

Book VI.
Title XLI.

Concerning those things which are provided in a will or testament as punishment.
(De his quae poenae nomine in testamento vel codicillis relinquuntur.)

Bas. 44.18.30; D. 34.6.

6.41.1. Emperor Justinian to Mena, Praetorian Prefect.

We abolish a useless observance of ancient laws which hinder the wishes of testators from becoming effectual, and direct that wishes of testators shall not be invalidated under the pretext that provisions for leaving or taking away bequests by way of penalty are invalid.¹ But a testator may, in order that his wishes may be carried out, direct money to be given or a penalty to be inflicted on whomsoever he wishes, either by depriving them of inheritances, legacies, trusts or manumissions, or by directing the first receiver of a gift to transfer it to others, or to give some other property to others, if the heir, legatee or donee of liberty does not comply with his directions. 1. If a person so ordered, however, to do something which is forbidden by law, or is disgraceful or impossible, he may ignore the order of the testator without prejudice.
Given at Constantinople January 1 (528).

Note.

A legacy, trust or gift of an inheritance was considered as having been given for the benefit and the honor of the donee. If not so given it was considered contrary to the nature thereof, and therefore void. Hence formerly the gift, revocation and transference of legacies by way of penalty was void. A penal legacy is given in order to coerce the heir into doing or not doing something; for instance, the following: "If my heir gives his daughter in marriage to Titius," or "if he does not give her in marriage to Titius, let him pay ten gold pieces to Titius." Even the emperor would accept no legacy by which a penalty was imposed on some other person; such legacies were void even in the will of soldiers, though these wills were ordinarily treated with the utmost consideration in order to carry out the testator's wishes. His prime consideration in connection with will was the wish of the testator. Inst. 2.20.36; 9 Cujacius 781.

¹ [Blume] As stated in D. 34.6.