to Arnott, 14 May 1942.

The 1935 Gift: Conditions, Context, History

The conditions relating to the paintings, drawings, prints and printing matrixes, jewellery, porcelain and other objects that were given to the University of Glasgow in 1935 are outlined in the 1935 memorandum of agreement between Birnie Philip and the University. Clause 1 states that:

The Scheduled property shall be kept and displayed together and the said University shall not at any time part with any of the articles therein comprised.¹⁹

Clause 4 of the same memorandum states that:

The Scheduled property shall never be removed from the buildings of the said University.²⁰

One of the clearest articulations of Birnie Philip's own rationale for the conditions on the 1935 gift (including those in the clauses outlined above but also those that will be discussed below) is found in a letter that she wrote to her lawyer, Arnott, in 1942. In her letter, Birnie Philip explains that she had had "experience of careless handling [of works] on several occasions, hence my imposing the restrictions on the gift."²¹ As we will see, Birnie Philip's rationales for the restrictions on the 1935 gift were complex and varied, but care of the collection and Whistler's reputation were central to her decision-making process.

After Whistler's death, Birnie Philip managed the Whistler Estate, a responsibility that, as mentioned above, included lending works to exhibitions at home and abroad. She had evidently been unimpressed with the handling of works on too many occasions and foresaw the possibility of similar careless handling of the collection in its institutional setting. She expressed similar concerns to the Victoria & Albert Museum in 1934, for, on arranging to collect the items to be loaned for an exhibition celebrating the centenary of Whistler's birth, Martin Hardie, Keeper of Prints & Drawings, stressed to the transit department, "[a]s Miss Birnie Philip is very particular as to how these are handled, will you be good enough to send two packers who will deal with her very carefully."²² Birnie Philip was by all accounts a woman who had strong ideas about how things should be done. She was by no means what she referred to on other occasions as an "incapable hen" and her experience in managing the Whistler Estate and lending works to exhibitions meant that she was well-versed in the practicalities of keeping and caring for a collection.

Birnie Philip oversaw every detail of the process of the transfer of the objects from the Whistler Estate from London to Glasgow, including practicalities such as how artworks would be transported safely. Owing to the large size of the 1935 gift, it was given in two instalments that were physically delivered to Glasgow with an interval of almost a year. The first instalment of the gift arrived at the University in May 1935 and the second was delivered in April 1936 when the gift was finalised.²³ Birnie Philip hired James Bourlet

19 *Ibid.*

20 1935 memorandum of agreement between Rosalind Birnie Philip and University of Glasgow. 3 June 1935. Whistler Archives, The Hunterian, University of Glasgow.

21 Birnie Philip to Arnott, 14 May 1942.

22 Martin Hardie to Victoria & Albert Transit Room, 12 March 1934. Victoria & Albert Museum Archive 34/641.

23 A letter from Arnott to Birnie Philip on 23 April 1936 contained an invoice totalling £42 for

& Sons Ltd, a firm that had previous experience handling transportation of artworks by Whistler and which she trusted, to oversee the transfer of objects north to Scotland. The cost was born by Birnie Philip and, although the University offered to share this expense, Birnie Philip determined to bear the expenditure alone.²⁴ Bourlet understood the importance of the collection and on 17 July 1934, almost a week after the centenary of Whistler's birth (and indeed on the anniversary of his death), he wrote to Birnie Philip saying "We have been thinking over the question of transport of your collection of Whistlers from London to Glasgow" and assured Birnie Philip that the firm would "make a point of giving our most careful and personal attention to this transaction and do all in our power to give you full satisfaction."²⁵ Given its importance, Bourlet advised Birnie Philip to raise the insurance on the collection and add additional personnel to oversee the transfer stating:

We confirm that the actual transport from door to door will be between £40 and £45 per journey, but in view of the importance of the collection, we do think you would be well advised to have a foreman packer to travel with the collection, hand them over at the other end and also be responsible for the protection of the pictures before they go in the van. Some of the exhibits, we think, should be put in cases and further, that the collection should be insured for £2,000 per load. These items would of course we realise, mean further expense but as it is a unique collection, we think it would be money well spent. It means raising the cost of transport per load for the whole of the services indicated to approximately £60 per load.²⁶

With her previous experience of managing loans of Whistler's works, Birnie Philip was well aware of the importance of safe handling of artworks in transit. An extant receipt for £60 indicates that Birnie Philip agreed with Bourlet's recommendation and opted for the more expensive option.²⁷ When the care of the collection was at stake, Birnie Philip did not cut corners.

The danger of careless handling of objects within the 1935 gift would theoretically be lessened by restricting movement of the gifted collection to within the University. Historically, the threat of disposal or deaccessioning has been ever-present in museums and, as a result, restrictions on the physical movement of gifts of objects to institutions are not entirely unusual and nor were they so in 1935.²⁸ The collection of Charles Freer (which includes a significant collection of works by Whistler) was initially gifted to the National Gallery of Art in Washington D.C. in 1906 and completed in 1919 and (like those of William Burrell and Richard Wallace and the American collectors Isabella

the law firm's service.

24 Birnie Philip to Rait, 12 Nov. 1934. MS Whistler P583.

25 Bourlet to Birnie Philip on 17 July 1934, "We should like to say how very pleased we are to have the opportunity of doing this work as we were privileged to work for Mr. Whistler and have of course handled a great many of his pictures..." MS Whistler B154.

26 *Ibid.*

27 *Ibid.* For Birnie Philip's response, see MS Whistler P581.

28 The collections of Sir Hans Sloane at the British Museum in 1753 and the J.M.W. Turner Bequest to the National Gallery in London in the mid-nineteenth century are just two examples of gifted collections with restrictions. For a longer history of disposal or deaccessioning, see Martin Gammon, *Deaccessioning and its Discontents: A Critical History* (Cambridge, Massachusetts: MIT Press, 2018).

Gardner and Henry Clay Frick at other institutions) it is restricted in movement, display and disposal.²⁹ It is possible that Birnie Philip may well have had the example of Freer in mind when making her own restrictions on the 1935 gift. Birnie Philip was closely acquainted with Freer and she corresponded with the collector up to his death in 1919 (during the time she was first considering the University as a home for the Whistler Estate). Freer had amassed (with the help of Whistler and later Birnie Philip herself) a great collection of Whistler's work. On the transfer to the Smithsonian, Freer stipulated that:

nothing was to be removed or added; nothing was to be lent for exhibition elsewhere; and nothing else was to be shown in the building he planned to construct for its display.³⁰

Linda Merrill has demonstrated how the correspondence between Freer and Whistler "hint[s] of an unwritten agreement that inspired both Freer's gift to the nation and the strings he so securely attached to it", suggesting that the restrictions stemmed at least in part from Whistler's wishes and provided the basis for what she terms a "scheme of preservation".³¹ While the Smithsonian tried to negotiate the terms, Freer was immovable and when the gift was made in 1906, the "ironclad conditions" were accepted.³²

As Merrill has reasoned, the terms of the gift ensured that the Whistler works in the Freer Collection in the Smithsonian would never again circulate in the art market and that the surroundings in which they were presented to the public could be controlled. This was important as between 1890 and 1903 when the value of Whistler's work increased, collectors sold works via the market without consulting the artist, much to Whistler's anger and dismay. Freer and Whistler manoeuvred on more than one occasion to prevent a work being sold via the open market by arranging a private sale. Freer's stipulations also ensured that Whistler works would never be displayed beside what might be considered inferior works. The two men had previous experience of lending paintings to various international exhibitions and being less than happy with their subsequent hangings. The conditions of Freer's gift ensured that, as Merrill notes, the works would never be "shown in anything less than an honourable position in an aesthetically appropriate setting".³³ The future presentation of Whistler paintings was also central to Birnie Philip's hopes for her gifts to institutions. For instance, following her gift of a single painting, *An Arrangement in Grey and Green. Portrait of John James Cowan (1846 -1936)*, to the National Galleries Scotland in 1930, Birnie Philip wrote to the Gallery, saying:

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- 29 See Thomas Lawton and Linda Merrill, *Freer: A Legacy of Art* (New York and Washington, D.C.: Freer Gallery of Art, Smithsonian Institution, 1993), particularly 177-201. The Burrell Collection is discussed in Martin Bellamy and Isobel MacDonald, *William Burrell: A Collector's Life* (Edinburgh: Birlinn Ltd, 2022); Isobel MacDonald, 'Filling in the Gaps in his Collection?: A Reassessment of Sir William Burrell's (1861-1958) Late Collecting Practice, 1944-57' in *The Art Market and Museums*, edited by Frances Fowle and MaryKate Cleary (London: Bloomsbury, forthcoming 2023); and it is also discussed by Duncan Dornan in this Special Issue.
- 30 Linda Merrill (ed.), *With Kindest Regards: The Correspondence of Charles Lang Freer and James McNeill Whistler 1890-1903*, 1995 (Washington, D.C. and London: Freer Gallery of Art, Smithsonian Institution, Washington, D.C. Smithsonian Institution Press, 1995), p. 40.
- 31 *Ibid.*, at pp. 9 and 27.
- 32 *Ibid.*, at p. 40.
- 33 *Ibid.*, at p. 40.

I must thank you for your kind care [of the painting], and I am happy in knowing that you will present the picture in a sympathetic way.³⁴

The painting in question was unfinished so by “sympathetic” Birnie Philip probably meant that the best features of the painting would be emphasised rather than its flaws highlighted. By restricting the movement of works to within institutions, it was hoped that works could both be presented at their best (in this case ‘best’ in the traditional art historical sense) and also kept from the unpredictable art market.

Birnie Philip was kept informed of Freer’s plans for his gallery and his gift: for example Freer wrote to Birnie Philip on 22 July 1918 to tell her about the progress on the building for the collection, his expansion of his collection and his designs of galleries that would be dedicated always and exclusively to Whistler’s art.³⁵ It is quite possible that Freer’s execution of his stipulations on his gift inspired Birnie Philip’s thinking behind clause 1 and clause 4 of the 1935 memorandum of agreement which (as mentioned above) stipulate that the objects in the gift “shall be kept and displayed together”; the University will “not at any time part with any of the articles”; and the collection “shall never be removed from the buildings of the said University”.³⁶ Without conditions of this type there was the danger that museums would do whatever they wanted, including loaning or selling donated objects at future dates, or displaying works in less than ideal settings.³⁷ Applying conditions to gifts was a way to eliminate this possibility and, like Freer, the implications of Birnie Philip’s restrictions are that the objects in the 1935 gift should be displayed together and they cannot be lent or disposed of.

As in the case of the Smithsonian and Freer, the future ramifications of the restrictions on Birnie Philip’s gift (particularly for lending objects in the gift) were recognised by the University of Glasgow and considered during their formal acceptance of the gift in 1935. Principal Robert Rait (1874-1936) was Birnie Philip’s main point of official contact with the University during negotiations and he did not initially consider the conditions on the gift to be an insurmountable issue. On 9 May 1935, Rait wrote to Arnott (Birnie Philip’s lawyer) that “I will bring the Memorandum before the University Court this afternoon, and I don’t think that any question can arise about its acceptance”.³⁸ However, Rait wrote again on the following day to communicate concerns about the implications of the physical restrictions on the gift:

[the] memorandum with the conditions of your great gift to the University

34 Birnie Philip to Mr Caw, 7 Jan. 1930. National Galleries of Scotland Archives, NG 1744 – Provenance File. The author is grateful to the NGS for permission to quote from unpublished sources and to Tor Scott of the NGS for assistance in accessing the NGS Archive.

35 Freer to Birnie Philip, 22 July 1918, MS Whistler F528. Quoted in *ibid.*, 41.

36 1935 memorandum of agreement.

37 The cumbersome nature of growing collections was one that museum professionals faced in the late nineteenth century when the Museums Association in the United Kingdom was founded (1888). The problem of ‘duplicate’ or ‘surplus’ objects or specimens became a particularly overwhelming problem (especially in Natural History Museums). Jennifer Durant has demonstrated that the concept of disposal in museums in fact predated accessioning which was only formally adopted by the association from library practices in 1891. Both practices were a way for museum professionals to manage collections. See Jennifer M. Durant, ‘Disposal from Museum Collections: Navigating the Ethos, Ideals, and Practice of Transparency’ (PhD thesis, University of Leicester, 2022), ch. 3.

38 Robert Rait to Arnott, 9 May 1935. MS Whistler F556.

[was] accepted by the University Court yesterday afternoon as a record of the obligations undertaken by the University [but there is] one point to which I should like to direct your attention.³⁹

Recognising that clauses 1 and 4 (which restrict the University from “parting with” items in the gift and which curtail it to the University premises) meant that objects in the gifted collection could not be lent out to exhibitions, Rait wanted assurance that Birnie Philip was aware of the significant restriction this placed on the collection, particularly for lending to exhibitions. As Rait correctly inferred, the clause “[p]rohibits, at any time in the future, our lending one or more of these treasures to, say, a great national Exhibition”.⁴⁰ He highlighted some of the important works within the University Collection that had been loaned for external exhibitions and foresaw a similar demand for the works by Whistler:

On great occasion we make such loans, E.g. we recently lent our famous Chardin to Paris and our famous Rembrandt to Amsterdam and some pictures to the 18th century Exhibition in London. At some period in the future we shall doubtless be asked to lend some of our famous Whistlers to a great Exhibition of the art of the period.⁴¹

Rait went as far as to offer Birnie Philip ultimate approval on any future loan requests, stating that if she were “to decide to render such loans under the agreement with the University, we should not lend anything in your lifetime without your full approval.”⁴² As a significant benefactor, Birnie Philip’s wishes were to be fully taken into consideration, even if that meant the University was unable to lend works from the gifted collection without her permission.

When, five years prior to her gift to the University, Birnie Philip gifted *An Arrangement in Grey and Green. Portrait of John James Cowan (1846-1936)* to the National Galleries of Scotland, she expressed a similar wish that the gallery keep the painting and not consider it for external loans. This gift was prompted after John James Cowan (an Edinburgh paper manufacturer and patron to Whistler) wrote to Birnie Philip in 1929 seeking to obtain the portrait for which he had made multiple sittings decades earlier. At Whistler’s death in 1903 the painting was still unfinished, and the artist gave instructions to Birnie Philip that Cowan was not to have it, but he did not include it amongst the pictures which he asked her to destroy. In view of Whistler’s instructions, Birnie Philip felt unable to give Cowan the painting. Faced with this dilemma, she decided that she would give the painting to the National Galleries of Scotland, and associate Mr Cowan with the gift. Like the conditions she would later place on the gift to the University of Glasgow, Birnie Philip’s intention was that the portrait of Cowan would also be restricted in its movement. A letter from Birnie Philip’s lawyer to the Gallery on 3 February 1930 outlines her conditions:

Miss Philip has asked us to mention two conditions which she would like to

39 Rait to Arnott, 10 May 1935. Whistler Archives, The Hunterian, University of Glasgow.

40 *Ibid.* Rait refers to this clause as “clause 3” while it appears as clause 4 in the final memorandum. This indicates that one of the first three clauses in the memorandum was added to a second draft of the memorandum between 10 May and 3 June. Unfortunately, it is difficult to know which of the three clauses was the late addition.

41 *Ibid.*

42 *Ibid.*

be complied with as far as may be practical. The first is that the picture should never be parted with, either *temporarily or permanently*, by the Directors of the Gallery, and the second is that a full record of the picture's history – the facts of which are in your possession – should be preserved in the National Gallery of Scotland.⁴³

This elaboration on what is meant by “parted with” is crucial to understanding Birnie Philip's intentions. The qualification of “temporarily or permanently” makes it clear that this restriction was intended to prevent future permanent disposals (by any means) *and* temporary loans to external institutions. In an earlier letter to the Gallery on 12 December 1929, Birnie Philip elaborated, saying:

When I asked if I might make the condition that Mr Cowan's portrait, if accepted, should never leave your National Gallery, I was not thinking of myself, but of Mr Whistler's expressed wish that I should never *give*, or *bequeath*, any of his works to an English gallery.⁴⁴

In this instance “give” can be interpreted as a temporary action such as a loan. On receiving notice of this condition, the Gallery responded cagily:

I note the two conditions suggested by Miss Philip and, *while the present Board are of course unable to bind their successors for all time, they will ensure that these conditions are carried out as far as practical*. A record of this letter will be placed in the file relating to the picture and its history and, and of course the correspondence with Miss Philip; and I shall have the conditions typed out and fixed to the stretcher of the canvas.⁴⁵

In 1930, the Gallery was careful not to commit to Birnie Philip's conditions in perpetuity and the portrait of Cowan has indeed been loaned to exhibitions all over the world. Birnie Philip's wishes for this gift are not recorded in a memorandum of agreement or in the Gallery's official minutes, but in correspondence held in the institutional archive. While the nature and scale of the gifts to National Galleries of Scotland and the University of Glasgow differ dramatically, they offer a significant point of comparison and are indicative of Birnie Philip's original wishes and intentions for her gifts, particularly her opposition to temporary loans of works.

In contrast to the National Galleries of Scotland's general yet evasive acceptance of Birnie Philip's restrictions on her gift of the Cowan portrait, the University of Glasgow agreed wholeheartedly to the conditions placed on the 1935 gift. When Rait wrote to Birnie Philip on 10 May 1935, he sought to ensure that she understood the limitations that the conditions in the memorandum of agreement would place on the gift, but also offered repeated reassurances that the University was ready to accept the gift, despite the clauses that would prevent external loans being made:

If this is your considered wish, we accept it readily; I do not want to suggest

43 Freshfields to NGS, 3 Feb. 1930. National Galleries of Scotland Archives, NG 1744 – Provenance File. Emphasis added.

44 Birnie Philip to Mr Caw, 12 Dec. 1929. National Galleries of Scotland Archives, NG 1744 – Provenance File.

45 NGS to Freshfields, 5 Feb. 1930. National Galleries of Scotland Archives, NG 1744 – Provenance File. Emphasis added.

in any way your re-considering it. I want only to make sure that the point has been in your mind; if you have considered this possibility and decided against it, I am quite content; Let me repeat that I do not want to suggest any change in a decision that you have made, I want only to be sure that the question has been brought to your notice.⁴⁶

Rait was careful to ensure that his inquiries would not offend Birnie Philip or cause her to reconsider her gift or the University's commitment to caring for the gifted collection, assuring her that he was only "thinking of the distant future of this great and historical Collection".⁴⁷ Indeed, Rait recognised the significant work that goes into loaning works of art and predicted that a restriction prohibiting loans would make the future of the gift more straightforward and "save me or my successors some trouble in the future".⁴⁸ Rait's successors within the University may debate this, but regardless Birnie Philip herself was well aware of the implications for loaning objects in the gifted collection and while her reply to Rait is as yet unlocated, the clauses remained within the terms of the gift in the 1935 memorandum of agreement (dated 3 June 1935).

Despite Birnie Philip's resolution to include restrictions on physical movement in the terms of the gift in 1935, she did entertain the possibility of making an exception on one occasion. In 1950 the University received a loan request from Thomas Honeyman of Glasgow Museums (then the Municipal Art Gallery) for an exhibition celebrating the centenary of the 1851 Great Exhibition and the founding of the University of Glasgow (in 1491). Birnie Philip declined the direct loan request from Honeyman which did not specify which works from the gift were to be lent (giving her the impression that the request was for a loan of the entire gifted collection). She wrote to Professor John Walton that:

I have a strong feeling that this is not the time to move the Whistler gift from the University building. I therefore must decline Mr. Honeyman's request.⁴⁹

While she was not prepared to approve a loan of the entire gifted collection, she did grant an exception:

You may, however, *if you think fit*, loan Sir William Boxall's portrait of Whistler as a boy, and the oil painting "The Thames" which shows the site of the coming [18]51 exhibition with the shot tower.⁵⁰

In this particular case, Birnie Philip approved two specific paintings for loans that *she* thought might be suitable *if* the University trusted the source of the loan request and judged the exhibition worthy enough to deem a loan appropriate.

Further research is needed to determine whether the University went ahead with this loan, but it is notable that Birnie Philip's approval was essential to anything the University wished to do with the gifted collection. Professor Walton most clearly articulated this position when he said, "Miss Birnie Philip is a great benefactor of the University and we

46 Rait to Arnott, 10 May 1935. Whistler Archives, The Hunterian, University of Glasgow.

47 *Ibid.*

48 *Ibid.*

49 Birnie Philip to Walton, 11 Nov. 1950. Whistler Archives, The Hunterian, University of Glasgow.

50 *Ibid.* Emphasis added.

on our part will not do anything which does not meet with her full approval.”⁵¹ Despite the legal transfer of objects to the University, Birnie Philip’s wishes were central to any decisions regarding the gifted collection. Although Honeyman requested the loan from Birnie Philip directly in 1950, it seems that Birnie Philip expected the University itself to seek her approval, which given Principal Rait’s earlier reassurances that the University would do just this, is not unreasonable (although it should be noted that Rait himself died in 1936).⁵² Official channels of communication were important to the etiquette of decision making surrounding the gift. Birnie Philip wrote of Honeyman’s loan request that “I have not received a request from the Principal to loan my gift to the Municipal Art Gallery”.⁵³ The use of the possessive pronoun ‘my’ in connection to works in the Whistler Estate is extremely rare in Birnie Philip’s letters but this instance does point to the level of continued responsibility and ownership she felt towards the gifted collection, despite the legal transfer of property being complete. This may well have been connected to the fact that she continued to own and fiercely guard the copyright in Whistler’s letters (as will be discussed below). In her letter to Walton, Birnie Philip considered that it was “not the time” for the gifted collection to leave the University premises, which could possibly indicate that she envisioned a time in which such a move might be possible, at least for a temporary lifting of the restrictions on physical movement of objects in the 1935 gift under the right circumstances.⁵⁴

So, how can Birnie Philip’s apparent willingness to make an exception to the terms of her 1935 gift cast new light on her original intentions behind the restriction on the movement of the gift? In lieu of indiscriminately lending the entire 1935 gift, Birnie Philip suggested two possible paintings that might be suitable, but the way in which she did so suggests that the curatorial validity of the exhibition and the reputation of the requester were central to any exception that might be made to the terms of the 1935 gift. Birnie Philip would have been aware of both Whistler’s own attitude of ownership towards his works that happened to be contained in the collections of others and how the artist considered himself entitled to borrow such works or restrict their movements when it came to exhibitions. For example, in 1901, Whistler planned to hold a retrospective of his work in Paris and wished to send his painting, *Nocturne: Blue and Silver – Bognor* (owned by Freer) to the exhibition. However Freer had promised the painting to another exhibition at the time and it was unavailable. In an attempt to ensure this would not happen in the future, Whistler appealed to Freer, with the result that, as Merrill notes, “the painting would be reserved, in the future, for only those exhibitions the artist deemed worthy”.⁵⁵ Freer was not happy with the restriction but deferred to the artist’s wishes. Arguably, Birnie Philip’s apparent willingness to make an exception to the terms of the 1935 gift could indicate a similar curatorial inclination to judge the worthiness of loan requests. It is therefore reasonable to suggest that the restriction on movement of the 1935 gift was not only intended to keep the gifted collection intact (and therefore prevent works being dispersed on the market) but was also intended to prevent indiscriminate lending

51 Walton to Lillian Browse, 20 July 1943. Whistler Archives, The Hunterian, University of Glasgow.

52 Thomas Honeyman to Birnie Philip, 25 Oct. 1950. Whistler Archives, The Hunterian, University of Glasgow.

53 Birnie Philip to Walton, 11 Nov. 1950.

54 *Ibid.*

55 Merrill, ‘*With Kindest Regards*’, above, note 30, at p. 27.

that did not judge the validity of the request or the curatorial intentions or expertise of the requestee.

