

## Opinion No. 54-6053

December 7, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Honorable Richard F. Rowley District Attorney Ninth Judicial District Clovis, New Mexico

{\*525} In your letter of November 27, 1954, you request the opinion of this office as to whether or not § 41-4524, N.M.S.A., 1941, our embezzlement statute, has application to a situation in which a tenant farmer fails to account to his landlord for the landlord's share of the crop rent.

Specifically, you state that a complaint has been lodged with you by a landlord that his tenant failed to meet his obligation, under an oral lease, to deliver to the landlord one-fourth of the cotton produced on the landlord's farm, (three-fourths share belonging to the tenant under the oral lease). The tenant has moved from the farm, and the landlord has no knowledge of his whereabouts, nor of the whereabouts of any of the cotton.

Our embezzlement statute reads:

"If any person who shall be entrusted with any property of another shall embezzle or fraudulently convert to his own use or shall secrete with intent to embezzle or fraudulently convert to his own use any such property, he shall be deemed guilty of embezzlement and if such property exceeds the value of fifty dollars, shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than ten years, or be fined not to exceed one thousand dollars (\$ 1,000.00) or both such fine and imprisonment in the discretion of the court. Provided, that where the value of such property is less than fifty dollars he shall be deemed guilty of misdemeanor and shall be punished by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days, or by fine of not less than twenty-five dollars nor more than one hundred dollars, or by both such fine and imprisonment."

You will note that the statute provides that the property which is the subject matter of an embezzlement must be "property of another."

The New Mexico Supreme Court defined the elements of the offense of embezzlement in the case of **State v. Prince**, 52 N.M. 15, 189 P 2d 993 as follows:

"The essential elements of the offense of embezzlement are: (a) **That the property belonged to some one other than the accused.** (b) That the accused occupied a designated fiduciary relationship and that the property came into his possession by reason of his employment or office. (c) that there was a fraudulent intent to deprive the owner of his property." (Emphasis ours).

It is our opinion that the offense of embezzlement is not indicated by the facts of the situation set forth in your letter. The **fructus industriales** in question, the cotton crop, was not the "property of another" at the time that was evidently removed from the land, for the reason {\*526} that at that time an undivided three-fourths interest therein belonged to the tenant. It cannot be said, therefore, "that the property belonged to some one other than the accused."

It appears to us that the fact situation indicates a partnership relation between the landlord and the tenant with regard to the cotton crop. It is well established that a partner cannot be convicted of embezzling partnership property. The leading case upon this question is the case of **Ex parte Sanders**, 23 Ariz. 20, 201 P. 93, 17 A.L.R. 980, in which the Arizona Supreme Court said:

"We have come to the conclusion that 'a partnership cannot be guilty of embezzlement of partnership funds, because such partner combines in himself at once the character of principal and agent. The partners have the community property and are interested in the partnership effects."

See also **People v. Cravens**, 79 Cal. App. 2d 658, 180 P. 2d 453.

Trusting that the foregoing will answer your question satisfactorily, I am.

By: Henry A. Kiker, Jr.

Assist. Attorney General