On considering the restrictions on physical movement of the gifted collection, it is significant to note that although Birnie Philip entertained an exception to the restriction on the 1935 gift in 1950, she did not lift any restrictions within later legal documentation (such as her 1954 will or its 1957 codicil). Although the restriction on the physical movement of the 1935 gift is the most well known, Birnie Philip in fact placed the same restriction on the gift she made to the University in 1954. The 1954 memorandum of agreement between Birnie Philip and the University of Glasgow states that the 1954 gift (which contained Whistler's letters, personal papers, books and albums of press cuttings) "shall not at any time be removed from the building of the said University nor disposed of by said University in all time coming".⁵⁶ That Birnie Philip placed the same physical restriction on the second gift that she made to the University indicates her resolution on restricting the physical movement of her gifts and preventing future disposals.

Executrix of the Estate: Interpreting Whistler's Wishes

How can examining the other conditions on Birnie Philip's gifts alongside extant correspondence and other archival evidence place the restrictions on the movement of the gifts within a broader context? In what ways did Birnie Philip's curatorial attention to the Whistler Estate stem from her understanding of Whistler's own wishes? In what ways did her own knowledge and experience underpin her decisions as to the future of the Whistler Estate and its care in an institutional setting?

In addition to Birnie Philip's letter to the National Galleries of Scotland quoted above, the further articulation of her rationale for the conditions she placed on the 1935 gift can be found in the 1942 letter to her lawyer. Referring to a disgruntled curator and art historian who questioned her decision to send a significant portion of the Whistler Estate north to Scotland (and who was also unhappy as to Birnie Philip's reluctance to authorise photography of watercolours by Whistler in the University Collection for a new book), Birnie Philip stated:

[i]t is a curious thing that people will not accept the fact that my doings and decisions are governed [by] Whistler's expressed wishes, and they naturally endure for the period of my life.⁵⁷

As this letter implies, Birnie Philip considered her actions and decisions regarding the Whistler Estate to be directed by her understanding of Whistler's wishes, as the artist himself "expressed".⁵⁸ The verb "governed" points to Birnie Philip's role as the executrix of the Whistler Estate and suggests the existence of an overarching set of rules Whistler dictated to Birnie Philip and which regulated her actions. However, this stated rationale is deceptively straightforward and no set of overarching guidelines for the executrix existed. The only such legal 'rule' relating to Whistler's wishes for the future of his estate is found in the codicil to his will and it must be considered within the wider historical

56 1954 memorandum of agreement between Rosalind Birnie Philip and University of Glasgow (dated 30 April 1954). Whistler Archives, The Hunterian, University of Glasgow.

57 Birnie Philip to Arnott, 14 May 1942.

58 *Ibid.*

context so as to more fully untangle the nuances and complexities within Birnie Philip's decision-making processes.

Within the codicil to Whistler's will (dated 3 May 1903), the artist asked Birnie Philip to bequeath the jewellery, silver and china in his collection to the Louvre in Paris, but the language of this request gives room for Birnie Philip's own judgment.⁵⁹ Whistler stated:

I hereby *confirm a desire but not so as to control or bind her* that in the event of the said Rosalind Birnie Philip retaining the said collection during her life she should bequeath the same to the Louvre on the same conditions...⁶⁰

The earlier version of Whistler's will (dated 27 November 1896) bequeathed these items to the Louvre directly on the condition that they were displayed together and named for his late wife Beatrix Whistler; the codicil revises this bequest, giving them to Birnie Philip ("for her own use absolutely") but also essentially requesting that she undertake the task of administering or negotiating the same bequest to the Louvre.⁶¹ Crucially, Whistler's language is a request not an instruction that would "bind" or "control" Birnie Philip's actions. Further research is required to determine why Birnie Philip's negotiations with a representative from the Louvre in 1905 were not successful, but ultimately, this was an expressed wish of the artist that (despite attempts to follow) Birnie Philip did not or was unable to fulfil.

So, despite the seemingly straightforward nature of Birnie Philip's statement in her 1942 letter to her lawyer about following the artist's own wishes, this expression of the rationale for her actions cannot be interpreted literally or without understanding the broader context of Birnie Philip's role as executrix and curator of the Whistler Estate. Birnie Philip was extremely modest about her own expertise and knowledge of the collection, but she did not always follow Whistler's wishes to the letter. Another instance of Birnie Philip's deviation from Whistler's wishes was when she used her own judgment to loan works to the Victoria & Albert Museum for an exhibition in 1934 and when she later gifted the Museum a watercolour, *Blue and Brown – Westgate, the Moors*, despite Whistler's wish (expressed in correspondence rather than legal documentation) that no works of his go to collections in England. Whistler's wishes do have clear relevance to decisions that Birnie Philip made, but her own curatorial knowledge and experience in such matters should not be underestimated.

This is particularly important when it comes to understanding restrictions that Birnie Philip placed on objects such as artworks that featured prominently in Whistler's artistic legacy and around which she herself had witnessed controversy. One such instance is the restriction that Birnie Philip added to a specific object in the 1935 gift: the contentious painting *Arrangement in Brown and Gold: Portrait of Lady Eden*. Elena Cooper discusses this controversial portrait and its legal history in her contribution to this volume. As Cooper explains below, *Eden v. Whistler* is an important context for understanding Birnie

59 Whistler's will is dated 27 Nov. 1896 and bequeaths jewellery, silver and china to the Louvre. The 'residue' is left to Birnie Philip whom he appoints his executrix. The codicil dated 3 May 1903 revokes the bequest to the Louvre in favour of Birnie Philip and expresses the wish that she should bequeath them to the Louvre. See MS Whistler W1348.

60 *Ibid.* Emphasis added.

61 *Ibid.* Originally, Whistler's terms of the bequest to the Louvre included some of Beatrix Whistler's etchings, which he instructed should be displayed beside the objects permanently.

Philip's decision to place a condition restricting the University from exhibiting or parting with the painting. Here, I discuss the evolution of Birnie Philip's process of creating this restriction as it relates to the larger 1935 gift. In doing so, I establish an important gap in the documentation that unfortunately has not survived and examine the restriction on the painting within the context of the wider conditions Birnie Philip placed upon her gifts to protect objects in the gifted collection and Whistler's legacy.

In the spring of 1936, the second instalment of the 1935 gift, which was primarily comprised of 40 oil paintings, was prepared for delivery to Glasgow. A revised Schedule of Property for these 40 paintings was drawn up and it is here that we find the restriction on the painting on *Arrangement in Brown and Gold: Portrait of Lady Eden*. It is described as:

Destroyed Portrait of Lady Eden.

This picture of Lady Eden caused a lawsuit between the artist and Sir William Eden. The book entitled 'The Baronet and the Butterfly' was written by the artist to explain his position with regard to Sir William Eden, and to point out that the case had made a difference in the Law.

The picture is not to be exhibited or parted with, but it is to be kept by the University as a record of the picture about which so many false statements have been made.⁶²

According to this condition, the University may not part with the painting nor exhibit it. The original version of the schedule of property that accompanied the 1935 memorandum of agreement (dated 3 June 1935) only lists the painting as "Destroyed Portrait of Lady Eden" indicating that this restriction was conceived and applied to the gift later.⁶³ The 1935 memorandum had been signed the previous June, but archival evidence suggests that Birnie Philip was thinking about this restriction in February 1936. While Birnie Philip's original letter to this effect is as yet unlocated, a letter from her lawyer, Arnott, on 17 February 1936 allows us to date her consideration of the restriction, as Arnott replies to her that "[y]ou can of course impose in respect of Lady Eden's portrait the conditions referred to in the list of paintings you sent us."⁶⁴ Arnott essentially assured his client that she was within her rights to prohibit the University from exhibiting or parting with the painting. As Cooper has shown, Birnie Philip's understanding of the *Eden v. Whistler* legal dispute and its implications, particularly the sensitivities towards the Eden family and their rights under French law, are probably the reasons for her decision to place restrictions as to the exhibition of the painting. The ruling in *Eden v. Whistler* also shaped the different way in which curators in The Hunterian in the 1980s interpreted the restriction on the painting.

62 List of oil paintings (once associated with as yet unlocated 1936 memorandum of agreement). UG Archives GB 248 DC 008. Emphasis added. This list is mentioned in Arnott to Birnie Philip, 17 Feb. 1936. MS Whistler F559.

63 A letter from Arnott to Birnie Philip on 23 Sept. 1935 suggests that Birnie Philip's will may have been where Birnie Philip initially intended to add this restriction: "You thought that the exact terms of your new Will could best be settled after the gift has been completed and this will not be the position until the objects have been actually handed over. I think that if the exhibition is to last some time it might be worth trying to arrange with the university authorities for someone on their behalf to take formal delivery of the objects at your house; the objects could then remain in your keeping until the University removed them but the gift would be complete so that the provisions of your Will would no longer affect the objects." MS Whistler F558.

64 Arnott to Birnie Philip, 17 Feb. 1936. MS Whistler F559.

However, while it is certainly significant, the restriction on the painting is not an isolated occurrence. It in fact occurred within a much larger framework of conditions that were placed upon gifts, including individual objects and (as we will see) groups of objects, which, as I argue, stemmed from Birnie Philip's own curatorial knowledge and experience and her desire to protect Whistler's artistic legacy. Arguably, any exhibition of the *Portrait of Lady Eden* which effectively violated the rights of Lady Eden would also reflect badly on Whistler himself. Birnie Philip may have interpreted the ruling this way when envisioning the future of the painting in its institutional home. With this in mind, could the restriction that Birnie Philip placed on the painting have been intended to not only protect the rights of the Eden family, but also to ensure that Whistler's legacy was not marred by a future exhibition of the painting which the artist had been prohibited from exhibiting?

Keeping the painting within the University Collection was key to this and, while the 1935 memorandum effectively prohibits the University from parting with any objects in the larger gift, this condition is repeated in specific connection to the *Portrait of Lady Eden*. As discussed above, to "part with" can have many implications, including temporary loans, but also gifts or sales. It is possible that Birnie Philip envisioned a future occasion on which the University might decide or be convinced to part with the painting, perhaps if a descendant of the Eden family made a new claim on the painting. Such a supposition is supported by archival evidence that suggests that Birnie Philip considered imposing conditions on the painting that related specifically to the Eden family. After assuring Birnie Philip that she could place conditions that prohibited the University from exhibiting or parting with the painting, Arnott's letter on 17 February 1936 goes on to say that:

[o]n the other hand, I do not myself think it would be desirable even if it would be practicable to attempt to *impose any conditions referring specifically to members of the Eden family*.⁶⁵

It is difficult to be sure what kind of conditions Birnie Philip may have had in mind but there is the implication that the further conditions being considered related to restricting the Eden family from accessing the painting.

Such a condition that effectively restricted access to an object would not be entirely unprecedented, as Birnie Philip also outlined conditions restricting access to other objects in the 1935 memorandum (such as etching plates). As will be discussed below, such conditions were made with a view to protecting Whistler's artistic legacy. It is difficult to determine the extent to which Birnie Philip was deterred by Arnott's advice regarding the possible conditions related to the Eden family. She was, however, firm in her stance on the conditions on the painting outlined in the Schedule: a letter from Arnott on 19 February 1936 reassured her that "[w]e will certainly see that the condition precluding exhibition of the Eden portrait is made quite clear."⁶⁶ This suggests that while Birnie Philip moved forward with plans to restrict the exhibition of the painting, she may have thought twice about including a condition related to the Eden family specifically.

However, it is also possible that a restriction limiting the Eden family's access to *Portrait of Lady Eden* may have been referenced in the second as yet unlocated memorandum of

65 Arnott to Birnie Philip, 17 Feb. 1936. MS Whistler F559. Emphasis added.

66 Arnott to Birnie Philip, 19 Feb. 1936. MS Whistler F560.

agreement related to the gift which, according to archival evidence, appears to have been signed by the University in April 1936. To explain: on 11 February 1936, Arnott wrote to the University to arrange delivery of the second instalment of the gift and indicated that a second version of the memorandum of agreement for the 1935 gift was being prepared.⁶⁷ This version of the memorandum was sent to the University two months later: a letter from Arnott to Birnie Philip dated 20 April 1936 states:

I enclose a copy of a letter from the Secretary of the University Court which has been received together with a copy of the Memorandum sealed by the Court. We now have here *the Memoranda related to both the first and the second instalments of the Gift*. Would you like us to keep these documents in the Strong Room here, or what would you like done with them?⁶⁸

‘Memoranda’ points to more than one memorandum. The existence of the second version of the memorandum is further supported by Arnott’s invoice to Birnie Philip (dated 23 April 1936), for which the law firm’s services have included “preparing *Memoranda* in respect of the 1st and 2nd instalments of the Gift, making copies for approval, engrossing same (in duplicate) together with schedules to annex”.⁶⁹ Despite extensive archival research, it has not been possible to locate this second version of the memorandum. The restriction on exhibition and disposal of *Portrait of Lady Eden* is clearly documented in the gift’s schedule of property, but further research is needed to determine whether any extant correspondence or documentation exists that can give more insight into this restriction in the final (as yet unlocated) April 1936 version of the memorandum.⁷⁰

Caring for a Collection: Housing and Access

Prior to making the restriction on the *Portrait of Lady Eden* painting, Birnie Philip made other conditions on access to parts of the gifted collection and expressed clear views on its housing, care and naming within the University Collection. How can examining the other clauses within the 1935 and 1954 memoranda of agreement help place the restrictions on the movement of the gifts and the restriction on the *Portrait of Lady Eden* within a broader context of Birnie Philip’s care and attention to the future of the Whistler Estate?

While the 1935 gift was not finalised until April 1936 when the second memorandum was signed, negotiations with the University for the gift began in May 1934. These discussions took place shortly after Birnie Philip approached the Victoria & Albert Museum in London in early 1934 to pitch the idea of an exhibition that would celebrate the centenary of Whistler’s birth, and which would consist largely of works on loan from the Whistler Estate. Following the success of the exhibition, she gave a watercolour by Whistler entitled *Blue and Brown – Westgate, the Moors* to the Museum in part, as she described to Arnott “as a recognition of them having held the centenary exhibition of his works”.⁷¹ Despite the timing of this gift, it does not appear that the Victoria & Albert

67 Arnott to J.S. Muirhead, 11 Feb. 1936. UG Archives GB 248 DC 008.

68 Arnott to Birnie Philip, 20 April 1936. MS Whistler F561. Emphasis added.

69 Arnott to Birnie Philip, 23 April 1936. MS Whistler F562. Emphasis added.

70 Birnie Philip’s interpretation of ‘exhibit’ or ‘exhibition’ may be reasonably interpreted to mean a temporary or permanent display of the physical painting, particularly to a public audience.

71 Birnie Philip to Arnott, 14 May 1942. Birnie Philip previously gifted the French Empire bedframe to the V&A in 1933. See Hughes, above, note 12.

Museum was ever a serious contender as a permanent home for the Whistler Estate collection. In the months immediately prior to the centenary, and while negotiating and guiding the V&A exhibition, Birnie Philip simultaneously began negotiations with the University about a significant gift to its Art Collection.

A letter dated 7 May 1934 from Arnott's firm Freshfields, Leese & Munns to the Secretary of Court at the University of Glasgow indicates that Birnie Philip and Arnott approached the University and later met with Principal Robert Rait to discuss the gift.⁷² The meeting must have met with Birnie Philip's approval because in July 1934 she began thinking about the practical matter of transporting objects from the estate collection to Glasgow and of appropriate housing for them on their arrival.⁷³ Eight months later, in April 1935, Birnie Philip moved forward with plans for the gift and Arnott drafted a memorandum of agreement to which a schedule of property (a list of works) was added. On 1 April 1935, Arnott outlined what was needed to move forward with the intended gift, saying "there should be a Deed setting out the terms and conditions of the gift and this document would incorporate a list of everything which is included in the gift".⁷⁴ The list that Arnott refers to is a fourteen-part typewritten schedule of property that was associated with the 1935 memorandum of agreement.⁷⁵ It contains significant works from the Whistler Estate and (referring to the 1935 gift) Birnie Philip would later say that "I have handed over the best part of the Whistler collection to the Glasgow University".⁷⁶ The gift itself is what the memorandum refers to collectively as the "work or property of the late James McNeill Whistler [and] Beatrix Whistler, his wife, [which is] set out and described in the Schedules numbered 1 to 14 inclusive signed by the Donor and annexed hereto for the use and benefit of the University absolutely."⁷⁷ Subsequent curators in The Hunterian at the University of Glasgow have used this schedule to catalogue the objects within the new institutional setting, but the original schedule indicates Birnie Philip's own understanding of the components of the gift and is thus worth presenting in full here:

1. Pastel Drawings
2. Lithographs
3. Etchings
4. Etchings: Windsor Portfolio
5. Drawings

72 Freshfields, Leese & Munns to the Secretary of Court, Glasgow University, 7 May 1934. UG Archives GUA 24255. This letter refers to an arrangement for Birnie Philip and Arnott to meet with Principal Rait. It is unclear when exactly this meeting took place. A later invoice from the law firm dated 23 April 1936 indicates that the work on the gift officially began in June 1934. However, work on Birnie Philip's will is dated to Oct. 1933 so it is possible that this is when the work actually began. See MS Whistler F562.

73 Bourlet to Birnie Philip, 17 July 1934: "We should like to say how very pleased we are to have the opportunity of doing this work as we were privileged to work for Mr. Whistler and have of course handled a great many of his pictures..." MS Whistler B154.

74 Arnott to Birnie Philip, 1 April 1935. MS Whistler F555.

75 *Ibid.* Arnott's letter states his intention of having this typewritten list copied, saying "As you are having the list typewritten it will be possible to have several carbon copies made".

76 Birnie Philip to Arnott, 14 May 1942.

77 1935 memorandum of agreement. The original handwritten memorandum of agreement for the 1935 gift has yet to be located but a photocopy of the handwritten memorandum of the 1935 gift (3 June 1935) exists in the Whistler Archives, The Hunterian, University of Glasgow, as does a typescript copy of the memorandum and typescript copies of the fourteen parts to the Schedule of Property.

- 5A. Watercolours
6. Drawings by Beatrix Whistler
 7. Oil Paintings
 8. Oil Painting by Boxall (Early portrait of JMW painted by Sir William Boxall R.A. between 1848-49)
 9. Destroyed Lithographic Stones (8- The stones have been etched and the drawing inked, to show the work on the stone)
 10. Etching Plates
 11. Garnets
 12. Blue and White China
 13. Medals, decorations, diplomas
 14. Personal effects⁷⁸

Examining this overview of the 1935 gift reveals how Birnie Philip organised the components of the gift. Works on paper made up a large proportion of the gift; indeed, the much-valued pastel drawings by Whistler are named first in the list and were perhaps the most fragile, owing largely to the delicate media in which the works were executed. Significantly, Birnie Philip also included drawings by Beatrix Whistler in the gift, along with jewellery and objects from her sister's collection (Birnie Philip's stipulations concerning the legacy of her sister will be discussed in more depth below). Fine impressions of etchings were included, but Birnie Philip listed the 'Windsor Portfolio' separately. This was a portfolio of twelve etchings entitled *The Jubilee Naval Review* that Whistler made on the fiftieth anniversary of the coronation of Queen Victoria in 1887 and which he presented to Queen Victoria. When the etchings later came onto the market in 1906, Birnie Philip purchased them for the estate collection.⁷⁹ These etchings were included in the gift along with Whistler's printing matrixes (which Birnie Philip was determined to safeguard from unauthorised use) and 40 of Whistler's oil paintings, including important full-length portraits, which Birnie Philip had varnished before sending them to Glasgow in order to protect them. This schedule of property gives the clearest sense of how Birnie Philip understood the contents of the 1935 gift to the University of Glasgow. Examining the schedule alongside the stipulations that Birnie Philip made for individual components of the gifted collection significantly enhances our understanding of the intricacies and nuances of the gift and its restrictions.

Appropriate housing was central within Birnie Philip's priorities for the care of the gifted collection. Clause 3 of the 1935 memorandum refers to the entire gifted collection and stipulates that "The Scheduled property shall be properly housed."⁸⁰ Other clauses reference specific types of works listed among the schedule of property and reveal the depth of Birnie Philip's knowledge of the Whistler Estate and the attention she paid to safeguarding its future. Clause 6 of the 1935 memorandum points to the measures that

78 The fourteen-part schedule of property is located in the Whistler Archive, The Hunterian, University of Glasgow.

79 The provenance of the portfolio is thus: Presented by Whistler to Queen Victoria, June 1887; Royal Collection, Windsor; sold by King Edward VII to Thos. Agnew & Sons, London, 1906; purchased from Obach and Co. by Charles Lang Freer, Detroit, MI, 11 April 1906; sold to Rosalind Birnie Philip, London, 3 May 1906 (payment received 20 June 1906); given to the University of Glasgow, 1935. See <<https://etchings.arts.gla.ac.uk/catalogue/etchings/etching/?filename=K3260103&catno=K326&etchlist=y>>.

80 1935 memorandum.

Birnie Philip undertook to protect and conserve the objects and relates specifically to the care of fragile works within the gifted collection, namely the pastels and watercolours:

The pastels and watercolours included in the Scheduled property which are exceedingly delicate and in many instances unfixed shall be kept in cases constructed in a manner which has been indicated and approved by the Donor prior to the making of said gift.⁸¹

The housing conditions of the pastels were central to the negotiations around the gift and steps were taken prior to the signing of the memorandum of agreement to meet Birnie Philip's requirements. On receiving a draft of the memorandum from Arnott, Rait replied to the lawyer on 9 May 1935, saying:

The conditions are those which you and Miss Birnie Phillip outlined to me last year and I duly reported them to the Court. The first case has already been constructed to Miss Birnie Philip's satisfaction, and we are now ready for the first instalment of the gift.⁸²

Birnie Philip had instructed that new display cases be made to house the objects in the gift and included sketches of her suggested designs in letters to Rait.⁸³ Pastels and works on paper were central to this but she was also concerned with the etching plates and inquired if "drawers with suitable measures to carry the weight [of the plates would] be better than cases?" If this were so, "[t]here could be divisions to allow the plates to stand upright". At present it is unclear how the objects were stored in Birnie Philip's homes in London (first 103 Albert Bridge Road and then 54 Tite Street), but the conversation with Rait reveals the depth of her curatorial knowledge and instincts towards the gifted collection as to how to materially protect it for the future.

Broadly speaking, Birnie Philip trusted the University to care for the gifted collection, but also to regulate access to it and thus safeguard Whistler's artistic legacy. She was keenly aware of some of the dangers posed, particularly the threat to the legacy of Whistler's printed work through unauthorised impressions of his etchings.⁸⁴ In the 1935 memorandum she gave extremely detailed stipulations regarding access to a specific part of the gifted collection: the etching plates. Clause 5 of the memorandum relates specifically to the plates, stating that:

- a) They shall be kept together and shall never be printed from
- b) Only the best examples shall be exhibited for occasional periods
- c) No member of the public shall be allowed to have access to any plate except (i) under supervision and (ii) for the purpose of establishing the authenticity of a doubtful print or for some other good reason

81 1935 memorandum.

82 Rait to Arnott, 9 May 1935. MS Whistler F556. For further discussion of Birnie Philip's requirements for the housing of the collection in specially-designed cases, see Hughes, above, note 12.

83 Birnie Philip wrote to Rait on 19 Nov. 1934 to say: "I have looked over the plan of the proposed cases & I imagine that two such will be sufficient to house the Whistler collection." See MS Whistler P584. Details of the cases can be found at MS Whistler G66.

84 In 1931, again just prior to the centenary of Whistler's birth in 1934, Birnie Philip herself had authorised a number of new impressions from plates in the collection via the printer Nathaniel Sparks. See Martin Hopkinson, 'Nathaniel Sparks's Printing of Whistler's Etchings' (1999) 16 *Print Quarterly*, 340-352.

These detailed stipulations indicate both Birnie Philip's knowledge of the Whistler Estate, the value that she placed on the etching plates (and the many fine impressions of etchings) and the possible unauthorised use of the plates in the future. Birnie Philip's consideration of a possible restriction on the Eden family's access to the portrait of Lady Eden (discussed above) can be seen alongside these conditions. Birnie Philip was well aware of the wider legacy of Whistler's work and its material vulnerabilities; she responded directly to these perceived threats within the making of the gift, ultimately working to ensure Whistler's artistic legacy was materially secure within the confines of the University Collection and the parameters of the gift.

Naming a Collection

Thus far, restrictions regarding the housing, care and movement of the gifted collection have been considered, but it is also worth considering another stipulation of the gift that has been partially eclipsed: the name of the collection in its institutional home. Birnie Philip recognised the importance of the work of her artist sister Beatrix Whistler and placed it front and centre within the terms of the gift. The stipulated name and the components of the schedule of property that they were attached to changed between 1935 and 1954: clause 2 of the 1935 memorandum states that:

The jewellery described in the Schedule numbered 11 [Garnets] and the porcelain [Blue and White China] described in the Schedule numbered 12 and the drawings described in the Schedule numbered 6 [Drawings by Beatrix Whistler] shall be kept and displayed together as "the Beatrix Whistler Collection" and the remainder of the Scheduled property shall be displayed as "the Whistler Collection."⁸⁵

This stipulation ensured that Beatrix Whistler's drawings were a named part of the gifted collection in its institutional setting, but it also divided it along rather gendered lines with the jewellery and porcelain being under Beatrix's name and the works of art under Whistler's. This division may have originated from Whistler's previous intention to give his wife's jewellery and porcelain to the Louvre, on the condition that it was to be displayed together as "the Beatrix Whistler Collection".⁸⁶ The memory of her sister was important to Birnie Philip and later in 1949, she also gifted a set of Japanese woodcuts from the Whistler Estate to the British Museum in sole memory of her sister.⁸⁷ In the 1954 memorandum of agreement, she removed the earlier divisions in named collections so that the entire gifted collection would be known only and collectively as "The James McNeill and Beatrix Whistler Collection".⁸⁸ Further archival research is required to determine the reasons why Birnie Philip amended the title of the gifted collection in 1954, to bring it all under the joint names of her sister and brother-in-law. It is intriguing that, after the role of women in the Second World War had begun to spark a (slow) drive towards greater gender equality, Birnie Philip abandoned the earlier gendered division to bring it under the joint names of James and Beatrix Whistler.⁸⁹ Bringing

85 1935 memorandum.

86 See Whistler's will. MS Whistler W1348.

87 See Hughes, above, note 12.

88 1954 memorandum of agreement between Rosalind Birnie Philip and University of Glasgow (dated 30 April 1954). Whistler Archives, The Hunterian, University of Glasgow.

89 Thank you to Clare Willsdon for this observation and suggested direction for further research.

back the collective name into the wider institutional setting would be a significant step in recognising the strengths of the University's Collection and the benefactor's original wishes for the gift.

Transferring a Collection: A Wider Historical Context

Thus far, I have discussed the specificities of the restrictions placed on Birnie Philips's gifts to the University. In this section, I examine the wider context in which she transferred objects from the Whistler Estate to the University of Glasgow. How can considering the evolution of Birnie Philip's choice of the University as a home for the Whistler Estate help us form a deeper understanding of its history and Birnie Philip's role in choosing Glasgow as an institutional home for the it?

As mentioned above, the University was a contender as a home for the Whistler Estate as early as 1917. The bombing of London during the First World War may have prompted Birnie Philip to search for a home for the collection outside of London. Earlier consideration of the Louvre in Paris did not lead to a gift.⁹⁰ If Birnie Philip considered any alternative homes for the estate collection, it is not currently known. When she began to consider the University, she utilised her own network of contacts to do so. It appears that her brother-in-law, Charles Whibley, approached the University on her behalf to begin discussions, namely through the wider family's artistic networks and literary circles. The initial correspondence about this possible gift to the University is as yet unlocated, but a letter from the author Allan F. Baird dated 22 February 1917 in reply to Whibley describes how the University would value such a gift:

[I] have no hesitation at all in saying that the University of Glasgow would be grateful and proud to receive Miss Birnie Philip's intended benefaction. A gift of what she proposed would of course be valued by any sane body – & I make no exception in the case of universities... I am more than pleased to hear of Whistlers [sic] collection coming our way.⁹¹

In the letter, Baird indicates that he has spoken to Professor Thomas Hastie Bryce, who was then curator of The Hunterian Museum at University of Glasgow. Bryce reports via Baird that the war had delayed building plans for the Museum, and, depending on its size, it may be difficult to find a special room for the Whistler collection. As this letter indicates, the University was being considered as a possible home for the Whistler Estate as early as 1917; however, given the size of the collection, sufficient space to hold the objects had to be ensured before a gift could be seriously considered.

It would be almost twenty years later before the gift to the University was completed. In 1936, Birnie Philip was anxious to complete the transfer of the gifted collection as soon as possible and her anxiety about its care stemmed in part from contemporary political events developing on the continent, namely the threat of war with Germany.⁹² Birnie Philip

90 The Louvre was being considered in 1905, likely due to the wishes that Whistler expressed in his will and codicil. Thank you to Margaret MacDonald for this information. Further archival research is required to determine the exact nature of the negotiations with representatives from the Louvre in the early part of the twentieth century.

91 Allan F. Baird to Charles Whibley, 22 Feb. 1917. MS Whistler B6.

92 James Bourlet & Sons Ltd to Birnie Philip, 21 April 1936, confirming delivery of the second instalment of the gift. MS Whistler B154.

expressed her anxiety to Arnott in her desire to press forward with the second instalment of the gift in early 1936 and she sent this second instalment to Glasgow as quickly as possible following the closing of the University's Whistler exhibition in November 1935 (which was a celebration of the first instalment of the gift). The beginning of the Second World War was still some way ahead, but the dangerous possibility of war loomed and the memory of the First World War was still fresh in people's minds. Replying to an as yet unlocated letter from Birnie Philip, Arnott wrote to his client on 21 February 1936:

Please let me know as soon as you can about the date of removal [of the second instalment], though I fancy it will be some time before you or the masterpieces are endangered by hostile bombs!⁹³

Birnie Philip's anxiety about the prospect of war would prove well-reasoned of course and only a few months later in November 1936, Franco's nationalist aircraft bombed Madrid, including the Prado, Spain. Having sent the "best part" of the Whistler Estate north to Scotland, Birnie Philip placed some of the remaining works in the estate collection into the safe care of her bank during the war: when, in 1942, a curator from the National Gallery, Lillian Browse, asked Birnie Philip about the possibility of access to the Whistler Estate, Birnie Philip responded that she:

had some things put away in the bank, but that with the danger of the air raids still hanging over us it was not a time to disturb anything that had been put away for safety.⁹⁴

In a later reflection on her experience of the Blitz in a letter to Professor John Walton, Birnie Philip wrote "That night was a terrifying experience, for 6 mines fell in the district and hardly anyone escaped damage one way or another...When Glasgow was hit I thought of you all..."⁹⁵ As an important port city, Glasgow was also hit during the German air raids. The University's attention to caring for Birnie Philip's gifted collection was not always consistent (for example, in 1940, new locks on the cases had to be fitted when the Master of Works came across the cases unlocked) but when there was a threat of air raids it (like many other institutions) removed its collections to safety.⁹⁶ In November 1941, in response to a request from Mr Forrest Wilson, a scholar who hoped to write a new biography of Whistler and wanted to consult Whistler material, Professor Walton wrote that it was "deeply buried among other treasures in cellars to lessen the risk of air raid damage."⁹⁷ The few Whistler letters that the University owned at this time were "stowed away beyond recovery until the war is over."⁹⁸ During the war, Birnie Philip lost touch with the Waltons (with whom she had reconnected following her initial gift to the University). On reconnecting after the war, Walton told her:

the new air raid shelter built specially for the collection has now been in use for

93 Arnott to Birnie Philip, 21 Feb. 1936. MS Whistler F243.

94 Birnie Philip to Arnott, 14 May 1942.

95 Birnie Philip to Walton, 6 May 1942. Whistler Archives, The Hunterian, University of Glasgow.

96 See Mark Bird, Master of Works to Walton, 18 Jan. 1940. Whistler Archives, The Hunterian, University of Glasgow.

97 Walton to Forrest Wilson, 21 Nov. 1941. Whistler Archives, The Hunterian, University of Glasgow.

98 W.M. Cunningham (University Librarian and Keeper of the Hunterian Books and MSS) to Walton, 25 Nov. 1941. Whistler Archives, The Hunterian, University of Glasgow.

some time and a few weeks ago the Director of the National Gallery inspected it and approved of what we had done.⁹⁹

In response, Birnie Philip stated that she was: “glad and comforted to know that the university is taking such sound care of its collections,”¹⁰⁰ and “I was more than pleased to hear that the Whistler collection had come safely through this dreadful war and of the great care that you had taken to protect it.”¹⁰¹

The Use of a Collection: Protecting an Artistic Legacy

Birnie Philip considered this protection to be not only related to the gifted collection of material objects but also to extend to the protection of Whistler’s artistic reputation. As she held the copyright for Whistler’s work she was particularly concerned about the use of his correspondence in the creation of unauthorised biographies. How can the restrictions related to access and use that Birnie Philip placed on the gifted collection be understood as part of Birnie Philip’s wider ‘scheme of protection’ for the material collection and Whistler’s artistic legacy?

Access to the gifted collection is outlined in the 1935 memorandum, which (excluding Lady Eden’s portrait and the etching plates) stipulates that it should be made open to the public. Clause 3 of the memorandum stipulates that the gifted collection:

shall be open during such hours as the said University Court may decide to the inspection of any member of the public who is an artist or who is interested or to such other persons as the said University Court may in its absolute and uncontrolled discretion decide.¹⁰²

However, despite giving power to the University to make decisions regarding access to the gifted collection, Birnie Philip fully expected to be consulted on important matters while she remained alive and the University continued to defer to her, both out of respect for the gift and probably also in the hope of receiving future gifts. For example, in July 1943, in response to Lillian Browse’s request to photograph pastels and watercolours, Professor Walton wrote:

should require a clear expression of Miss Birnie Philip’s willingness that we should grant these facilities. As far as I can gather from her letters, she is not enthusiastic about your project.¹⁰³

While access may have been stipulated in the terms of the gift, *use* of the gifted collection was another matter and was one that (for a time at least) was determined based upon the user’s purpose, and the University consulted with Birnie Philip to ensure that requests aligned with her vision.

99 Walton to Birnie Philip, 7 July 1943. MS Whistler W30.

100 Birnie Philip to Walton, 8 July 1943. Whistler Archives, The Hunterian, University of Glasgow.

101 Birnie Philip to Walton, 24 Oct. 1945(?). Whistler Archives, The Hunterian, University of Glasgow. A letter from Freshfields to Walton dated 16 April 1942 confirmed Birnie Philip was alive and confirmed her address enabling Walton to reconnect with Birnie Philip. Whistler Archives, The Hunterian, University of Glasgow.

102 1935 memorandum.

103 Walton to Browse, 12 July 1943. Whistler Archives, The Hunterian, University of Glasgow.

Birnie Philip incurred much resentment for her continued refusal to authorise access to the gifted collection, particularly Whistler's correspondence (which she gifted to the University in 1954). In these cases, her actions often stemmed from her understanding of Whistler's wishes and she was quite fierce about, as she saw it, protecting Whistler's reputation. In one instance, she records vehemently deterring an artist who visited her seeking to write a book on Whistler ("I have an idea that I frightened him for his hand felt very cold and damp"¹⁰⁴) and she also described scaring away the "seeker after truth who founded his knowledge of me from the Pennell Life!"¹⁰⁵ The 'Pennell Life' was a popular biography of Whistler written by Joseph and Elizabeth Pennell which went through many editions – the Pennells maintained that Whistler had authorised the biography while Birnie Philip understood otherwise and objected to many 'facts' in the biography (particularly those that cast Whistler in a less than positive light). The biography makes few references to Birnie Philip, but in the instances in which she appears she is painted as a figure on the periphery who was simultaneously a dedicated carer and companion to Whistler in his last years, but who also came under suspicion for hoarding works by Whistler and claiming the artist had destroyed them.¹⁰⁶ Despite the Pennells' impression of a quiet young woman on the periphery, Birnie Philip was, by all other accounts, a formidable woman in her own right, who was determined that action surrounding the Whistler Estate should honour Whistler's wishes. However, as we have seen, Birnie Philip reinterpreted these wishes, following them in spirit, if not to the letter.

Stemming from the Pennells' biography of Whistler (and her own witnessing of Whistler's outrage about others who hoped to write about his life), Birnie Philip had misgivings about anyone trying to publish on Whistler's life or his artistic 'aims'.¹⁰⁷ In 1937, in response to the University's plans to publish a catalogue about its Whistler Collection, she stated:

If I may express a wish, I should like as little said as possible as to Whistler's "aims" in his art. It might have been difficult even for Whistler himself to have explained his aims, and personally I don't think that "aims" should be handled by anyone but the artist himself. It does not matter a bit what people think. The more wrong their ideas the more they insist they are right!¹⁰⁸

In response to Joseph Revillion's desire to write a life of Whistler, she said:

I can only repeat that Whistler did not wish his life to be written about but deal on the importance of his work.¹⁰⁹

She would express similar misgivings to Professor Walton, telling him that:

104 Birnie Philip to Walton, 16 March 1952. Whistler Archives, The Hunterian, University of Glasgow.

105 *Ibid.*

106 Elizabeth Robins Pennell and Joseph Pennell, *The Life of James McNeill Whistler* (London: Heinemann, 1909).

107 See, for example, Merrill, above, note 30, at pp. 33-34.

108 Birnie Philip to Mrs Walton, 12 Oct. 1937. Whistler Archives, The Hunterian, University of Glasgow.

109 Birnie Philip to Walton, 24 Oct. 1945(?). Whistler Archives, The Hunterian, University of Glasgow.

[m]y position is that Whistler did not wish a “Life” to be written, and that I am bound by this wish.¹¹⁰

Whistler’s wishes guided much of Birnie Philip’s management of the Whistler Estate, particularly of his letters, but she recognised her oversight could not continue in perpetuity.

In many ways, it was the letters in the Whistler Estate that caused Birnie Philip the most anxiety and she recognised that a biography of Whistler was inevitable. On 16 March 1952, she wrote to Walton saying, “My copyright ends on July 17th 1953 and I am imagining that many books will come on the market.”¹¹¹ For so long, Birnie Philip had maintained a degree of control over Whistler’s reputation thanks to the copyright she held over his letters as his executrix. She had viewed the previous ambitions to produce biographies of the artist with great suspicion and derided what she saw as the commercial interests of those individuals.¹¹² Quite aware of the value of the letters on the open market, she said “it would grieve me greatly if these letters ever fell into the hands of a person of a money making mind.”¹¹³ Birnie Philip did not want the letters to be published but ultimately placed her trust in the University as an academic institution which, if such a future publication were to be attempted, would have a scholarly approach free of commercial interest:

I don’t want them [the letters] to be published and will leave the matter in the hands of the university. I feel that if the material should ever be used, that the proceeds should be shared by the university and the author of the book, for I suppose the author would be a member of the university.¹¹⁴

She foresaw the continued scholarly interest in Whistler and the relevance of the gifted collection, saying:

if any writing is to be done it should have the benefit later on of the fresh discoveries in Whistler’s art, as I am sure the quality of this work will encourage more and more as time goes on.¹¹⁵

Ultimately Birnie Philip resolved that “I must make up my own mind”¹¹⁶ as to the fate of the letters and she determined what she termed a “scheme of my protection” for the gifted collection.¹¹⁷ In attempting to exert some degree of control, she decided that she should make a catalogue explanatory of the letters and that it should be kept by the University with the letters when they came into its possession.¹¹⁸ It was inevitable that:

110 Birnie Philip to Walton, 6 May 1942. Whistler Archives, The Hunterian, University of Glasgow.

111 Birnie Philip to Walton, 16 March 1952. Whistler Archives, The Hunterian, University of Glasgow.

112 This included Joseph Revillon. See Birnie Philip to Walton, 24 October 1945(?).

113 Birnie Philip to Mrs Walton, 6 April 1951. MS Whistler P714.

114 Birnie Philip to Walton, 16 March 1952. Whistler Archives, The Hunterian, University of Glasgow.

115 Birnie Philip to Arnott, 14 May 1942. The digital edition of the collection of letters in the Whistler Correspondence online project has done exactly what Birnie Philip wanted, being led by members of the University.

116 Birnie Philip to Mrs Walton, 6 April 1951. MS Whistler P714.

117 Birnie Philip to Walton, 29 Dec. 1953. MS Whistler P726.

118 Birnie Philip to Walton, 22 Jan. 1951. Whistler Archives, The Hunterian, University of

[s]omeone will write a biography of Whistler in future years, and the catalogue might protect the letters from any wild constructions being put on harmless statements.¹¹⁹

Following a bout of ill health in 1952, Birnie Philip recovered by:

sorting through the letters [...and] destroying what could be of no interest and keeping much that the university might think of small value.¹²⁰

In 1952, she planned to, as she described, “give the university the power to make the final decision as to the keeping or throwing out of the materials”, and was still considering this option two years later.¹²¹ A letter from her lawyer on 12 March 1954 points to her inquiries into the University’s plans for disposals within the gifted collection. The Principal of the University, Sir Hector Hetherington, considered the question of disposal before concluding:

I think it very unlikely that in fact the University would exercise the power [to dispose] if it were inserted in the Memorandum of Gift. In such a matter, the instinct of a librarian is to preserve at almost any cost. It is always so hard to say whether an apparently trivial and unimportant letter may not turn out to have some significance as a link in a chain of correspondence or as helping to fix the date of some event.¹²²

Despite this prediction of curatorial restraint, Birnie Philip evidently changed her mind, as no such power was outlined and the terms of the 1954 gift prohibit disposal. Moreover, Birnie Philip gave specific directions about controlling access to the letters: clause 2 of the 1954 memorandum states that:

no member of the public shall be allowed to handle the Scheduled property except under the supervision of an Official of said University or of an accredited member of the Academic staff.¹²³

Restrictions on the publication of some letters (that were primarily related to the family and personal matters) were also put in place and scholars wishing to access or publish content within them had to apply to the University Court for permission.¹²⁴ Birnie Philip trusted the University to protect the material and reputational legacy entrusted to it, but placed restrictions on the areas of the collection she deemed either the most important

Glasgow.

119 Birnie Philip to Walton, 16 March 1952. Whistler Archives, The Hunterian, University of Glasgow.

120 *Ibid.*

121 *Ibid.*

122 Principal of the University, Sir Hector Hetherington quoted in H.M. Dickie, Freshfields, to Birnie Philip, 12 March 1954. MS Whistler F546.

123 Clause 2 of the 1954 memorandum.

124 Whistler letters that had restrictions on publication were listed as BP II Res (for reserved). Thank you to Margaret MacDonald for this information. See also clause 3 of the 1954 memorandum which states “Permission to consult the items of the Scheduled property as listed in Part II of the said Schedule shall be restricted to serious students who will require the specific sanction from the Second Parties or the Principal of the said University and any person obtaining such permission as a condition thereof will require to give the Second Parties a written undertaking that nothing will be published without the approval in writing of the Second Parties of the matter to be published.”

or the most vulnerable. Birnie Philip's curatorial knowledge and expertise guided these actions, but she also empowered the University and deferred to its future judgment as to how other areas of the Whistler Estate were to be used so as to develop scholarship on Whistler.

The 1958 Bequest and the Future Development of a Collection

In closing this study on the history of 'The James McNeill and Beatrix Whistler Collection' at the University of Glasgow and its restrictions, it is useful to consider the 1958 bequest to the University, the terms of which are outlined in Birnie Philip's 1954 will and its 1957 codicil. The 1958 bequest came to the University upon Birnie Philip's death and included a financial bequest (with directions for investments and use, such as maintenance of the graves of James McNeill and Beatrix Whistler at Chiswick Cemetery in the southwest of London)¹²⁵ and thousands of objects, including paintings, etchings, lithographs and artist materials, that remained in the Whistler Estate following Birnie Philip's earlier gifts to institutions (and sales of works via art dealers and private collectors).¹²⁶ In 1958, the objects in the bequest were considered relatively minor although there are many fine works, including those that the Whistlers collected themselves. The objects bequeathed to the University Collection in 1958 were part of what Birnie Philip's will terms her "residuary trust estate"; unfortunately 'residuary' took on associations of 'leftover', which has in turn has implied 'less valuable'.¹²⁷ In fact, this bequest includes some very famous works – including paintings such as *Battersea Reach* – that often travel the globe as the only lendable part of the Birnie Philip's significant contributions to the Whistler Collection at the University of Glasgow. In contrast to Birnie Philip's earlier gifts in 1935 and 1954, the 1958 bequest of objects had (with a few exceptions) no restrictions on physical movement and in fact encouraged disposals of objects in the name of developing the University's Whistler Collection and future scholarship.

While the 1935 and 1954 gifts have restrictions on their physical movement and prohibit collective disposal, Birnie Philip ensured that the terms of her bequest allowed for the future development of the University's Whistler Collection, including the possibility of disposal of objects (although not collectively). Clause 3 of Birnie Philip's 1954 will states:

I expressly hereby direct that in exercising in respect of any of the said objects and property the trust for sale comprised in the said trusts hereinafter declared

125 See clause 11 of 1954 will of Rosalind Birnie Philip (dated 29 Aug. 1954): "I EXPRESS the earnest wish that in view of the foregoing bequests to the said University Court and in view of the gifts of works of the said James McNeill Whistler and Beatrix Whistler and of other objects connected with them or either of them which I have made from time to time to the said University the said University Court will keep in good repair and order the graves and monument of the late James McNeill Whistler and Beatrix Whistler in the Chiswick cemetery including the cleaning of the bronze at least once a year and the upkeep of the turf on the surround and will take the necessary steps to have the said graves and monument and the grave space adjoining made over to the said University Court." The University agreed to this term and took over the costs of maintaining the graves. UG Archives GB 248 DC 008.

126 The exact amount of the financial bequest is unclear as the final amount was dependent on various duties and legacies to family members. For Birnie Philip's gifts to other institutions and individuals, see Hughes, above, note 13.

127 1954 will of Rosalind Birnie Philip.

the said University Court shall pay a special regard to the desirability of not disposing of the said objects and property in large quantities by a single sale or at one time but shall have the fullest power in its absolute discretion to retain all or any of the said objects and property unsold for as long as it may think fit and generally to realise them piecemeal or otherwise to the greatest possible advantage in any manner that it may think fit.¹²⁸

While the language is convoluted, the University (which was appointed Trustee) was essentially entrusted to use and develop the bequeathed collection in any manner it saw fit, including disposals. Birnie Philip's will expressly prohibits the University from collectively disposing of bequeathed objects, but it directs the University to use the bequest for "the promotion and encouragement of education."¹²⁹ Individual disposals could be made "at the discretion of the university" and the proceeds were to be used to create the Beatrix Whistler and James McNeill Whistler Scholarship Fund.¹³⁰ Birnie Philip evidently requested confirmation of such an interpretation following the creation of her will, for a letter from her lawyer on 12 March 1954 understood it thus:

With regard to the question of the sale of any of the Whistler pictures etchings etc. given by your Will to the University, I find on referring to the Will that they are to be held as part of your residuary estate which the University is expressly directed to sell and to apply the net proceeds for establishing the J.M. Whistler and Beatrix Whistler scholarships.¹³¹

By appointing the University as Trustees of her residuary trust estate and giving it the power to dispose of objects, Birnie Philip effectively empowered the University to act as an executor of the Whistler Estate collection and to care for and develop it in the future.

Such care also required funds, and the terms of Birnie Philip's will also had financial provisions related to the care and preservation of her gifts and bequest in the University Collection. Clause 9 of Birnie Philip's will directed the University to (if the financial part of her residuary trust estate was sufficient), reimburse itself for the cost of the display cases constructed for the "better housing and preservation" of the 1935 gift.¹³² It also states:

at any time or times and from time to time to apply any part or parts of the capital or income of my residuary trust estate in payment for any expenses incurred in connection with the custody of the said Collection.¹³³

128 *Ibid.*

129 See clause 7(ii) of Birnie Philip's 1954 will (dated 29 Aug. 1954).

130 Some exclusions of specific objects (namely items of furniture) were added to the 1957 codicil. Excluded from possible disposals were a 'Mahogany Sheraton style folding top table' and a 'Louis XV circular back armchair' which 'belonged to the late James McNeill Whistler.' Birnie Philip stated: "I express the hope that the said university Court will keep them for display as part of the James McNeill and Beatrix Whistler and Collection belonging to the said University Court and will not sell them." See 1957 codicil to Birnie Philip's will (dated 26 Aug. 1957). For the terms regarding the scholarships, see clauses 7 and 8 of Birnie Philip's 1954 will. UG Archives.

131 H.M. Dickie, Freshfields, to Birnie Philip, 12 March 1954. MS Whistler F546. The date on this letter suggests that Dickie was interpreting an earlier version of Birnie Philip's will which contained the same provision.

132 Clause 9 of Birnie Philip's 1954 will.

133 *Ibid.*

Curatorial care of the objects from the Whistler Estate continued to be central to Birnie Philip's wishes. In the 1980s, the University interpreted the terms about collection care, custody and development in Birnie Philip's will as authorisation to sell and exchange works to develop facilities for the University's Art Collection, which included the Whistler Collection, in the form of the new Hunterian Art Gallery. A number of prints in the 1958 bequest were sold and exchanged to raise money for the new art gallery (multiple impressions of Whistler's etchings were considered to be 'duplicates' rather than objects with their own individual artistic value and object biography). Although there was a campaign against these disposals, the terms of Birnie Philip's will allowed for such disposals if the proceeds were to be applied to facilities for the care, preservation, display and storage of the Whistler Collection. Today, accredited institutions are required to follow professional guidelines (such as those offered by the Museums Association) for disposals, but at the time the University (as custodians of the gifted collection and Trustee of Birnie Philip's residuary trust estate) was within its rights to act as it did.

Further archival research is needed to ascertain how Birnie Philip articulated her rationale for the provisions around the 1958 bequest, but some reasoned speculation is possible. Birnie Philip had maintained a relationship with the University over decades and was in her late seventies at the time of making her will. She was particularly friendly with the Waltons who were connected to Whistler through artistic lineage and often sought their counsel, particularly as to the cataloguing of the letters in the 1950s. In the 1950s she also met Andrew McLaren Young, the first Professor in the University's newly founded History of Art department and curator of its Art Collection, whom (according to surviving correspondence) she esteemed highly. The close institutional ties that had developed after Birnie Philip's choice of the University as a home for the Whistler Estate had been strengthened by the close attention that individuals within the institution had paid to her wishes for the gifted collection over the years. The gifted collection contained thousands of objects, and it is understandable that Birnie Philip, who had deemed the objects already given to the University in 1935 as the 'best part' of the Whistler Estate, may have considered some objects more valuable than others. Arguably Birnie Philip understood the University to have sufficient artistic knowledge and sensitivity so as to properly judge future disposals and award scholarships with the proceeds.

Conclusion

Ultimately, Birnie Philip's primary goal was to ensure that the Whistler Estate was housed within an institutional setting where the material objects and Whistler's artistic legacy and reputation would be cared for, protected and developed. Birnie Philip thought carefully about the future of the Whistler Estate and all of her responsibilities attached to it, but until now scholarship on the Whistler Collection (that she herself hoped and provided for) has obscured her own role in bringing the Whistler Estate to the University and ensuring its future in an institutional setting. By providing the first in-depth study of Birnie Philip through the examination of original archival evidence, including unpublished correspondence and legal documentation, this article has offered a new history of the Whistler Collection at the University of Glasgow and demonstrated the significant role that Birnie Philip played as executrix and curator of the Whistler Estate collection.

In seeking to resolve the tension between the historical understanding of the 1935 gift as the most important part of the Whistler Collection at the University of Glasgow – a designation which has been reinforced by the restriction on the gift’s physical movement – and the lack of acknowledgement of Birnie Philip’s role in bringing the ‘best part’ of Whistler’s Estate collection to Glasgow, the terms of the 1935, 1954 and 1958 gifts and bequest have been reconstructed to provide a full outline of their history. The restrictions on physical movement of the gifts are just one aspect of the history of the gifted collection and must be understood alongside the nuances of Birnie Philip’s conditions that have been discussed within this article, including display, exhibition, naming, care, housing, access, publication, disposal and development. In assessing the creation of these conditions, the depth of Birnie Philip’s curatorial knowledge and experience and her capability and conscientiousness where the future of the collection was concerned have been uncovered. Examination of the historical context of the conditions, including Whistler’s expressed wishes, the comparable terms of gifts made by Charles Freer to the Smithsonian in the US and Birnie Philip’s hold of Whistler’s copyright, shows the extent to which she was inspired or directed by others, but also the way she used her own knowledge and judgment to make curatorial decisions about the future of the Whistler Estate collection.

This can be seen not only in the attention she gave to making the gifted collection accessible for future artists, members of the public, students and researchers, but also in her stipulations about its naming, housing, and access to and use of vulnerable objects with particular requirements, including the pastels, watercolours, etching plates, letters and *Portrait of Lady Eden*. While the restrictions on each of these objects are significant in and of themselves, they collectively evidence Birnie Philip’s curatorial knowledge and her attention to their specific requirements. In recent years, the pastels and etching plates have been rehoused in The Hunterian in line with best collection care and management practice, which continue to meet the legal stipulations of the gifts as to housing and care, and which Birnie Philip would surely approve of. With regards to the name of the gifted collection, it has become known by the shorthand of “the Whistler Collection”, as it has come to encompass other Whistleriana acquired by the University via other purchases and gifts. It is unclear whether the University ever displayed the gifted collection as “The James McNeill and Beatrix Whistler Collection”, as Birnie Philip directed in the 1954 memorandum. Reinstating this name for the gifted collection has the potential to increase the visibility of Beatrix Whistler’s place within the Whistler Collection, as Birnie Philip originally intended, and to encourage further scholarship on this important nineteenth-century woman artist, whose work is indeed one of the strengths of The Hunterian collection.

As early as 1917, Birnie Philip determined that the University of Glasgow was the best home for the Whistler Estate collection based on her own understanding of Whistler’s biography and his wishes. She effectively negotiated with the University, ensuring that members of staff continued to seek her approval for actions around the gifted collection during her lifetime. She gave close attention to preparing objects for transfer to Glasgow and her experience in managing transportation for works between institutions demonstrates the depth of her curatorial expertise. Curatorial care was at the heart of the restrictions that Birnie Philip made as to the physical movement of the objects in her gifts. As I have shown, it is not only objects in the 1935 gift which are restricted to

the University premises, but so too are those in the 1954 gift. As my analysis of original archival evidence (including the one instance that Birnie Philip considered an exception to the terms of the 1935 gift) suggests, the reasons behind these restrictions were a combination of Birnie Philip's experience of 'careless handling' that endangered works themselves and her desire to keep the gifted collection intact to prevent future disposals on the art market or displays of works in sub-optimum settings that did not adequately present the work (or Whistler). The one historical instance in which Birnie Philip contemplated making an exception to the terms of the 1935 gift is extremely revealing; for Birnie Philip to consider loaning a work from the 1935 gift, the curatorial validity of the request had to be appropriate (in terms of the work, the exhibition and the fit of the work requested) and above reproach. When this request was considered in 1950, Birnie Philip considered it "not the time" for such loans, perhaps indicating that she foresaw a time that exceptions to the terms might be made, albeit in a controlled manner. Should any temporary lift on restrictions on physical movement of the gifts be considered in the future, Birnie Philip's position should be fully appreciated and considered. Significantly, despite her apparent willingness to temporarily lift the restriction of the 1935 gift in 1950 (under specific conditions), Birnie Philip did not include in her 1954 will any clauses that lifted restrictions on physical movement or access to the earlier 1935 gift, and in fact included a similar clause that restricted physical movement of the objects within the 1954 gift. While the historical exception to Birnie Philip's restriction is significant, it is a concession that is revealing of her wider curatorial intentions and motivations, not a loophole that warrants disregard of her wider "scheme of protection" for the gifted collection.

Part of what makes Birnie Philip and the Whistler Estate collection so fascinating are the intricacies, nuances and even what appear to be conflicts or contradictions. Birnie Philip attempted to diligently adhere to Whistler's expressed wishes and yet she also deviated from them and used her own judgment to care for the Whistler Estate in different ways. Despite Whistler's wish that she not give or bequeath any of his works to English institutions, she made a significant loan to an exhibition that she herself instigated at the Victoria & Albert Museum in London on the centenary of the artist's birth in 1934 and she bequeathed a watercolour painting to the institution afterwards in recognition of their work. She worked within the confines of Whistler's wishes to gift a painting to National Galleries of Scotland in 1930, even outlining conditions that would restrict movement of the painting (although these were not fully taken on board). There are contradictions in the terms of her gifts to the University, namely the restrictions on disposal in the 1935 and 1954 gifts and her expressed permission (even direction) for disposal in the terms of the 1958 bequest. However, what might appear initially as a conflict can be reconciled when we consider Birnie Philip's wider wishes about the use of the earlier gifts to the University. With her extensive curatorial knowledge of the Whistler Estate collection, she would have recognised that such a large collection would require funding for its care and upkeep, and she attempted to provide for this in the terms of the bequest. Collective disposal was prohibited, but the terms of the bequest made sure that funds could be raised to ensure the future of the gifted collection in its institutional setting.

Ultimately, Birnie Philip foresaw a future use for the Whistler Estate collection in which scholarship on Whistler's art would develop through the use of the collection by students and researchers, even going as far as to create scholarships to enable such research to be

undertaken. Birnie Philip's directions to form a scholarship fund coincide with the early years of the official founding of the History of Art department at the University; Andrew McLaren Young was a professor in the department from the 1950s and there is archival evidence (including letters between Young and Birnie Philip) that indicate he visited Birnie Philip in London and was involved in the gifts to the University in this period. Further research is needed to explore any connection between the development of the academic department and the gifts in the 1950s. Likewise, there is archival evidence (including letters, lists of works and receipts) that show Birnie Philip was working closely with dealers in the commercial gallery P. & D. Colnaghi & Co. during the 1950s and sold works prior to giving the remainder of the collection to the University of Glasgow, which would seemingly contradict her concern with keeping Whistler works out of the secondary art market. Consideration of Birnie Philip's relationship with the art market in the 1950s alongside her gifts to institutions could provide further insight into her actions and intentions for the collection.

By providing the first in-depth study of Birnie Philip and the restrictions on the gifted "The James McNeill and Beatrix Whistler Collection" at the University of Glasgow, this article provides a significant step towards a full appreciation of the work that Birnie Philip undertook over the course of 55 years to ensure the future of the Whistler Estate collection. Understanding the circumstances and motivations surrounding restrictions on collections is crucial to developing a deeper understanding of the role women played in forming, managing and curating historical collections; how objects move from private spaces into public institutions; and the gift exchange dynamics that surround such transfers of ownership. A broad historical approach is necessary and legal documentation should be examined alongside extant (and absent) archival evidence such as correspondence. As custodians of collections, institutions have a responsibility to fully research, understand and communicate the history of their collections, the people who formed them and how they did so. If the restrictions placed on collections in the past ultimately shape their future, we must ensure those restrictions are legally and historically understood.

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LEGACY OF THE BURRELL LENDING CODE

Duncan M. Dornan*

Burrell Collecting

Sir William Burrell (1861-1958) was both a prominent Glasgow businessman and one of the world's most successful collectors. After attending Abbey Park boarding school in St Andrews, he joined the family firm of Wm Burrell & Son at the age of 13, where he proceeded to demonstrate considerable skill in running the business alongside his brother George.¹ Sir William's grandfather, George Burrell, had set up on his own account in 1856, the core business generally being the operation of barges on the Forth and Clyde Canal. In 1862 the firm acquired its first ocean-going vessel and by the time young William Burrell joined the firm in 1873, it consisted of the canal and coasting trade plus nine ocean-going ships. William and George bought out elements of the business on the death of their father in 1875 and the fleet was updated with two batches of ships, taking advantage of a depression in shipbuilding to acquire at favourable prices. This fleet was sold off by 1899, in part reflecting a mild improvement in trading conditions to facilitate a profit. Following the slump in shipping values after the Boer War (1899-1902), the Burrells ordered a new fleet of sixteen ships, again at favourable rates. Having generated significant profit during the First World War, Burrell finally sold off most of the fleet from 1916 and was not destined to return to the business.

Burrell's collecting career also started early. He quoted an early acquisition experience to the British Antique Dealers' Association, buying a painting by J.M.W. Turner at a sale for 18 shillings, but reflecting on the cost of framing, he re-entered it in the sale, losing 3 shillings.² His eye for a good deal sharpened, as he applied his business skill to the acquisition of art. Sir William, supported by his wife Constance Mary Lockhart, Lady Burrell (née Mitchell; 1875-1961), built a substantial collection covering his primary areas of interest: Chinese ceramics, medieval stained glass and tapestries, arms and armour, religious iconography, French Impressionist art, a substantial number of works by the 'Glasgow Boy' Joseph Crawhall and by Matthias Maris,³ later augmented by works representing ancient civilisations.

In assembling this collection, Burrell researched extensively, relied on trusted dealers for advice and stalked his prey, to secure good value for his investment. A consequence of

1 I am grateful to the biography by Martin Bellamy and Isobel MacDonald for the following summary.

2 Martin Bellamy and Isobel MacDonald, *William Burrell: A Collector's Life*, (Edinburgh, Birlinn Ltd, 2022), p. 17.

3 Matthias Maris (17 Aug. 1839-22 Aug. 1917) was a Dutch painter, etcher and lithographer. He was also known as Matthijs Maris or Thijs.

* Head of Museums and Collections at Glasgow Life.

his thorough approach was building a collection containing items of outstanding quality, with peer objects in many of the world's most renowned institutions. It is a reflection of the diligence of the Burrells that by the early 1940s the collection numbered in excess of 6,000 items. A significant amount were held in Hutton Castle, outside Berwick on Tweed, where the Burrells lived amongst the objects. However, many objects were in store, or on loan to a large number of institutions across the UK. It is important to know that Burrell was an enthusiastic lender to institutions and exhibitions across the UK, lending to the 1901 Glasgow International Exhibition, later Kelvingrove Art Gallery and Museum, the National Galleries in Edinburgh and the Tate Gallery in London, to name but a few.

Donation of the Collection

Through the 1930s Burrell seems to have started to think seriously about the fate of his collection. There was some expectation on the part of the Victoria and Albert Museum, London, that had benefited from loans, that elements of the collection might pass to it. However, Burrell was anxious to see it intact and held in a separate building, to which end, in 1942, he approached London County Council. Though the matter was considered very seriously, the resultant cost of maintenance was felt to be unsustainable, and the offer was rejected in December 1943.⁴ Within days Burrell wrote to T.J. Honeyman, the Director of Kelvingrove Art Gallery and Museum, in Glasgow, offering the collection to his home city.

This was an act of extreme generosity, with the collection potentially valued at around £1m, plus £450,000 to build a new museum. The Burrell Trustees were established as a body to administer the balance of the estate, to support continued development of the collection and to essentially act as guardians of the spirit of the bequest. The deed of gift came with a number of conditions, most onerous, initially, that the collection was to be housed by Glasgow Corporation, in a suitable distinct and separate building, within four miles of Killlearn, Stirlingshire, and not less than sixteen miles from Glasgow Royal Exchange. This condition was to overcome the fear of pollution damaging the collection. He also stated that "the collection should be shown as it would be in a private house".⁵ It should be noted that, during Burrell's lifetime, a degree of flexibility on these restrictions was shown. The search for a suitable estate to hold the collection, in broadly the right location, involved the ultimate rejection of three properties in Stirlingshire. As a result, locations closer to Glasgow were explored, namely Mugdock Castle and Dougalston Estate, both with Sir William's approval. Significant progress on plans for a museum had been made at Dougalston when the National Coal Board revealed proposals to sink a mine shaft in the area. This ended Burrell's support for the site. Though ultimately none of these proved successful, the flexibility shown made the decision to build in Pollok Estate in 1966, when it was gifted to the Council, much easier. The consideration of design proposals for the museum building, which secured Sir William's approval, also indicated some leniency in relation to the caveat to display as in a house.

4 Bellamy and MacDonald, above, note 2, p. 158.

5 *Ibid.*, at pp. 156-158.

Restrictions Applied to the Gift

Of more lasting significance were Burrell's stipulations regarding the lending of material from the collection and display of peer items in the new museum, alongside the collection. The Memorandum of Understanding, between Burrell and the City states:

[...] the donees shall be entitled from time to time to lend temporarily to responsible bodies any article or articles forming part of the collection as they think fit for exhibition in any Public Gallery in Great Britain.

Burrell was to further enhance this restriction in his will of 1958 adding that lending was permitted, "[...]except pastels, tapestries, carpets, rugs, lace, needlework and all other textiles." Whilst Burrell did not specify a closed collection, with the Burrell Trustees able to add works of sufficient quality, the agreement stipulated that "[...] no other pictures or works of art of any description shall be housed therein".⁶

The first of these conditions would persist until 2013, though the second was quickly considered not to restrict temporary display of borrowed works. The restriction on lending abroad in particular would be challenged twice, first in 1997, with limited success, and again in 2013, where a comprehensive relaxation of the conditions was secured by Act of the Scottish Parliament. It would be claimed that the restrictions in no small part contributed to a decline in visitors to the Burrell and the international reputation of the collection.

The Burrell is a part of Glasgow Museums, the group of ten museums and galleries owned and operated by the City of Glasgow, the largest museum service in the UK outside London.⁷ Glasgow Museums is fortunate to hold a very large internationally recognised collection and has been a willing lender over many decades. This made the restrictions on the Burrell Collection an anomaly from the outset. Consequently, a degree of tension seems to have existed between Glasgow Museums and the Burrell Trustees. In 1953, Tom Honeyman was the first Director⁸ to be reprimanded in relation to this constraint, by lending works to an exhibition in *Switzerland*. The Trustees remonstrated with him, and the matter appears not to have been tested for a number of years thereafter. By the 1990s, the then Director of Glasgow Museums, Julian Spalding, and the City Council were minded to challenge the restrictions, citing in their submission a number of well-rehearsed issues. At this time, only the condition relating to international lending was challenged whilst the implied limitations on displaying other works alongside the Burrell Collection was not considered to limit exhibition aspirations.

The Need for Refurbishment

The purpose-built Burrell Collection building in Pollok Park, Glasgow, had opened

6 Memorandum of Agreement between Sir William Burrell and Lady Constance Mary Lockhart Burrell and the Corporation of the City of Glasgow acting under the Glasgow Public Parks Acts 1878 to 1937.

7 Glasgow Museums is a part of Glasgow Life, the arm's length charitable organisation that delivers cultural, sporting and learning activities on behalf of Glasgow City Council, see: <www.glasgowlife.org.uk/museums>, accessed 19 Jan. 2023

8 Tom John Honeyman (1891-1971) was Director of Glasgow Art Galleries and Museums from 1939 to 1954

to international acclaim in 1983. The investment by the City Council represented a substantial commitment to the use of the City's museum collection to redefine Glasgow and drive inward investment. The Burrell Collection proved successful in doing so, attracting around 1 million visitors in the first year. The quality of the collection on display was outstanding, however visitor numbers dropped significantly over the following decade, stabilising at around 400,000. This was attributed to a significant degree to the inability to show Burrell objects alongside international peers, promoting the Burrell Collection internationally. This resulted in associated loss of commercial income and sustained footfall to the Burrell and Glasgow.

The 1997 Bill

Despite the objection of the Burrell Trustees, the City of Glasgow Council and the then Director of the Museum Service, Julian Spalding, promoted an Act of Parliament to overturn the restrictions on international loans, using the Private Legislation Procedure (Scotland) Act 1936. The use of private legislation had been identified as the only mechanism available in Scotland, as an application to the Court of Session, under the Trusts (Scotland) Act 1961. It would only be applicable if the intention of the trust could no longer be carried out. In this case clearly it was still possible to meet the conditions, if not necessarily in the long-term interests of the public.⁹ This led to a public enquiry in September 1997, that sought guidance from a range of sources.

Neil MacGregor, the Director of the National Gallery in London, provided testimony as to the increasing frequency of international lending of collections, to increasingly diverse institutions, supported in particular by the European Commission, particularly to increase public access to art.¹⁰ It should be noted, however, that he stated clearly that he neither supported nor opposed the proposal to remove the lending restrictions. He cited benefits of lending as encouraging repeat visits, enhancing the educational impact of collections through viewing in different contexts and commercial gain through increased spend in shops. He also highlighted the academic benefits of lending: to provide physical comparison and analysis and the opportunity for new publications to come from this. The enquiry pressed him for examples of other collections which could lend in Britain but not elsewhere, but no example could be recalled. Mr McGregor also highlighted the need for reciprocity, where an inability to lend would impede an institution from borrowing works to animate exhibitions. There was also discussion of the fact that some works are simply too fragile for travel, or potentially of too great a national significance. Of particular pertinence, he referred to four occasions in the last 110 years on which the National Galleries had been enabled by Parliament to engage in lending inconsistent with the terms of the bequest of works, in all cases a specified number of years had to have elapsed since such bequest, ranging from 25 to 50 years.

In their statement to the enquiry, the Burrell Trustees set out their objections to the proposal.¹¹ The Trustees were not persuaded that the restriction on international lending

9 Ian McCulloch and Jessica Korovos, 'The Burrell Showcase – The Public Interest and Compliance with Bequests', (1998) III *Art Antiquity and Law* 193.

10 Private Legislation Procedure (Scotland) Act 1936. The Burrell Collection (Lending) Draft Provisional Order. Public Enquiry 1997, pp. 1272-1295

11 Statement of Colin Dunlop Donald, Senior Trustee in Sir William Burrell Trust, to the Burrell collection Lending Order, Sept. 1997

reflected concern about the safety of the collection during wartime conditions, as Sir William had repeated the restriction again in his will in 1953. Their view was that, regardless of the technical evidence regarding transportation, conservation and visitor numbers, they had an overriding duty to see the terms of the gift adhered to, unless there were a wholly compelling reason for amendment, such as the operation of the collection being rendered unworkable by the restriction. This statement also referred to the decline in the spirit of co-operation between the Trustees and the City on a number of issues, despite continued co-operation on acquisitions. Of particular concern was a loan of Burrell textiles to the Habitat store, Tottenham Court Road, London. The Trustees objected strongly to this and indeed took legal advice. The Museums Service asserted that the space met all necessary conditions and was to be regarded as a branch gallery to promote Glasgow collections in London.

The decision of the enquiry was in favour of the Order, but subject to terms and conditions, which the Trustees themselves had not sought. It proposed a complete ban on the lending of any pastel, tapestry, carpet, rug, needlework, lace or other textiles, reflecting the additional constraint on lending in Burrell's will. In addition, it restricted lending to a maximum of twelve months. Though the Order was essentially a success for the Council, it was in practice more restrictive than the status quo.

The advice from the Parliamentary Agents was that three options were available:¹²

- not pursuing the Order further;
- continuing to promote the Order as amended and approved by the Commissioners; and
- continuing to promote the Order and in doing so, to seek to amend to remove the restrictions.

The third option was acknowledged to be extremely risky. The first option was the one ultimately pursued. A handwritten note, added to the letter from the agents, suggested taking the matter to the Scottish Parliament, newly established in 1999.

We might speculate that, in addition to the stated objections, the Burrell Trustees would have been influenced by the sometimes difficult relationship which had developed between them and Glasgow Council's Museum Service. This may have made the Trustees more acutely aware of fulfilling their duty to Sir William in the most robust manner possible.

The 2013 Bill

As the handwritten note referred to suggested, the next phase of this story would play out in front of the Scottish Parliamentary system, with a second attempt at overturning the restrictions in 2013. By this time the Burrell building, though only opened in 1983, was suffering from significant structural failure, in particular the flat roof system, which had always leaked but was now a serious threat to the safety of the collection. The concerns with regard to visitor numbers in the 1990s continued, with footfall at the Burrell by 2013 having fallen to less than 200,000 annually and continuing to decline. This was in

12 Glasgow Museums Archive, Letter from Ian McCulloch, Dyson Bell Parliamentary Agents, June 1999 to GCC Legal Services Dept.

contrast to the strong and steady increase of footfall in Glasgow's other museums. The need to raise capital for refurbishment of the building and the need to revive the use of the collection made a second attempt necessary, based again on the need to raise the profile of the collection to encourage philanthropic support and robust local, national and international footfall. The relative isolation of the collection in Glasgow had led to an unjustified sense that the objects were actually not of sufficient quality to be shown against their peers. Demonstrating the falsehood of this was an essential outcome to provide the collection with a more sustainable future. This issue of course, was not one which might have been foreseen in the middle of the twentieth century, before the ability to routinely see peer objects together thanks to the increased volume of lending referred to by Neil MacGregor in his testimony.

The second enquiry was held in September 2013 and was entitled the Burrell Collection (Lending and Borrowing) (Scotland) Bill. The title included reference to the additional restriction created by the deed of gift regarding only showing Burrell items in the museum. The expansion of the proposed Bill, to cover both lending and borrowing, might seem surprising, given that borrowing had not been considered a problem. The broader aspiration of the Bill however, reflected constructive negotiations with the Burrell Trustees: in addition to removing the restrictions on borrowing, this Bill offered an opportunity to clarify the ambiguity in the Deed of Gift and to establish clearly the role of the Trustees in the management of the collection. In this instance, though there were objections to the Bill, the Burrell Trustees were fully supportive of the change.

The case for the City was put first by Councillor Archie Graham, then Chair of Glasgow Life, the arm's length trust which had operated Glasgow City's Museums since 2007. The case was essentially that, in order to compete and attract footfall, the Burrell had to be part of the international community of exchange, and that, further, through the resultant research, conservation and interpretation would be improved.¹³ The proposal however was founded on an agreement with the Burrell Trustees requiring the City to secure their agreement to any proposed loan, regardless of destination. This was a significant change since the previous attempt to remove the restrictions. One might speculate that in the intervening period, the relationship between the City and the Trustees had improved markedly, facilitating a proposal of this type. Again, the suggestion was made that the objection by Sir William had been based substantially on his observed perception of the risk of cargo handling at ports and the risk of shipping, and was therefore of less concern now with air transport and bespoke professional art handling available.

In the following session Ben Thomson, the Chair of the National Galleries of Scotland,¹⁴ offered a two-sided view, recognising the increasing demand for international access to collections and the benefits which could derive from this, but also the commitment to donors to respect their conditions of gift or bequest. Finding the balance between these two objectives would prove instrumental in arriving at a final resolution in relation to the Burrell.

Christopher McLaren, Chair of the Samuel Courtauld Trust was next to give evidence.¹⁵

13 Burrell Collection (Lending and Borrowing) (Scotland) Bill Committee Report, 9 Sept. 2013, session 4, p. 14.

14 *Ibid.*, at p. 43.

15 *Ibid.*, at pp. 44-47.

He outlined why their Trust supported loans, reflecting again the comments of earlier speakers. He also stated that the Trust believed that the safety of lending was now much improved allowing flexibility in responding to restrictions on gifts, as well as that donors, with an interest in art scholarship, would have been keen for collections to go on display under appropriate circumstances. He cited the case of the so-called *Princes Gate Collection*, the anonymised bequest by Count Antoine Seilern to the Courtauld in 1978, where lending restrictions had been relaxed.¹⁶ He was challenged by the panel on the need to restrict the lending of sensitive objects in any judgment, but confirmed that though in the above case some constraint relating to fragility had been imposed, this had never proved a difficulty, as the Courtauld's own processes would not judge these sensitive items fit to lend.

Jeremy Warren, representing the Wallace Collection, was called next.¹⁷ He advised that the Wallace Collection, governed by the Museums and Galleries Act 1992, was not allowed to acquire for the collection, though there was no specific restriction in place in relation to lending or borrowing. The Trustees had however taken the view that they should remain bound by the sentiment of Lady Wallace and keep the collection together, unmixed. The Wallace too had suffered a significant decline in visitor footfall, from 1 million annually in 1900 to a low of 160,000 by 1990, rising after a refurbishment to 400,000. Since this refurbishment, the Wallace had delivered a small temporary exhibition programme, involving loans from other institutions. Warren also referred to the stability of the condition of works in the Wallace, which the Trustees felt in some part reflected the fact that its works never travelled. At this time the Wallace remained happy with its position, though recognising the disadvantages, it felt that the institution's reputation benefited from its consistency. On questioning, it was noted that section 5(3)(a) of the Museums and Galleries Act 1992 had made provision for English national museums to change the terms of a bequest after a period of 50 years.

It is of interest to note that the Wallace Collection changed its position in 2019: the Board of Trustees and the Director successfully applied to the Charity Commission for an Order which has granted the Wallace Collection the power to lend, a decision supported by the Department for Digital, Culture, Media and Sport (DCMS). The Wallace Collection has now joined other national museums in lending works from its collection, both within the UK and internationally.¹⁸

The second day of contributions to the committee saw the submission from Sir Peter Hutchison, Chair of the Burrell Trustees.¹⁹ He opened by stating that the Trustees welcomed the refurbishment of the Burrell building, the condition of the roof in particular being something the Trustees had been concerned about. The Trustees also recognised the potential benefit a major show or tour might have in securing financial support for the refurbishment. He noted that Sir William's restriction on international lending was commonly felt to reflect both a concern that the risk was higher with international loans

16 See e.g. <https://en.wikipedia.org/wiki/Antoine_Seilern>, accessed 20 Jan. 2023.

17 Burrell Collection (Lending and Borrowing) (Scotland) Bill Committee Report, 9 Sept. 2013, session 4, pp. 48-52.

18 <www.wallacecollection.org/blog/The-Wallace-Collection-to-lend-works-for-the-first-time/>, accessed 20 Jan. 2023.

19 Burrell Collection (Lending and Borrowing) (Scotland) Bill Committee report, 9 Sept. 2013, session 4, pp. 72-80.

and also Sir William's own experience of shipping, the first assumption certainly being true, and the second possibly true. However, the proposal incorporated a new role for the Trustees in approving any lending proposal, in addition to the existing robust lending procedures for Glasgow Museums and these two mechanisms were felt to provide a rigorous and effective process to evaluate loans both across the UK and abroad. In addressing the issue of donor's wishes, Sir Peter recognised that the Burrell was not a closed collection, such as the Wallace or The Frick Collection in New York. Burrell had lent extensively in his lifetime in the UK. The Order in 1997 had also in effect freed the Trustees enabling them to consider overseas lending, subject to rigorous safeguards. He also advised, perhaps very significantly, that the Trustees and Glasgow Life now engage in constructive discussion, perhaps overcoming the single greatest barrier in 1997.

The legal adviser to the Trustees, Robert Taylor,²⁰ advised that whilst the deed of gift had restricted international lending, Burrell's later will, of 1958, had specified that tapestries, pastels, carpets, rugs, lace and needlework could not be lent at all. However, there was legal doubt that a will could amend an agreement concluded several years earlier. He also noted that at the time of the 1997 Bill, there had been very little consultation with the Trustees.

The most robust objection came from Michael Daley of Art Watch UK.²¹ Daley was disturbed by the attempt to overturn the prohibition on foreign loans and cited some examples of works damaged whilst on loan in recent years. His view was that the Burrell Collection did not currently face these risks and he urged the retention of the, in his eyes, well-founded restriction on international lending. He also raised the issue of the quality of professional expertise used to oversee the transportation of works, and the variation in advice applied to this; clarifying that this was not simply due to professional skill but to variations in approach between practitioners. The committee Chair did note, however, that this evidence had strayed into the principle of lending generally rather than the variation to Sir William's bequest.

Further submissions were made by Professor George Gretton, University of Edinburgh.²² He confirmed that pursuing a Bill was the only route available to Glasgow City Council to secure its objective in this case. He opined that, having viewed the deed of gift and the will, he considered inward loans to be acceptable. When asked about the moral dimension to overturning restrictions applied by donors, he referred to the example of restrictions applied to land or property: can they be enforceable forever? He suggested that after a substantial period, conditions could be opened up. When challenged on what represented a substantial period, he offered no personal opinion, having no museum expertise, but did refer to section 5(3)(a) of the Museums and Galleries Act 1992, previously mentioned, establishing 50 years as appropriate. His view was clearly that the law has to limit tying and controlling property long after the donor's death: the longer the period, the less justifiable are non-variable conditions.

In subsequent questioning, the existing international standing of both Glasgow Museums and the collections were highlighted by Jeremy Warren, as was the exceptional interest in collections shown by the citizens of Glasgow and the efforts of the service to build its curatorial expertise.

20 *Ibid.*, at pp. 80-84.

21 *Ibid.*, at pp. 85-90.

22 *Ibid.*, at pp. 96-101.

This time the Bill was passed as the Council had hoped, unlocking international lending, within the bounds of responsible custodianship as overseen by both the museum service and the Burrell Trustees. To support this a detailed procedure had been agreed, providing the Burrell Trustees with final approval of loans from the Burrell Collection to other venues as well as incoming loans.²³

Conclusion

We now have the opportunity to reflect on the impact of the Bill, with the benefit of almost a decade of hindsight. Over the course of the Burrell refurbishment, from 2016 to 2022, items from the collection travelled to North America, Australia, France, the Netherlands, Germany and Japan. The 143 objects involved included tapestries, carpets, sculpture and pastels. Across the 24 venues involved, the combined audience for these exhibitions was 6,920,000. During this entire programme no damage was sustained by any of the works. The working relationship between the Trustees and Glasgow Museums has proven positive, with the parties able to agree a refinement of the approval procedure which had been established in support of the Bill.

The Burrell reopened in March 2022, towards the end of the Covid pandemic and, despite this, it attracted more than 160,000 visitors in the first ten weeks, more than in the full final year before closing. Significantly, 60 per cent of these were international tourists, a demographic rare in the Burrell in 2016.

The Burrell refurbishment opened to almost universal acclaim, having cost £68.25m, secured through a highly successful fundraising campaign. We might contend, at this point, that the hopes of those promoting the Bill were met without injury to the collection.

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23 Code to regulate lending from the Burrell Collection between the Trustees of Sir William Burrell, Glasgow City Council and Culture and sport Glasgow, as agent for the council. May 2022

**AN ARCHAEOLOGY OF INTENTIONS?
THE ROSALIND BIRNIE PHILIP GIFT AT THE
UNIVERSITY OF GLASGOW BEFORE A HORIZON OF
COMPARATIVE ANALYSIS FROM TURNER TO BARNES**

Grischka Petri*

**The Whistler / Birnie Philip Collections at the
University of Glasgow**

Glasgow is a given travel destination for any Whistler scholar, or indeed for anybody interested in the work of James McNeill Whistler (1834-1903), since Whistler's executrix, his sister-in-law Rosalind Birnie Philip (1873-1958) donated a large part of the artist's estate to the University of Glasgow in 1935. The artist's estate, the lion's share of his correspondence, and near complete collections of his prints have firmly established the University of Glasgow, its Archives & Special Collections and The Hunterian as the European hub for Whistler studies. The University's online projects of the 21st century – the edition of Whistler's correspondence and the *catalogues raisonnés* of Whistler's etchings and paintings – have in no way outweighed the visit to the Scottish city.

This article deals with the parts of the gift regulations that restrict loans. Asking whether there are reasons to modify such restrictions and if so, under what kind of circumstances, the Birnie Philip Gift will be placed in the context of selected comparisons. Some concern the same artist, Whistler: the Freer Gallery of Art in Washington, D.C., and The Frick Collection in New York are governed by similar provisions. The case of the Barnes Foundation in Philadelphia is particularly pertinent because it sharply accentuates the underlying considerations, compromises and consequences of preserving the original idea of a donor. To distinguish considerations of ownership from artistic concerns, the classic case of the J.M.W. Turner bequest is taken into account before a final reassessment of the Birnie Philip Gift.

The 1920s and the first half of the 1930s had not been a boom time for Whistler exhibitions. James Laver's biography of the artist, published in 1930, recorded several recent critical voices relegating Whistler to a less important position in the history of modern art.¹ A certain change of the tide occurred at the centenary of Whistler's birth in 1934, and after *Arrangement in Grey and Black: Portrait of the Painter's Mother*

1 James Laver, *Whistler* (Faber & Faber, 1930), pp. 291-294.

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(YMSM.101, Musée d'Orsay, Paris) toured the USA between 1932 and 1934.² Rosalind Birnie Philip's gift was timely. Works from the donation were exhibited at the University in 1936. The catalogue proudly described the gift: "39 oil paintings, hung in the Library Hall of the Hunterian Museum; 57 etchings, and 29 etching plates; 15 water colours, 7 drawings, 98 lithographs, and 102 pastel drawings", numerous manuscripts, 80 drawings by Beatrix Whistler, the artist's wife, and "a collection of blue and white china".³

The draft memorandum of Birnie Philip's donation, dated 3 June 1935, contained the clause "The Scheduled property shall never be removed from the buildings of the said University."⁴ Sir Robert Rait (1874-1936), at the time Principal of the University, wanted to reassure himself and pointed out in a letter to the donor that the clause:

prohibits, at any time in the future, our lending one or more of these treasures to, say, a great national exhibition. If this is your considered wish, we accept it readily, and I do not want to suggest in any way your reconsidering it. I want only to make sure that the point has been in your mind.⁵

In the end, the clause remained unchanged. If a similar clause forbidding the lending of Whistler's works for exhibitions elsewhere had been in place immediately after Whistler's death, the major retrospectives of London, Paris and Boston would have shown a very different selection of works. Rait had specifically drawn Birnie Philip's attention to the fact that the university usually sent loans to important exhibitions.⁶ Perhaps Birnie Philip thought that such exhibitions were unlikely to happen anytime soon. She had not always opposed loan exhibitions. In the catalogue for the 1905 Paris memorial exhibition, Léonce Bénédite concluded his foreword reporting that Rosalind Birnie Philip had, "at the wish of Whistler himself, taken the initiative for the present exhibition."⁷ She had lent three paintings and several pastels and drawings to the Boston Memorial Exhibition of the Works of Mr. J. McNeill Whistler, organised by the Copley Society.⁸

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- 2 The portrait was on loan from the Louvre; see Kevin Sharp, 'Pleasant Dreams: Whistler's *Mother* on Tour in America, 1932-4' ch. 4 in Margaret F. MacDonald (ed.), *Whistler's Mother: An American Icon* (Lund Humphries, 2003), pp. 81-99. The ups and downs of Whistler's critical afterlife can also be traced in Robert H. Getscher and Paul G. Marks, *James McNeill Whistler and John Singer Sargent. Two Annotated Bibliographies* (Garland, 1986). The number of publications dedicated to Whistler is considerably lower in the 1920s compared to other decades. YMSM numbers refer to Margaret F. MacDonald and Grischka Petri, *James McNeill Whistler: The Paintings, a Catalogue Raisonné* (University of Glasgow, 2020), <<http://whistlerpaintings.gla.ac.uk>>.
- 3 Dorothy Walton, *Catalogue of the Hunterian Collection of Pictures and of the Works of Art and Personal Memorials of James McNeill Whistler* (University of Glasgow, 1936), p. 14.
- 4 Archives of The Hunterian, University of Glasgow. I am grateful to Patricia DeMontfort, Alicia Hughes and Elena Cooper for their successful efforts to recover unpublished documents relating to Rosalind Birnie Philip's gifts and bequest. For a closer analysis of these archival materials see the article by Alicia Hughes at p. 9 of this Issue.
- 5 Archives of The Hunterian, University of Glasgow.
- 6 See the article by Alicia Hughes at p. 20 of this Issue.
- 7 "Miss Rosalind Birnie Philip ... qui, sur le désir exprimé par Whistler lui-même, a pris l'initiative de la présente Exposition", *Exposition des œuvres de James McNeill Whistler* (Palais de l'École des Beaux-Arts, 1905), p. 10. The catalogue stated (*ibid.* at p. 2) that all paintings, watercolours and pastels "sans indication d'origine appartiennent à la Succession de James Mc Neill Whistler."
- 8 The paintings were *Grey and Silver: La Petite Souris* (YMSM 502), *Grenat et or – le petit cardinal* (YMSM 469) and *Harmony in Red: Lamplight* (YMSM 253), a portrait of her sister



1. Installation view of the Whistler Memorial Exhibition, Copley Society, Boston, 1904 with two loans by Rosalind Birnie-Philip, *Grey and Silver: La Petite Souris* (visible behind the second tree from the left) and *Harmony in Red: Lamplight* as the centrepiece of the wall. Photograph, Glasgow University Library, Sp Coll Whistler PH6/9.

Rosalind Birnie Philip had, however, been critical of the initiatives to organise a memorial exhibition in London. After Whistler's death in 1903, a dispute over the interpretive sovereignty of the artist had broken out.⁹ In particular, the split between Rosalind Birnie Philip and the Pennells had an immediate effect on the London exhibition. Elizabeth Robins Pennell and Joseph Pennell belonged to the group of Whistler's earliest biographers.¹⁰ Since 1900, the couple had regularly met Whistler, who freely shared his reminiscences with them. The Pennells' influential two-volume *Life of James McNeill Whistler* came out in 1908, followed by a tight sequence of revised editions leading in 1911 to a fifth, revised, edition in one volume, which was further revised in the sixth edition of 1919 and the final seventh of 1925. The *Life* established the dominant perspective on Whistler for decades to come. Already during the phase of preparation, Rosalind Birnie Philip made clear that she did not want the Pennells to quote from Whistler's letters. Indeed, the Pennells were not always accurate in their efforts to erect their biographical monument to the man who was in their view one of the greatest artists of all time.¹¹ After his death

Beatrix, Whistler's wife.

9 See Daniel E. Sutherland, *Whistler: A Life for Art's Sake* (Yale University Press, 2014), pp. 343-347.

10 The first biography in book form was Théodore Duret, *Histoire de J. Mc N. Whistler et de son Œuvre* (H. Floury, 1904).

11 Cf. Daniel E. Sutherland, 'Getting Right with Whistler: An Artist and His Biographers', in: Lee Glazer, Margaret F. MacDonald, Linda Merrill and Nigel Thorp (eds), *James McNeill Whistler in Context: Essays from the Whistler Centenary Symposium*, University of Glasgow,

the Pennells were prohibited by Rosalind Birnie Philip from quoting from any of the numerous Whistler letters they had in their possession. Thus they published Whistler's *Life*, not a *Life and Letters*.¹² The underlying disagreements between the Pennells and Birnie Philip, however, dated back much further. Immediately after Whistler's death, Birnie Philip refused to co-operate in any way with the International Society of Sculptors, Painters and Gravers, with which Joseph Pennell was closely associated and whose first president had been Whistler.¹³ The German *Kunstchronik* reported that Whistler's executrix protested against the use of Whistler's signature butterfly in the London catalogue.¹⁴ In general, personal antipathies seem to have played a major role, as a wish for retaining exclusive control over Whistler's legacy. If these feelings were still present in 1935, they are a possible explanation for the restrictions of Rosalind Birnie Philip's gift to the University of Glasgow.

American Precedents: The Freer Gallery of Art and The Frick Collection

At the time of Birnie Philip's gift it was not unusual to make donations with comparably restrictive provisions. Another important collection of Whistler's work remains in Washington, D.C., at the Freer Gallery of Art, today part of the National Museum of Asian Art and the Smithsonian Institution.¹⁵ The Freer Gallery was established after the death of Charles L. Freer (1856-1919). It opened in 1923. Freer had been one of the most important collectors of Whistler's works during the artist's lifetime and shortly thereafter.¹⁶ In the "ironclad conditions"¹⁷ of his bequest, Freer not only prohibited future additions to his American holdings, which he regarded as perfectly complete, but also loans of the works in his collection.¹⁸ Freer conceived his "collection as a coherent, aesthetic unity with artistic integrity of its own."¹⁹ Charles L. Freer and Rosalind Birnie Philip co-operated closely after Whistler's death. Freer, who had been asked by Whistler to serve as executor of the estate but declined, helped Birnie Philip settle Whistler's affairs.²⁰ It is possible that Freer's gift conditions became a model for Rosalind Birnie Philip when she decided to make her own.

2003 (Smithsonian Institution, 2008), pp. 169-182.

12 *Philip v. Pennell* [1907] 2 Ch. 577.

13 Ronald Anderson and Anne Koval, *James McNeill Whistler: Beyond the Myth* (John Murray, 1994), p. 460, speak of "a background of petty obstructionism".

14 Otto von Schleinitz, 'Die Whistler-Ausstellung in London' (1905) 16 *Kunstchronik* col. 353. The *Catalogue of the Whistler Memorial Exhibition* (International Society of Sculptors, Painters and Gravers, 1905) does not contain any butterflies as design elements. The illustrated *édition de luxe* of the catalogue reproduces two drawings (o. p. 20, p. 127).

15 <<https://www.si.edu/museums/freer-gallery>>

16 See Linda Merrill, 'Tokens of Esteem', Introduction of Linda Merrill (ed.), *With Kindest Regards: The Correspondence of Charles Lang Freer and James McNeill Whistler, 1890-1903* (Smithsonian Institution Press, 1995), pp. 13-46.

17 Merrill, above, note 16, p. 40.

18 On selected provisions of Freer's gift see John A. Pope, 'The Freer Gallery' (1969/70) *Records of the Columbia Historical Society* 380-398.

19 Thomas Lawton and Linda Merrill, *Freer: A Legacy of Art* (Freer Gallery of Art, Smithsonian Institution, 1993), p. 186.

20 Merrill, above, note 16, pp. 37-38. See also the article by Alicia Hughes at pp. 18-19 of this Issue.



2. James McNeill Whistler, *Arrangement in Black: Portrait of F. R. Leyland* (YMSM 97), Freer Gallery of Art, Washington, DC (left) and James McNeill Whistler, *Symphony in Flesh Colour and Pink: Portrait of Mrs Frances Leyland* (YMSM 106), The Frick Collection, New York. The reproductions can be viewed in the online *catalogue raisonné* of Whistler's work (www.whistlerpaintings.gla.ac.uk/catalogue/browse/#y106) and at the collections' websites, <https://asia.si.edu/object/F1905.100a-b/> (Freer Gallery of Art) and <https://collections.frick.org/objects/283/symphony-in-flesh-color-and-pink-portrait-of-mrs-frances-l> (The Frick Collection).

Other collections including works by Whistler were and are also bound by collectors' restrictions – for example The Frick Collection in New York City.²¹ Showcasing the collection of Henry Clay Frick (1849-1919), it opened in December 1935, only months after Rosalind Birnie Philip's gift to the University of Glasgow.²² While The Frick Collection has added works to its holdings after the death of its founder, the original collection is to remain intact, and works from it cannot be lent. Frick envisioned “an institution which shall be permanent in character”, and stipulated that the gallery shall “at all times ... be maintained ... in and upon the premises” at 1 East 70th Street.²³ Such restrictions have effects on research, scholarship and the curation of themed exhibitions. Important aspects of Whistler's oeuvre will, under these circumstances, never be highlighted by the physical vicinity of key works. For example, the two portraits of Frederick R. Leyland and his wife, Frances Leyland (above, Fig. 2), two extremely

21 <https://www.frick.org/>.

22 An anthology of the contemporary press reviews is Frick Collection (ed.), *'Legacy of Beauty'. The Frick Collection 1935* (Frick Collection, 1995).

23 Part of Frick's Last Will and Testament are quoted in George Harvey, *Henry Clay Frick: The Man* (Charles Scribner's Sons, 1928), pp. 352–353. See also Esmée Quodbach, ““I want this collection to be my monument”: Henry Clay Frick and the Formation of The Frick Collection” (2009) 21 *Journal of the History of Collections*, pp. 229-240.

important protagonists of Whistler's life in the 1870s, can never be shown together. One portrait is part of The Frick Collection, the other belongs to the Freer Gallery of Art.

Restrictions by Collectors: The Case of the Barnes Collection

Interestingly, the above-mentioned loan restrictions on Whistler's works all originate with collectors and the estate, not with the artist himself. They are expressions of positions of ownership. They aim at preserving the integrity of an arrangement, of a collection, of a compilation. The ownership of a piece of cultural heritage comes with a certain degree of public responsibility. The power of property, in William Blackstone's classic definition "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe",²⁴ is moderated by the immaterial, symbolic character of works of art. They are not merely an external thing. When it became known that the Japanese collector Ryōei Saitō (1916-1996) had expressed a wish to be cremated alongside Van Gogh's *Portrait of Dr Gachet*, which he had acquired in 1990 for \$82,500,000, nervousness spread inside the art world until the emerging legend was rectified by the collector himself. Saitō had made a joke about saving on inheritance tax.²⁵

Access to works of art in public collections can be restricted by gift provisions, with effects that are comparable to a mortgage or a similar burden. At times, they can put the gift in the shadow, which constitutes a problem in the age of attention economy. The prominent case of the Barnes Collection is indicative. The extensive art collection, which is today based in Philadelphia, was assembled by the pharmaceutical entrepreneur Albert C. Barnes (1872-1951) during the first half of the twentieth century. Barnes made his fortune with the development and commercialisation of Argyrol, an antiseptic based on solutions of mild silver protein. He sold the pharmaceutical factory in 1929, just a few months before the collapse of the stock market.²⁶ The Barnes Collection's main focus is modern European paintings with numerous works by Auguste Renoir, Paul Cézanne, Henri Matisse, Pablo Picasso, Amadeo Modigliani and Chaim Soutine. Barnes had established the Barnes Foundation in 1922 through an Indenture of Trust as an educational institution.²⁷ After completion of the gallery and administration buildings in Merion, Pennsylvania, it opened in 1925. Influenced by the philosopher and educational reformer John Dewey (1859-1952), Barnes had conceived his Foundation as a school rather than

24 William Blackstone, *Commentaries on the Laws of England. Book the Second* (Clarendon Press, 1766), p. 2.

25 'Art Collector: "Burial" Plan a Jest', *Los Angeles Times*, 15 May 1991, <www.latimes.com/archives/la-xpm-1991-05-15-ca-1893-story.html>.

26 William Schack, *Art and Argyrol* (2nd edn, A.S. Barnes & Co., 1963), p. 209, mistakenly states the year as 1928; Howard Greenfield, *The Devil and Dr. Barnes: Portrait of an American Art Collector* (Viking Press, 1987), pp. 149-150; John Anderson, *Art Held Hostage: The Story of the Barnes Collection* (W. W. Norton, 2003), p. 36; Mary Ann Meyers, *Art Education, and African-American Culture: Albert Barnes and the Science of Philanthropy* (Transaction Publishers, 2004), p. 165.

27 A transcript of the document can be found on <www.barneswatch.org/main_bylaws.html> (saved to archive.org). For monographs on Barnes's life and the fate of his collection see Schack, above, note 26; Greenfield, above, note 26; Anderson, above, note 26; Meyers, above, note 26; Neil L. Rudenstine, *House of Barnes: The Man, the Collection, the Controversy* (American Philosophical Society, 2012).

a museum. (Dewey's book *Art as Experience*, published in 1934, was dedicated "To Albert C. Barnes in Gratitude"). While Barnes regularly gave his factory workers tours of the teaching collection and even displayed paintings in his factory,²⁸ access to the Collection was limited for members of the art establishment. Barnes famously rejected applications for visits with sarcastic letters, signed in the name of his pet dog, Fidèle.²⁹ Since most visitors failed to live up to Barnes's expectations and proved unable to look at the Collection in the same way as the collector, the Foundation began to close its doors to more and more people. In addition, the Foundation's investment strategy failed as a result of the high inflation rates of the 1970s and 1980s. Neil L. Rudenstine points out two further important factors in the Barnes Foundation's economic decline: the ban on social events at the Foundation prevented the formation of a committed community of friends and donors, and sources of earned revenue were absent.³⁰ To solve its financial crisis in the 1990s, the Barnes Foundation sent a selection of more than 80 works on an eighteen-month exhibition tour, which served to raise money for renovations, travelling to the National Gallery of Art, Washington, D.C., Musée d'Orsay, Paris, the National Museum of Western Art, Tokyo, the Kimbell Art Museum, Fort Worth, Texas, the Art Gallery of Ontario, the Philadelphia Museum of Art, and the Haus der Kunst in Munich. The tour provoked allegations of a major breach in its founding charter, as Barnes had stipulated that the paintings should not be moved from their positions on the wall.³¹ The provision in the Indenture of Trust reads:

After Donor's death no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of except that if any picture passes into a state of actual decay so that it no longer is of any value it may be removed for that reason only from the collection.³²

In his analysis of the provisions, Heinrich Schweizer aptly understands them as "a frozen aesthetic manifesto from another time."³³

When the Foundation faced imminent insolvency in 2002, friendly art foundations started a rescue operation to raise \$150,000,000, on condition that the Barnes would undertake to relocate its galleries to downtown Philadelphia. Schweizer points out that such a relocation clearly ran counter to Barnes's original intentions, but that the Indenture contained a provision on the possible relocation of the institution to Philadelphia if:

said collection [was] ever ... destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures.³⁴

The decision to allow the Barnes to move to Philadelphia was carefully considered by Judge Stanley Ott in his December 2004 opinion, also quoted by Rudenstine:

28 Meyers, above, note 26, p. 24.

29 Lindsay Edouard, 'Antisepsis with Argyrol, Acrimony and Advocacy for African Art' (2011) 15 *African Journal of Reproductive Health / La Revue Africaine de La Santé Reproductive* pp. 12-13. See also Schack, above, note 25, ch. 13; Rudenstine, above, note 27, pp. 126-130.

30 Neil L. Rudenstine, 'Albert Barnes and His Foundation: Three Paradoxes' (2014) 158 *Proceedings of the American Philosophical Society* 123-124; see also Rudenstine, above, note 27, pp. 151-155.

31 Edouard, above, note 29, p. 13.

32 Transcript of the document, <www.barneswatch.org/main_bylaws.html>.

33 Heinrich Schweizer, 'Settlor's Intent vs. Trustee's Will: The Barnes Foundation Case' (2005) 63 *Columbia Journal of Law and the Arts* 64.

34 *Ibid.*, 65; see also Rudenstine, above, note 27, p. 171.

As for the prospects of generating additional revenue through development, we credited the opinions of the Foundation's witnesses that maintaining the *status quo* will neither generate excitement among potential benefactors nor attract the all-crucial "alpha donors" to the cause. ... Regarding options for increasing the income produced by the day-to-day operations at Merion, no solid solutions surfaced. The dream of augmented admissions (with the attendant increases in shop sales and parking fees) was shown, during these hearings, to be as elusive as ever.³⁵



3. Installation view of room 18, the Barnes Foundation, Merion, Pennsylvania, 1942. Photograph, Gottscho-Schleisner, Inc., Library of Congress LC-G612- 42795.

The local residents, the township government and the vigilant zoning board had for decades brought the Barnes Foundation before the local courts. Expansive museum development and higher visitor numbers would have been effectively stymied by the institution's neighbours.³⁶ The court followed "a pragmatic approach to ensuring that the settlor's primary goal be achieved" and concluded that, under the specific circumstances, "relocation may be permitted if necessary to achieve the settlor's ultimate purposes".³⁷ This is not the place to assess the complex intricacies of the Barnes case. For the purposes of this article, it is sufficient to conclude that original intentions can become difficult to follow under fundamentally changed circumstances, similar to a frustration of contract.

35 Rudenstine, above, note 30, p. 126, with edits. The original document, here quoted, Court of Common Pleas of Montgomery County, Pennsylvania, Orphans' Court Division, n° 58,788, 13 Dec. 2004, was deleted from its original web source (<http://www.barneswatch.org:80/pdf/12_13_04.pdf>) but is archived at <archive.org> (snapshot from 12 April 2005).

36 Rudenstine, above, note 30, p. 126.

37 The Barnes Foundation, No. 58,788 13 (Pa. Com. Pl. Jan. 29, 2004), pp. 23–24. The document was deleted from its original web source (<http://www.barneswatch.org:80/pdf/ott_1_30_04.pdf>) but is archived at archive.org (snapshot from 15 June 2004).

The Barnes case provides an extreme example of such a frustration of original intentions that required the institutional trustees of the founder to take new directions in order to save what could be saved of the original idea – Rudenstine speaks of a reanimation.³⁸ If The Hunterian felt that its public mission would be undermined by Rosalind Birnie Philip's gift conditions to a degree where the donor's own intentions would be compromised, the moral case for a re-assessment of the gift would be given.

Artistic Intentions? The Case of the Turner Bequest

Are restrictions imposed by artists different in this regard? Gail Levin vividly describes the breaches of trust in the handling of the bequests of Edward and Josephine Hopper, in particular by the Whitney Museum of American Art: lackadaisical documentation, obfuscated provenances, sales of works from the estates and the destruction of many works by Josephine.³⁹ Levin sees the damage not only for the Hoppers' artistic reputation but also for the accessibility of their works and, ultimately, for the public.⁴⁰ This is a combination of factors, which is relevant to most cases of artistic bequests and gifts. Perhaps the example of the Turner Bequest is the most prominent. J.M.W. Turner (1775-1851) had bequeathed his oeuvre to the nation.⁴¹ One of the best-known parts of this will are the paragraphs outlining the curatorial framework for the exhibition of his paintings *Dido Building Carthage* and *Sun Rising through Vapour*:

Also I give and bequeath unto the Trustees and Directors for the time being of a certain Society or Institution called the "National Gallery" or Society the following pictures or paintings by myself namely Dido building Carthage and the picture formerly in the Tabley Collection. To hold the said pictures or paintings unto the said Trustees and Directors of the said Society for the time being In Trust for the said Institution or Society for ever subject nevertheless to for and upon the following reservations and restrictions only that is to say I direct that the said pictures or paintings shall be hung kept and placed that is to say Always between the two pictures painted by Claude the Seaport and Mill and shall be from time to time properly cleaned framed preserved repaired and protected by the said Society ...⁴²

Contrary to Lady Eastlake's famous assessment that this was a "very stupid will – that

38 Rudenstine, above, note 27, p. 195.

39 Gail Levin, 'Artists' Estates: When Trust Is Betrayed', ch. 9 in Elaine A. King and Gail Levin (eds), *Ethics and the Visual Arts* (Allworth Press, 2006), pp. 125-141.

40 *Ibid.*, p. 139.

41 On Turner's will with its protracted history of codicils and revisions see Nicholas Richard David Powell, 'Will and Bequest' in Evelyn Joll, Martin Butlin and Luke Herrmann eds, *The Oxford Companion to J.M.W. Turner* (Oxford University Press, 2001), pp. 382-384. A transcription of the will is documented in Walter Thornbury, *The Life of J. M. W. Turner, R.A.* (Hurst & Blackett, 1862) vol. 2, pp. 409-422.

42 *Ibid.*, pp. 410-411, missing punctuation as from the printed transcript. 'Dido building Carthage' is still known under this title (National Gallery inv. no. NG498). The 'picture formerly in the Tabley Collection' is *Sun Rising through Vapour* (NG479). Turner had bought it back at the sale of the collection in 1827. The two Claude paintings are *Seaport with the Embarkation of the Queen of Sheba* (NG14) and *The Marriage of Isaac and Rebecca*, known as *The Mill* (NG12).

of a man who lived out of the world of sense and public opinion”,⁴³ Turner claims a prominent position within art history, literally next to Claude (c.1600-1682), the eminent French landscape painter. In his will, Turner evidently wants to ensure that this position will not cease to be publicly communicated by the National Gallery of Art. This goes beyond regulations derived from a collector’s position. Although the two Claude paintings share the provenance with the Turners, the artist is using his position of ownership to establish a specific context for his own work. The move can be understood by us today as akin to an extension of the moral rights of the artist (as we understand those rights today), aiming to safeguard a kind of art-historical integrity of the work in question. While moral rights are perpetual in France,⁴⁴ in other jurisdictions they end with the copyright term. Also, the scope of moral rights is not uniformly regulated. If proven to be part of the artist’s intentions, site specificity forms part of the moral rights in France.⁴⁵ In Turner’s case, the artist’s will to display two of his paintings in the specific art-historical context of Claude’s landscapes is documented in the best possible way. In the UK today, authors have the right not to have their work “subjected to derogatory treatment”, which the 1988 Copyright, Designs and Patents Act further explains as “addition to, deletion from or alteration to or adaptation of the work”.⁴⁶ This is commonly understood to mean interfering with the internal structure of a work.⁴⁷ It has been characterised as “unexpectedly narrow”.⁴⁸ Reaching further than the internal integrity of a work of art, Article 6bis of the Berne Convention gives the author the right to object to “other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation”. This includes placing a work of art in a new context.⁴⁹ The conclusion has been put forward that the UK has failed to implement the Berne Convention in this respect.⁵⁰

After the Second World War, the National Gallery no longer showed the two Turners next to the Claudes, claiming that “the moral issue raised by the terms of Turner’s will is no longer in question”. The paintings were reunited in 1968.⁵¹ It can be argued that an art gallery is not only displaying works of art like a group of assets but also presenting

43 Charles Eastlake Smith (ed.), *Journals and Correspondence of Lady Eastlake*, 2 vols (John Murray, 1895), vol. 1, p. 273, on the occasion of Turner’s funeral, entry of 2 Jan. 1852.

44 Article L. 121-1 Code de la propriété intellectuelle: “Il est perpétuel, inaliénable et imprescriptible.” Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006), 8.19, comments that in practical terms, perpetuity may be an overstatement but it would be true to state that in France, moral rights are of indefinite duration.

45 Adeney, above, note 44, 8.81.

46 CDPA 1988, s. 80. Turner died in 1851, and the first Act of Parliament protecting paintings (which included a precursor to ‘moral rights’ in section 7) was not passed until 1862 and applied only to paintings that had not been ‘sold or disposed of’ before July 1862: Fine Arts Copyright Act 1862.

47 Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property Law* (6th edn, Oxford University Press, 2022), p. 315; Gillian Davies and Kevin Garnett, *Moral Rights* (2nd edn, Sweet & Maxwell, 2016), 8-022.

48 Adeney, above, note 44, 14.63.

49 Bently, Sherman, Gangjee and Johnson, above, note 47, p. 315.

50 Davies and Garnett, above, note 47, 8-023.

51 Assistant Keeper Cecil Gould’s letter to Mr Noel Arnott, responding to his query about why the Turners were no longer hung with the Claudes, 1954. See the article on the Turner Bequest on the National Gallery’s website, <www.nationalgallery.org.uk/about-us/history/the-turner-bequest>.

and curating historical context, discourse and information. Whereas the decision to show the Turners next to the Claudes may no longer be morally compelling, it can still be the ethically better-founded option.



4. Installation view of Turner's painting *Dido building Carthage* (left) next to Claude's *Seaport with the Embarkation of the Queen of Sheba* (right) at the National Gallery, London. Photograph, 2015, Grischka Petri.

While the curatorial pairing of Claude and Turner was relatively easy to realise, the artist's wish that his pictures should be kept together and housed in a room or rooms to be called "Turner's Gallery"⁵² remains a matter of discussion. In the words of Nicholas R.D. Powell, "Successive attempts by governments, galleries, and curators to honour Turner's wishes and work (as they would put it) or fulfil the nation's obligations (as critics would say) have met mixed receptions."⁵³ It was not until 1861 that Turner's finished paintings were finally placed at the National Gallery in Trafalgar Square, and while most of the Turner Bequest is now housed in the Clore Gallery at Tate Britain, the issue of an independent Turner Gallery has repeatedly been raised.⁵⁴

The Hypothetical Whistler

In contrast to Turner, Whistler did not leave a will outlining a gift to the nation or a collection. During his own lifetime, the collection that came closest to such an endeavour was Freer's. His home was compared to a museum already during his lifetime, and it was known beforehand that he would give his collection to the American nation.⁵⁵ Arguably, Whistler acted as a kind of consultant. Artist and collector shared an interest in the

52 Turner's will, in Thornbury, above, note 41, p. 415.

53 Powell, above, note 41, p. 382.

54 Selby Whittingham and The Independent Turner Society have tirelessly campaigned for such an institution.

55 Leila Mechlin, 'The Freer Collection of Art: Mr. Charles L. Freer's Gift to the Nation, to be Installed at Washington' (1907) 73 *The Century Magazine*, 357-370.

success of the collection.⁵⁶ He famously wrote to Freer in 1899: “Meanwhile I think I may tell you without the least chance of being misunderstood, that I wish you to have a fine collection of Whistlers!! – perhaps The collection –”⁵⁷ The special correspondent of the *Sunday Star* (Washington) mused in 1906 that:

an understanding was arrived at between the two men that Mr. Freer should have certain of the Whistler paintings on the condition, either expressed or implied, that ultimately they should be placed in a gallery open to the public.⁵⁸

With the collaboration between Whistler and Freer, the artist took part of his estate management in his own hands.

On several occasions, Whistler articulated his view on museums, collectors and ownership. By the famous printer’s error in the second edition of *The Gentle Art of Making Enemies*, the statement from the catalogue of the 1892 retrospective at Goupil’s in London was changed from “Kindly lent by their owners” into “Kindly lent their owners”.⁵⁹ In a kindred spirit, Rosalind Birnie Philip’s restrictions in her 1935 gift served to exercise control over the selected works of art. The principle was confirmed when in 1954 Birnie Philip made a second gift to the University of Glasgow, of some 6,000 letters, ledgers, books, catalogues and press cuttings. Her bequest, in 1958, included the residue of Whistler’s studio, and more paintings and works on paper, manuscripts and books, and a huge collection of prints. The bequest did not include a clause preventing loans for exhibitions.

Rosalind Birnie Philip’s donation memorandum of 1935 was clear. The works may never leave the buildings of the University. But what if the University acquired a building in another place, or a satellite institution overseas? A museum is constantly called upon to measure its values and ethics against reality.⁶⁰ Whistler was proud of the honorary law degree awarded to him by the University of Glasgow,⁶¹ but that does not legitimise a legalistic interpretation of his artistic and curatorial intentions. In the necessary ‘archaeology of intentions’, wishes, plans and interests have to be constantly balanced against the field of options, considering efficiency and changing circumstances. What might the hypothetical will of an artist or donor have been, had she or he known of an altered set of conditions? Whistler would have agreed that it was preferable not to show his work in England. After Arthur Studd acquired *Symphony in White, No. 2: The Little*

56 Grischka Petri, *Arrangement in Business: The Art Markets and the Career of James McNeill Whistler* (Olms, 2011), p. 518.

57 James McNeill Whistler to Charles L. Freer, [29 July 1899], G UW 03196. G UW numbers indicate *The Correspondence of James McNeill Whistler, 1855-1903*, edited by Margaret F. MacDonald, Patricia de Montfort and Nigel Thorp, University of Glasgow, 2010, <www.whistler.arts.gla.ac.uk/correspondence>.

58 ‘Facts Concerning the Freer Art Collection’, *Sunday Star*, Washington, D.C., 11 March 1906, p. 10.

59 James McNeill Whistler, *The Gentle Art of Making Enemies*, (2nd edn, W. Heinemann, 1892), p. 293. Joseph Pennell and Elizabeth Robins Pennell, *The Life of James McNeill Whistler*, 2 vols (J.B. Lippincott, 1908), vol. 2, p. 126, report of five editions that were printed with this ‘statement’.

60 Johanne Landry, ‘Ethics and Public Programs’ ch. 17 in Gary Edson (ed.), *Museum Ethics* (Routledge, 1997), pp. 225-236 (at p. 226).

61 See his letter of thanks, James McNeill Whistler to Robert Herbert Story, 20 April 1903, G UW 01692.

White Girl (YMSM 52) in 1893, Whistler asked the painting's new owner if he "would promise me that, if ever you were to be persuaded to leave it away from your own family, you would never present it to any Gallery in England."⁶² Studd bequeathed it to the Tate Gallery in 1919, barely sixteen years after Whistler's death. Was it unethical to override the known intentions of the artist? Sometimes these intentions on their part are neither compelling nor ethically justified.

The provisions of Rosalind Birnie Philip's gift have been re-interpreted flexibly before. A few impressions of the mezzotint *The Model* (G.248) have been printed from the etching plates, contrary to the gift memorandum.⁶³ Some plates such as *Sheep* (G.487) remain unfinished and unprinted, but digital scanning technology made it possible to project an impression by inverting the colours of the flatbed scan for the *catalogue raisonné*. Technological progress can open new knowledge paths that were inconceivable at the time of a restricting gift provision. Restrictions are easier to set aside if they hamper research and prevent insights and findings. The aim of Birnie Philip's donation was that Whistler's work should be given a fitting environment for the study of his art. She gave the collection "for the use and benefit of the said university".⁶⁴ To research Whistler's work is part of the said university's main purpose.

The question of loans from the collection is not a given part of these considerations. It is an open question whether the University would be sued if it changed its lending rules, a decision presumably to be taken by the University Court. Section 9 of the National Heritage (Scotland) Act 1985 allows national museums to deviate from lending conditions, effectively breaking the will of a donor after 25 years. This is not immediately applicable to other cultural institutions but has already set a standard that was followed, when the lending rules of the Burrell Collection in Glasgow were altered.⁶⁵ The University of Glasgow could attempt to follow that path. A deviation from the restrictions of Rosalind Birnie Philip's gift would, however, set a precedent that might deter future donors. Birnie Philip confirmed her decision when asked about the prohibitive clause. That makes for a stronger case to keep the restrictions, because it voids the argument that she was unaware of the consequences. If, however, new insights were to be expected from a loan, a case for an exception could be made. Examples that come to mind are technical laboratories for research in other museums or cities, or the necessity to have works of art physically present for purposes of comparison, for example an analysis of canvas structures on the backs of paintings or of frames or papers.

If an artist's intentions can override those of an owner, with the weight of a moral right in kind, they still have to be reasonably established. Returning to Whistler's own

62 James McNeill Whistler to Arthur H. Studd, 21 Jan. 1894, GUV 0271.

63 G indicates Margaret F. MacDonald, Grischka Petri, Meg Hausberg and Joanna Meacock, *James McNeill Whistler: The Etchings, a Catalogue Raisonné* (University of Glasgow, 2012), <<http://etchings.arts.gla.ac.uk>>. Nathaniel Sparks printed a number of Whistler's etchings in 1931 with the consent of Rosalind Birnie Philip; see Martin Hopkinson, 'Nathaniel Sparks's Printing of Whistler's Etchings' (1999) 16 *Print Quarterly* 4, 340–352.

64 Memorandum, Archives of The Hunterian, University of Glasgow.

65 Burrell Collection (Lending and Borrowing) (Scotland) Act 2014. The Burrell Collection is a Glaswegian museum housing the art collection of Sir William Burrell and Constance, Lady Burrell. On the case see Ian McCulloch and Jessica Koravos, 'The Burrell Showcase – The Public Interest and Compliance with Bequests' (1998) III *Art Antiquity and Law* 193–200, and Duncan M. Dornan, 'Legacy of the Burrell Lending Code', at p. 45 *et seq.* of this Issue.

hypothetical intentions, any conclusion must necessarily be fairly inconclusive, since there remain so many unresolved variables in the equation. *Philip v. Pennell* raised doubts whether an inquiry into intention was a satisfactory test.⁶⁶ Writing the preface for their *Whistler Journal*, published in 1921, the Pennells confess to still being in doubt about “the master’s wishes”.⁶⁷ Not much has changed since this statement more than one hundred years ago. Nonetheless, a parallel to Albert C. Barnes comes to mind. Barnes was keen to preserve the arrangement of paintings as displayed in his Foundation. No such arrangement is the subject of Birnie Philip’s gift to the University of Glasgow. However, Whistler himself was often preoccupied about the display of his works at a loan exhibition. He would sketch how his paintings were shown, for example *Arrangement of paintings at the ISSPG* (M.1539).⁶⁸ Surviving photographs of exhibition arrangements give further evidence. Some of these arrangements are Whistlerian in concept, others tell a story of contemporary exhibition display. It would make sense to allow the historical reconstruction of such arrangements in the framework of a loan exhibition dedicated to Whistler. By the 1890s, Whistler had established a reliable network of dealers, galleries and exhibition venues. He managed to establish his constant visibility at a growing number of national and international exhibitions.⁶⁹ After Whistler’s death and the three memorial exhibitions, this flurry of exhibiting activity decreased. A living artist usually invests more to obtain a reward that constitutes a token of the attention economy than his estate. However, it is impossible to tell whether it is the ethically right thing to set up a time capsule for a collection or not. The right decision is the one that stands the test of time. If it does not, any reassessment cannot happen without a diligent archaeology of intentions. In this regard, Rosalind Birnie Philip’s intentions were clearly communicated. Whistler’s own intentions remain as vague as a Nocturne.

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66 *Philip v. Pennell*, [1907] 2 Ch. 577 at 588 per Kekewich J.

67 Elizabeth Robins Pennell and Joseph Pennell, *The Whistler Journal* (J.B. Lippincott, 1921), p. v.

68 M refers to Margaret F. MacDonald, *James McNeill Whistler. Drawings, Pastels and Watercolours. A Catalogue Raisonné* (Yale University Press, 1995). The basic information from this catalogue has been integrated into the online edition of the *catalogue raisonné* of Whistler’s paintings, above, note 2.

69 Petri, above, note 56, pp. 553-557.

**DONOR RESTRICTIONS AND WHISTLER’S
PORTRAIT OF LADY EDEN:
REAPPRAISING *WHISTLER V. EDEN* (1897)**

Elena Cooper*

Introduction

The University of Glasgow, as Alicia Hughes and Grischka Petri have explained,¹ holds one of the pre-eminent collections of the work of the painter and print-maker James McNeill Whistler (1834-1903). This includes oil paintings, drawings, watercolours, pastels and impressions of etchings and lithographs, in addition to his papers and studio contents, gifted to the University in 1935 and 1958 by Whistler’s ward and heir Rosalind Birnie Philip (1873-1958). One of the oil paintings – *Brown and Gold: Portrait of Lady Eden* (1894-5)² – has remained in the vaults of The Hunterian, University of Glasgow, since it was gifted by Birnie Philip to the University in 1935; it has been out of public view for over a century and only briefly brought into the gallery space.³ *Portrait of Lady Eden* was last publicly displayed in the final years of the nineteenth century, in the law courts in Paris, as evidence in legal proceedings: a case brought by the commissioner of the painting, Sir William Eden, against Whistler. The case, *Whistler v. Eden*, decided in December 1897 by the Paris Court of Appeal, and upheld by the Cour de Cassation (the French Supreme Court) in March 1900, is known by copyright lawyers today as significant to the development of the author’s moral rights under French law. Different aspects of the case inform gallery practice in Glasgow: at The Hunterian, the case is understood today to underpin Birnie Philip’s wishes that there would be a perpetual restriction on the painting’s public exhibition. This article revisits the history of the

1 See their articles published in this Special Issue at pp. 9 and 55.

2 Accession Number: GLAHA 46356. For more details about the painting, see ‘YMSM 408, Brown and Gold: Portrait of Lady Eden’ in Margaret F. MacDonald and Grischka Petri, *James McNeill Whistler: The Paintings, a Catalogue Raisonné*, (University of Glasgow, 2020), website at <<http://whistlerpaintings.gla.ac.uk>> accessed Oct. 2022, and Andrew McLaren Young, Margaret F. MacDonald, Robin Spencer and Hamish Miles, *The Paintings of James McNeill Whistler* (Yale University Press, 1980), no. 408, p. 182 (Text volume) and Plate 271 (Plates volume).

3 See further below, text following note 54 below.

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painting and reappraises the decision in *Whistler v. Eden* for the purpose of casting new light on Birnie Philip's intentions with regard to this specific painting, and for opening up the possibility of the display of the painting today in Glasgow by The Hunterian.

1. '*Brown and Gold: Portrait of Lady Eden*'



Brown and Gold – Portrait of Lady Eden by James Abbott McNeill Whistler (1834-1903)
Image courtesy of The Hunterian, University of Glasgow.

What story lies behind Whistler's *Portrait of Lady Eden*? In 1892, Sir William Eden (1849-1915), a wealthy baronet and landowner, expressed that he would like Whistler to paint his wife Lady Sybil Frances Eden (1867-1945).⁴ Sir William was an art collector and the owner of Whistler's oil painting *The Seashore*.⁵ Whistler initially said he would charge 500 guineas, which Sir William thought to be too much.⁶ Later Whistler changed his mind and said he would agree to paint Lady Eden for between 100 and 150 pounds.⁷ Lady Eden first sat for the portrait in Paris in January 1894 in Whistler's studio at rue Notre-Dame-des-Champs. On 14 February 1894, Sir William saw the painting in Whistler's studio and, as he was "completely satisfied" with the painting, he sent a

4 Sir William Eden's wish was communicated to Whistler in 1892 through the London dealer D.C. Thompson. Sir William Eden was the second son of the sixth Baronet. He succeeded his father in 1873 and lived at Windlestone, Ferry Hill, County Durham. He was also an amateur artist, a huntsman and achieved the rank of Colonel in the army. Lady Eden was the daughter of Sir William Grey, a former Lieutenant Governor of Bengal and Governor of Jamaica. She married Sir William Eden in 1886. See further Young, Macdonald and Miles, above, note 2, p. 182 and 'YMSM 408: Brown and Gold: Portrait of Lady Eden' in MacDonald and Petri, above, note 2.

5 Young, Macdonald and Miles, above, note 2, p. 150. It is not specified when this picture was purchased.

6 See further, 'Provenance' in MacDonald and Petri, above, note 2.

7 See further, 'History' in Young, Macdonald and Miles, above, note 2, p. 182.

cheque to Whistler for 100 guineas (under cover of a humorous note referring to the fact that their meeting took place on St Valentine's day).⁸ Whistler accepted the cheque, but kept the painting and wrote to Sir William as follows:

I have your Valentine –

You really are magnificent! – and have scored all round –

I can only hope that the little picture will prove, even slightly worthy of all of us – and I rely upon Lady Eden's amiable promise to let me add the few last touches we know of – She has been so courageous and kind all along in doing her part.⁹

Eden then travelled to India on a sporting tour, and while he was overseas, Whistler sent the painting to an exhibition in Paris, at the Société Nationale des Beaux-Arts, where it was exhibited as '*Brun et or; – Portrait de Lady E.*'¹⁰

When Sir William returned from India, he demanded delivery of the painting, which was communicated to Whistler through Eden's lawyers on 24 October 1894.¹¹ Whistler refused to deliver the painting to Eden and, acting through his lawyers, on 9 November 1894, sought to return the money which Eden had paid him.¹² Whistler's position was that, in returning the money, he was not obliged to deliver the painting to Eden. Sir William's lawyers did not accept Whistler's cheque.¹³ Then, in November 1894, Eden started legal proceedings against Whistler in Paris, for delivery of the painting. The case was heard by the Tribunal civil de la Seine in February 1895, by which time Whistler had painted out the face and the figure of Lady Eden, and painted, over the top, the portrait of another sitter – Margaret Curzon Hale (1862-1948)¹⁴ – and added a pot of flowers to the right of the sitter. When the case was decided by the Court, Mrs Hale is believed to have sat beside Whistler, wearing the brown costume in which she had posed for Whistler.¹⁵

8 J.M. Whistler, *Eden Versus Whistler: The Baronet and the Butterfly: A Valentine with a Verdict* (Paris, Louis Henry May, 1899), pp. 8-9. These were the facts presented to the Paris Court of Appeal in legal proceedings in December 1897.

9 Letter J.M. Whistler to Sir William Eden, 14 Feb. 1894, No. 02688, in Margaret F. MacDonald, Patricia de Montfort and Nigel Thorp (eds) *The Correspondence of James McNeill Whistler Including the Correspondence of Anna McNeill Whistler, 1829-1880 edited by Georgia Toutziari* (University of Glasgow, 2003-2010), website at <<http://whistler.arts.gla.ac.uk/correspondence/>> accessed Oct. 2022.

10 See 'Exhibitions' in MacDonald and Petri, above, note 2, website at <<http://whistlerpaintings.gla.ac.uk/>>, accessed Oct. 2022.

11 Letter from Messrs Sewell & Maugham to J.M. Whistler, dated 24 Oct. 1894, No. 05409, in MacDonald, de Montfort and Thorp, above, note 9,

12 Letter from Messrs George & William Webb to Messrs Watkins, Baylis and Co., dated 9 Nov. 1894, No. 06212, in MacDonald, de Montfort and Thorp, above, note 9.

13 Letters from Messrs George & William Webb to Messrs Watkins, Baylis and Co., dated 9, 14 and 15 Nov. 1894, Nos. 06212-06214, in MacDonald, de Montfort and Thorp, above, note 9 (eds) *The Correspondence of James McNeill Whistler* (University of Glasgow, 2003-2010), website at <<http://whistler.arts.gla.ac.uk/correspondence/>> accessed Oct. 2022.

14 Margaret Hale was a graduate of Harvard and attended the Ecole des Beaux Arts in Paris for four years. She married the American architect Herbert Dudley Hale. See 'Margaret Curzon Hale' in MacDonald and Petri, above, note 2.

15 'Provenance' in 'YMSM 408: Brown and Gold: Portrait of Lady Eden' in MacDonald and Petri, above, note 2, referring to Letter from J.M. Whistler to B. Whistler, 3 March 1895, No. 06626, in MacDonald, de Montfort and Thorp, above, note 9.

The Court delivered judgment on 20 March 1895, in Sir William's favour: Whistler was ordered to deliver the portrait to Sir William, on the grounds that it was his property, to refund the 100 guineas paid for it and also to pay damages to Sir William in the amount of 1,000 francs with interest.¹⁶ Whistler appealed to the Paris Court of Appeal, which decided the case in Whistler's favour in December 1897, and that decision was upheld by the Cour de Cassation in March 1900 (and these decisions are discussed in detail at Section 3 below). In April 1900 Eden was ordered to pay Whistler's costs before the Cour de Cassation.¹⁷ In the interim (before the rulings of 1900, but after the Paris Court of Appeal ruling), Whistler reported to Birnie Philip, that he was sandpapering the picture down to reveal Lady Eden again:

I have been sandpapering it down all the afternoon... the more I scrape off, the more the original comes through! And I don't think the whole thing ever looked so like Lady Eden before, dress & all!!¹⁸

Whistler also published, in 1899, the full transcript of the Court of Appeal proceedings, together with a humorous preface and résumé, as *Eden Versus Whistler: The Baronet and the Butterfly: A Valentine with a Verdict*.¹⁹ *Portrait of Lady Eden* remained in its sandpapered-down state in Whistler's possession during his lifetime, and then passed on his death in 1903, with the rest of his estate, to his ward Rosalind Birnie Philip.

2. Rosalind Birnie Philip and the University of Glasgow

Birnie Philip, as noted above,²⁰ gifted *Portrait of Lady Eden* to the University of Glasgow in 1935, as part of a larger donation of works by Whistler to the University of Glasgow. The schedule to the memorandum of gift of 1935, which lists the property to be gifted, includes the painting alongside the other oil paintings to be donated, and refers to it as the 'Destroyed Portrait of Lady Eden'.²¹ The painting, therefore, is subject to the more general restrictions imposed by Birnie Philip in the memorandum of gift (explored by Alicia Hughes and Grischka Petri elsewhere in this issue): it "shall never be removed from the buildings of the ... University".²² However, there is no mention in the memorandum of any additional restrictions applying specifically to *Portrait of Lady Eden*.

A review of archival material held by the University of Glasgow Library, suggests that any such restriction was introduced in 1936, after the memorandum of 1935 was concluded but before the oil paintings were transferred to the University. In February

16 The details of the judgment are contained in the statement of appeal presented to the Paris Court of Appeal in Dec. 1897, which are reproduced in Whistler, *The Baronet and the Butterfly*, above, note 8 at p. 21.

17 *Eden v. Whistler*, Cour de Cassation, 14 March 1900, Recueil Sirey 1900, 1re partie, pp. 489-90 cited in 'Provenance', in MacDonald and Petri, above, note 2. See also Young, Macdonald and Miles, above, note 2 at p. 182.

18 Letter from J.M. Whistler to R. Birnie Philip dated 1 Nov. 1899, GUL BP II Res 19/143, quoted in Young, Macdonald and Miles, above, note 2 at p. 182.

19 J.M.W. Whistler, *Eden Versus Whistler: The Baronet and the Butterfly: A Valentine with a Verdict* (Paris, Louis Henry May, 1899).

20 See Alicia Hughes, above, p. 9 *et seq.* of this Issue.

21 'List of Oil Paintings', No. 40, in memorandum as to gift of certain personal chattels by Miss Rosalind Birnie Philip to the University of Glasgow dated 3 June 1935, The Hunterian's archive, Glasgow (hereafter, 1935 memorandum).

22 1935 memorandum, p. 2, para. 4.

1936, Freshfields, Leese & Munns solicitors, acting for Birnie Philip, sent the University a schedule of the oil paintings comprising 'the second instalment' to be transferred to the University. This includes, as item '40' the 'Destroyed Portrait of Lady Eden', accompanied by the following restriction, preventing the University from 'exhibiting or parting with' the painting:

This picture of Lady Eden caused a lawsuit between the artist and Sir William Eden. The book entitled 'The Baronet and the Butterfly' was written by the artist to explain his position with regard to Sir William Eden, and to point out that the case had made a difference in the Law. *The picture is not to be exhibited or parted with, but it is to be kept by the University as a record of the picture about which so many false statements have been made.*²³

Also in the University archive is a subsequent letter from Freshfields to Birnie Philip, advising her on the drafting of the condition, which indicates that Birnie Philip considered a reference to the Eden family in the wording of the restriction:

You can, of course, impose in respect of Lady Eden's portrait the conditions referred to in the list of paintings you sent us. On the other hand I do not myself think it would be desirable even if it would be practicable to attempt to impose any conditions referring specifically to members of the Eden family.²⁴

Birnie Philip's reply does not survive, but a further letter to her from Freshfields, sent two days later, suggests that the condition imposed (at least) concerned the 'exhibition' of the portrait:

We will certainly see that the condition precluding exhibition of the Eden portrait is made quite clear.²⁵

There are also references to a restriction on the exhibition of *Portrait of Lady Eden* in later records. A researcher wanting to find out more about the painting at The Hunterian's archive, held at Kelvin Hall, Glasgow, will be referred to the painting's 'Object File'. This file includes correspondence that shows that, as late as 1985, curators at The Hunterian understood that they were 'forbidden to exhibit' *Portrait of Lady Eden* "by the terms of Miss Rosalind Birnie Philip's Bequest", and that the reason for the restriction was that "Miss Philip interpreted the ... decisions of the [Paris] Court to mean that the picture was not to be exhibited in perpetuity".²⁶ That special restrictions attach to *Portrait of Lady Eden*, is also recorded in the *catalogue raisonné* detailing the history of all of Whistler's works:

By the explicit terms of Miss Birnie Philip's gift, [*Portrait of Lady Eden*] can neither be lent or exhibited, although it has occasionally been shown in the Hunterian itself.²⁷

23 Letter from Freshfields, Leese & Munns to J.S. Muirhead, Secretary to the University Court, University of Glasgow, 11 Feb. 1935, University of Glasgow Library, emphasis added.

24 Letter from Freshfields, Leese & Munns to R. Birnie Philip, 17 Feb. 1936, University of Glasgow Library.

25 *Ibid.*

26 Letter from Martin Hopkinson, Curator, The Hunterian, Glasgow, to MG MacKenzie, 11 Jan. 1985, The Hunterian's archive, Glasgow, GLAHA.46356.

27 'Exhibitions' 'YMSM 408: Brown and Gold: Portrait of Lady Eden' in MacDonald and Petri, above, note 2.

3. The Decision in *Whistler v. Eden* (1897)

As the above-quoted passages from the Freshfields correspondence indicate, the ‘lawsuit between the artist and Sir William Eden’ formed the context for the restrictions imposed by Birnie Philip on the University ‘exhibiting or parting’ with *Portrait of Lady Eden*. In particular, Birnie Philip would have had access to the transcript of the Paris Court of Appeal decision in Whistler’s pamphlet *Eden Versus Whistler: The Baronet and the Butterfly*: Birnie Philip gifted to the University a copy of this pamphlet (item 41 of the Schedule of 1936) with the portrait (item 40 of the same Schedule). With this in mind, and with a view to reflecting on Birnie Philip’s intentions, I now turn to the decision of the Paris Court of Appeal in 1897, upheld by the Cour de Cassation in 1900.

Before the courts, Eden argued that the picture was complete when he saw it in February 1894 and, as he had paid the price, Whistler was therefore obliged to deliver it to Eden, as he was the commissioner of the picture. However, Whistler resisted this argument, on the basis that the work was unfinished. As his lawyer argued in court: “you cannot oblige an artist, to give up an unfinished work and allow the incomplete creations of his heart and brain to circulate the world”.²⁸ Overruling the first instance court, that had decided in favour of Eden, the Paris Court of Appeal held that Whistler could keep the picture, so long as both the purchase price and damages were paid to Eden, and this ruling was then approved by the Cour de Cassation.

Today *Whistler v. Eden* is understood by intellectual property lawyers as significant to the development of the author’s right of divulgation or disclosure under French law: *Whistler v. Eden* is considered today to be the “case that appears to have fixed [the right of disclosure] in the French canon”.²⁹ The right of divulgation or disclosure today rests on the principle that it is fundamental to the personality of the author, for the author to decide when a work is ready to be disclosed to the public. The contribution of *Whistler v. Eden* to this principle is today understood to be the Court’s ruling that:

the contract by which an artist was commissioned to paint a portrait for a set price did not mean that property in the painting was automatically acquired by the commissioning party. The acquisition would occur only when the artist chose to relinquish the painting and the commissioner chose to accept it.³⁰

The right of divulgation or disclosure under French law has always been understood to be perpetual; after the author’s death, it is for the heirs to exercise the right of disclosure.³¹ In addition, there are other aspects of the French law of moral rights today, that might be

28 Whistler, above, note 19 at p. 27.

29 Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006), p. 45, para. 2.06. Adeney considers the right of disclosure to be “perhaps the most fundamental of the authorial rights” (at p. 44, para. 2.02).

30 *Ibid.*, p. 45, para. 2.06. An alternative view is that the Paris Court of Appeal, unlike the lower court, decided that the contract between Eden and Whistler was not in fact a contract of sale, but a contract for services, and therefore an order for specific performance was not appropriate. I thank Ruth Redmond-Cooper for drawing this reading to my attention.

31 On the perpetual term and the position after the death of the author see Adeney, *ibid.*, p. 59, para. 2.53 and p. 63, para. 2.61. On choice of law in international moral rights cases, see Adeney, *ibid.*, p. 645, para. 19.73.

thought to be relevant to *Portrait of Lady Eden*:³² for example the right of the author to withdraw the work (to which the right of disclosure is closely related)³³ and/or the right of integrity, for example, on the basis that *Portrait of Lady Eden* is a 'destroyed portrait' not reflecting Whistler's skill as an artist (the latter point is also discussed later in this article, but in relation to the question of Birnie Philip's intentions in 1936³⁴).

However, my focus here is not on the French law of moral rights itself. Rather my interest is in ascertaining Birnie Philip's intentions and their implications for The Hunterian's position today: for example, what issues would arise if The Hunterian treated *Portrait of Lady Eden* like the other works gifted in 1935, and exhibited it within the University of Glasgow?

As regards the protection of *Portrait of Lady Eden* today by moral rights, it is UK law that applies in relation to its exhibition in Glasgow. First, under Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works (which binds both the UK and France, amongst many other States) "the extent of protection" as well as "the means of redress afforded to the author to protect his rights" are "governed exclusively by the laws of the country where protection is claimed", which is here the UK. Secondly, UK law is the applicable law on the basis of conflict of law principles: as the *lex loci protectionis* or law of the place where the work is used/exploited and the *lex loci delicti* or law of the place of alleged infringement.³⁵ The only protection under UK law today, akin to the French right of disclosure, is protection for unpublished works predating the passage of the UK Copyright Act 1911 (which protection will expire in 2039). However, any such protection for the painting as an unpublished work would have been lost by its exhibition by Whistler at the Société Nationale des Beaux-Arts, Paris in 1894.³⁶ Also, while other moral rights under UK law today are contained in Part I Chapter IV Copyright Designs and Patents Act 1988 (the rights of attribution, integrity and false attribution), these are time-limited, expiring seventy years after the death of the author in the case of the attribution and integrity rights, and twenty years after the death of the author as regards false attribution. In any event, the right of attribution and the right of integrity, introduced by the 1988 Act, do not apply to any artistic work where the author died before 1 August 1989 (as is the case with Whistler).³⁷ Accordingly, under UK law,

32 I thank Mira Sundara Rajan for drawing this point to my attention.

33 See, for example, William Strauss, 'Study No. 4: The Moral Rights of the Author', July 1959, p. 122, n. 33, reprinted from (1955) 4(4) *American Journal of Comparative Law* 506, discussing *Whistler v. Eden* in relation to the right of withdrawal.

34 See text to note 50, below.

35 On choice of law in international moral rights cases see Adeney, above, note 29 at p. 645, para. 19.73.

36 *Turner v. Robinson* (1860) 10 Ir. Ch. R. 121: unconditional exhibition (e.g. not subject to conditions of confidence) amounts to publication as regards common law protection for unpublished works.

37 Copyright Designs and Patents Act 1988, s. 86. Sch. 1, para. 12(4) today protects an unpublished work until 2039, where the work was created by an author who died before 1 Jan. 1969 and where the work was unpublished at the time when the CDPA came into force on 1 Aug. 1989. On the prospective nature of the abolition of protection for unpublished works by the 1911 Act see Tanya Aplin, Lionel Bently, Phillip Johnson and Simon Malynicz, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2012, 2nd edn) p. 58, para. 2.108. On the transitional arrangements for the introduction of moral rights into UK law by the 1988 Act, see 1988 Act, Schedule 1, para. 23(1) and the Copyright Designs and Patents Act 1988 (Commencement No.1) Order

there would be no moral rights issues today, should The Hunterian display the painting in Glasgow.

Notwithstanding the fact that the French law of moral rights does not apply, the ruling in *Whistler v. Eden* nevertheless *did* have a bearing on Birnie Philip's intentions expressed in 1936, particularly, as noted above, the English translation of the decision in *The Baronet and the Butterfly*, which she gifted to the University with the painting; *Whistler v. Eden*, then, is relevant to the position of The Hunterian today, as a context for understanding donor restrictions. Specifically, did the perpetual nature of the French right of disclosure, and the fact that the right was understood during Birnie Philip's lifetime to pass to her, colour her intentions in 1936? In restricting the University of Glasgow from exhibiting or parting with the painting, was Birnie Philip purporting to embody in contractual form, a right akin to Whistler's right to prevent disclosure set out in *Whistler v. Eden*?

In fact, the ruling in *Whistler v. Eden* is more complex. Particularly, the judgment of the Paris Court of Appeal, after ruling that Whistler can keep the painting, goes on to state that Whistler's "right to the picture" was however, "not absolute". The Court acknowledged that Whistler had "mischievously altered" the painting (in painting out Lady Eden, and painting Margaret Curzon Hale over the top). However, it held that:

this portrait, though altered in some essentials, still retains the general harmony given to his composition by the artist with the help of certain motives furnished by Lady Eden, and that, *under these conditions*, it seems evident that the artist's right to the picture is not absolute, without limitation or restriction, and that, on the contrary, so long as the transformation of the little picture is not complete, *Whistler may not make any use of it public or private.*

This passage is as set out in the Court transcript in *The Baronet and the Butterfly*, to which Birnie Philip had access. In fact, the word "motives" is a mistranslation of the French word "*motifs*" which is perhaps better translated as "elements of the image"; it more accurately refers to the fact that Lady Eden had contributed certain things, such that the portrait was personal to her.³⁸

This reasoning also explains the detail of the Court's final order, restricting the use which Whistler could make of the painting:

[The Court] discharges Whistler from all obligation to give up the portrait to William Eden laid upon him by the lower Court, but declares, on the other hand, that so long as the work remains incomplete, and unfit to deliver, *Whistler can make no sort of use of it, public or private.*³⁹

Accordingly, while Whistler hailed the ruling as establishing the "Absolute Right of the Artist to control the destiny of his handiwork",⁴⁰ in fact the judgment of the Court was equivocal as regards the use that Whistler could make of the painting.

1989, no.816, c.21, art.2.

38 Whistler, above, note 19 at p. 77, emphasis added. I thank Ruth Redmond-Cooper for drawing the meaning of the word '*motifs*' to my attention. The original French text refers to '*...l'harmonie générale que l'artiste avait donnée à sa composition, à l'aide de motifs à lui fournis par la dame Eden...*'.

39 Whistler, above, note 19 at p. 78, emphasis added.

40 *Ibid.*, at p.78.

Why did the Court impose this limit on Whistler's use of the painting? Some explanation can be gleaned from the reported version of the judgments in *Eden v. Whistler*. The Paris Court of Appeal held that Whistler's use of the painting was limited: "so long as the transformation of this little painting is not complete and *has not rendered it unrecognisable*". This view is also supported by the ruling of the Cour de Cassation, of March 1900: the Cour de Cassation summarises the Paris Court of Appeal ruling as "forbidding" Whistler "from making any use whatsoever of the canvas before modifying the appearance, so as to make it unrecognisable". The implications of the word "unrecognisable" are, perhaps, that the picture is not recognisable as a portrait of Lady Eden.⁴¹ This interpretation is also how the decision is understood by scholars today: *Whistler v. Eden* is also seen as part of the 'right to one's image' under French law (discussed further below), which protects the person depicted in a picture, rather than the artist. *Whistler v. Eden* establishes that "French courts may" to protect the sitter "request that the defendant take appropriate actions to render the features of the plaintiff unrecognisable".⁴² As I argue in the next section, both the Court's limit on Whistler's use of the portrait, and that it stemmed from the fact that the painting was recognisable as Lady Eden, should be borne in mind in assessing Birnie Philip's intentions in 1936.

4. Reappraising Birnie Philip's Intentions

How does revisiting the decisions in *Eden v. Whistler* help us better to understand the restriction on the University of Glasgow "exhibiting or parting with" *Portrait of Lady Eden* imposed by Birnie Philip in 1936?

At the outset, there is nothing in the judgment of the Paris Court of Appeal, as upheld by the Cour de Cassation, which expressly binds any party other than Whistler: it is *Whistler* who may not make "any use" of the painting "public or private" (not a subsequent owner of the painting); the Court's order was *not* that the picture could not be "exhibited in perpetuity" (as suggested by curatorial correspondence in 1985).⁴³ Birnie Philip's restriction on the University of Glasgow, therefore, is not merely an embodiment of the legal ruling. The court case, nevertheless, informed Birnie Philip's intentions in 1936.

41 I thank Ruth Redmond-Cooper for her detailed reading of the reported decisions at C.A. Paris, 1897, C.P.1898.II.465 (Paris Court of Appeal) and CdC 14 March 1900, DP 1900 497 (Cour de Cassation). The relevant parts of the decisions as reported, with their English translations, are as follows: "as long as the transformation of this little painting is not complete and has not rendered it unrecognisable, Whistler may not make any public or private use of it" ("*tant que la transformation commencée de ce petit tableau ne sera pas complète et ne l'aura point rendu méconnaissable, Whistler ne pourra en faire aucun usage public ou privé*") Paris Court of Appeal (at p. 467), and "in forbidding, moreover, the latter [Whistler] from making any use whatsoever of the canvas before modifying the appearance, so as to make it unrecognisable, the decision which is being challenged ... far from violating the legislative texts at issue in the appeal, has in fact on the contrary, correctly applied those texts" ("*en interdisant, en outre, à ce dernier de faire un usage quelconque de la toile avant d'en avoir modifié l'aspect, de manière à la rendre méconnaissable, l'arrêt attaqué ... loin de violer les textes de loi visés par le pourvoi, en a fait, au contraire, une juste application.*") (Cour de Cassation) at p. 500.

42 Huw Beverley-Smith, Ansgar Ohly, Agnès Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge University Press, 2005), p. 183.

43 Cf. the Letter from Martin Hopkinson, Curator, The Hunterian, Glasgow, to MG MacKenzie, 11 Jan. 1985, The Hunterian's archive, Glasgow, GLAHA.46356, quoted above, text to n. 25.

How can a more detailed understanding of the court case, help us to reflect again on Birnie Philip's motives and how the restriction should be interpreted today? Two points can be made.

First, as already mentioned, an important legal context for the decision in *Whistler v. Eden*, may be 'the right to one's image' under French law (today often referred to as 'personality rights') which developed during the course of the second half of the nineteenth century. This stemmed from a legal principle first enunciated in the *Rachel* case, decided by the Tribunal Civil de la Seine in 1858. The case concerned an actor, Elisabeth Félix (1821-1858), known by the stage-name Mademoiselle Rachel, who was portrayed on her deathbed without the consent of her family. The Court held:

no one may, without the *express consent of the family*, reproduce and make available to the public the features of a person on his deathbed, however, famous this person has been and however public his acts during the life have been; the right to oppose this reproduction is absolute, it flows from the respect the family's pain commands and it should not be disregarded; otherwise the most intimate and respectable feelings would be offended.⁴⁴

In a number of subsequent cases, in the 1880s to 1900, this principle was extended such that any "reproduction or exhibition of a portrait required the consent of the portrayed person, or after his death, the consent of his heirs."⁴⁵ Also stemming from the *Rachel* ruling, is the power of French courts to impose "specific remedies to prevent or alleviate infringements of personality rights", for example, in the *Rachel* case, the destruction of the negative of the photograph so that the violation could not be repeated. As mentioned above, *Whistler v. Eden*, though it concerned a sitter who consented to her portrait being painted, is today understood to be part of this body of case law: it establishes the power which the courts have today to order that the features of the sitter be rendered unrecognisable so as to protect the sitter.⁴⁶

This legal context – that a sitter and their heirs had rights to control the reproduction and/or exhibition of a portrait – may explain the Court of Appeal's reference, in *Whistler v. Eden*, to the portrait having been composed "with the help of certain items furnished by Lady Eden"; the interests of Lady Eden, as a sitter, and the fact that she was recognisable in the portrait, are (to use the Court's phrase) "the conditions" under which the Court felt it appropriate to impose a limitation on Whistler's own use of the picture.⁴⁷ In turn, these legal principles may explain why, in correspondence with her solicitors, Birnie Philip considered drafting the restriction on exhibition as "referring specifically to... the Eden family".⁴⁸ Though it seems that the Eden family was not mentioned in the final form of the restriction,⁴⁹ the French legal context – that there may be rights to

44 Decision of Tribunal civil de la Seine, 16 June 1858, D. 1858, 3, 62, quoted in Beverley-Smith, Ohly, Lucas-Schloetter, above, note 42 at p. 147, emphasis added. See also Ruth Redmond-Cooper, 'The Press and the Law of Privacy', (1985) *International and Comparative Law Quarterly*, 769-785, at pp. 772-3.

45 Beverley-Smith, Ohly, Lucas-Schloetter, above, note 42 at pp. 147-148.

46 *Ibid.*, at, p. 183 and note 156.

47 Whistler, above, note 19 at p. 77, quoted above: accompanying text to notes 37 and 38.

48 Letter from Freshfields, Leese and Munns to R. Birnie Philip, 17 Feb. 1936, University of Glasgow Library.

49 See text to note 23, above.

restrict reproduction and/or exhibition perpetually vesting with the Eden family – may nevertheless be at least one explanation for the restriction imposed by Birnie Philip on the University of Glasgow.

What do these observations mean for how we should interpret the restriction on the University of Glasgow exhibiting or parting with *Portrait of Lady Eden* today? During the course of the twentieth century, there has been a shift in the right to one's image under French law: whereas nineteenth-century case law supported *post-mortem* protection, such that personality rights of the deceased were transmitted to heirs by succession, civil case law since the late twentieth century favours the view that such rights expire on the sitter's death, though intimate aspects of the life of the deceased might still be protected.⁵⁰ Accordingly, to the extent that Birnie Philip's restriction was imposed in 1936, due to her understanding of the then far more extensive rights of the Eden family under French law, the changing legal context may be one way into reappraising how the University of Glasgow interprets the restriction today: as the rights of the deceased family have since lessened, accordingly less weight should be attached to Birnie Philip's concerns stemming from the rights of the Eden family.

However, archival documents suggest that a concern about the Eden family is not the whole story behind Philip's restriction on the University exhibiting or parting with the painting: she also refers to the painting as a "destroyed portrait", both in the schedule to the 1935 memorandum and the appendix to Freshfields' correspondence to the University in 1936. This takes us to a second way in which a fuller understanding of the legal case in *Eden v. Whistler* may help us to ascertain Philip's motivation in 1936. As recounted above, during the course of the legal proceedings, Whistler first painted over Lady Eden with a depiction of Mrs Hale, and then later sanded down the painting so as to bring Lady Eden into view again, and the painting remains in this sanded-down state today.

The phrase "destroyed portrait", then, may suggest that Birnie Philip wished to restrict the University's exhibition and parting with the painting, also because the painting is in an unfinished state and not reflecting Whistler's skill as an artist. This analysis is consistent with other aspects of the 1935 memorandum, that reveal Birnie Philip's concern with Whistler's artistic reputation: that only "the best examples" of his etchings are to be exhibited.⁵¹ However, while it is possible that *Portrait of Lady Eden* was not, in Birnie Philip's view, a "best example" of Whistler's work, this concern should not be overstated. The 1935 memorandum also includes the gift of a number of other unfinished works, for example, *Unfinished Study of a French Girl* (1895/6) and *The Rose Scarf* (1890), the latter of which is painted over another unfinished painting by Whistler, and these unfinished works are *not* subject to any special restrictions,⁵² indeed, gallery practice at The Hunterian is publicly to exhibit such examples, as they provide interesting

50 Beverley-Smith, Ohly, Lucas-Schloetter, above, note 42, at p. 202: "Starting in the 1980s, French courts have explicitly acknowledged the expiration of the personality rights at the death of their owner." I thank Ruth Redmond-Cooper for drawing to my attention the possibility for the *post-mortem* protection of intimate details.

51 1935 memorandum, p. 2, para. 5(b).

52 Andrew Young, Margaret F. MacDonald and Hamish Miles, *The Paintings of James MacNeill Whistler: Text* (Yale University Press, 1980), cat. 390 and 433, p. 173 and p. 192 (Text volume). On the fact that *The Rose Scarf* is painted over another unfinished picture see the entry for GLAHA 46342, in the on-line catalogue at <<https://collections.gla.ac.uk>> (accessed Dec. 2022).

insight into Whistler's working process.⁵³ Accordingly, there is nothing inherent in the unfinished state of *Portrait of Lady Eden* that would justify the imposition by Birnie Philip of special restrictions.

Of course, the phrase "destroyed portrait" denotes more than just the fact that the painting is unfinished; the implications are that Whistler's acts in sanding down the painting, mutilated the work. Why, then, did Birnie Philip want the University to retain a "destroyed" work? Ultimately, the Freshfields correspondence indicates that Birnie Philip wanted the University to have the painting as a "record" of a picture "about which so many false statements have been made",⁵⁴ most likely, due to the legal proceedings. Within this statement, of course, lies a way into a more balanced interpretation on the prohibition on "exhibition"; perhaps there are instances, concerned with the case itself, where display of the painting *is* consistent with Birnie Philip's intentions (and therefore outside "exhibition" in a strict sense). A good example is an event held in The Hunterian in October 2019, where *Portrait of Lady Eden* was brought out of store for a few hours, especially for a lecture about the case given by the present author for the British Literary and Artistic Copyright Association; this was, arguably, illustration for the purposes of an academic talk about the case, and therefore consistent with Birnie Philip's view of the painting as a "record".⁵⁵

5. Conclusion

The gift of *Brown and Gold: Portrait of Lady Eden* to the University of Glasgow, provides an example of a donor's restrictions on a single painting, stemming from a specific context: the historic legal dispute about the painting between the artist and the painting's commissioner, *Whistler v. Eden*, 1897. In this instance, a more detailed understanding of the legal case can shed new light on a donor's motivation in imposing restrictions. The review of the precise terms of the judgment of the Paris Court of Appeal as upheld by the Cour de Cassation, reveals that the restrictions on subsequent use of *Portrait of Lady Eden* imposed by the Court are expressed only to concern Whistler, not subsequent owners of the painting; the limitations on the University imposed by Birnie Philip are not an automatic consequence of the judgment. Further, legal change since 1936, the date that the gift to the University was concluded (the fact that heirs now have far more limited legal rights relating to a sitter's 'right to one's image' under French law) means that we should attach less weight to Birnie Philip's concerns that were motivated by her understanding of the then more extensive rights of the Eden family. Finally, an understanding of Whistler's activities during the litigation – in painting over and sanding

53 I thank Steph Scholten for bringing this to my attention.

54 See text to note 22 above.

55 This solution is in some ways analogous to the balance struck by French courts in balancing the privacy rights of a deceased person against those of biographers and historians: after a person's death, the heirs of a deceased person are "only entitled to defend his memory against the injury which would result from the report of erroneous or distorted facts published in bad faith or with excessive thoughtlessness" (*Matisse v. Aragon*, CA Paris 3 Nov. 1982, D. 1983, Jur. 248, quoted in Beverley-Smith, Ohly, Lucas-Schloetter, above, note 42 at p. 202, concerning a case brought in 1982 by the heirs of the painter Henri Matisse). I thank Ruth Redmond-Cooper for her comments on this point. Beverley-Smith, Ohly, Lucas-Schloetter refer to such rulings as establishing that the "rights of history... prevail over the susceptibility of the heirs..." (*Ibid.*, p. 205).

down the picture – enables us better to understand other reasons behind Birnie Philip's restriction: that, as the painting was a 'destroyed portrait', it was to be held as a 'record'. This latter point may open the way to a more balanced interpretation by the University today of Birnie Philip's restriction on 'exhibition': allowing for the painting's public display where the objective is to illustrate the story behind the case itself.

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