March 16, 1953.

Mr. R. E. Towle
Superintendent of Banks
State Capitol
Helena, Montana

Dear Mr. Towle:

You have asked my opinion upon the proper interpretation of Section 1, Chapter 77, Session Laws of 1951, which provides:

"Banks shall not be required to preserve or keep their records for a longer period than eleven (11) years next after the first day of January of the year following the time of the making of such records; provided, however, that the following records shall not be destroyed, viz., ledger sheets showing unpaid balances in favor of depositors of any banks. No liability shall accrue against any bank destroying any such records (except records the destruction of which is forbidden hereby) after the expiration of the time provided in this section."

The stated and obvious intent of Section 1 of Chapter 77 of the Laws of 1951 is to permit the destruction of those records which were made more than eleven years before, and contain no information of current value. In the exception, the legislature indicated an unwillingness to permit destruction of records which show current liabilities of any bank. In effect, the legislature said that it would not sanction the destruction of a record which showed a debt owing from the bank to a depositor, no matter how old. This is a necessary protection to the depositor, who may have lost his own record of his balance, and must rely on the bank's record to protect him against loss of his money.

The entire question hinges on the meaning of "unpaid balance." It has been unanimously held by the courts which have considered the question that the "balance" of an account is quite different from the account itself. It has been called "the difference between the debits and credits of an account." (Loeb vs. Keyes, 156 N. Y. 529, 51 N. E. 285). In the case of McWilliams vs. Allan, 45 Mo. 573, the court said:

"There is a broad distinction between an account and the mere balance of an account, resembling the distinction in logic between the premises of an argument and the conclusion drawn therefrom. A balance is but the conclusion or result of the debit and credit sides of an account."

This distinction was further explained in the case of Jones v. Marrs, 114 Tex. 62, 263 S. W., 750, where it was said:

"A 'balance' . . . means the amount of cash in the fund **at a given time**, whether the system of bookkeeping denominates it as credit or debit." (Emphasis supplied.)

All ledger sheets ever made on a single account would constitute a record of the **account**, but only the sheet showing the amount owing by the bank at the conclusion of the last transaction in the account would be a record of the **balance** within the meaning of the decided cases.

It is therefore my opinion that the exception contained in Section 1, Chapter 77, Laws of 1951, refers only to those ledger sheets showing a balance remaining after the last completed transaction in the account, and not to all ledger sheets containing records of the account.

Opinion No. 11.

Labor Law—Employers—Employees —Wages, Withholding of

HELD: An employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages to an account which the employee has with the employer unless the account existing between the employer and the employee is for board, room or other incidentals which the employee has agreed may be deducted as a condition to the employment.

March 26, 1953.

Mr. Oliver Sullivan, Commissioner
Department of Labor and Industry
Mitchell Building
Helena, Montana

Dear Mr. Sullivan:

Your predecessor requested that I issue an official opinion on the following question:

"Can an employer withhold pay due and owing to an employee for wages earned, and apply such wages to an account which the employee has with the employer, so that the employee receives no money for the period of employment?"

Section 41-1301, R. C. M., 1947, in part provides:

" * * * * * * * * *

"(2) Every employer of labor in the State of Montana, shall pay to each of his employees the wages earned by such employees at least twice in each month in lawful money of the United States, or checks on banks convertible into cash on demand at the full face value thereof, and **no person for whom labor has been performed shall withhold from any employee any wages earned or unpaid for a longer period than five (5) days after the same became due and payable; provided, however, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever such deductions are a part of the conditions of employment, or other deductions provided for by law;** provided further, that if at such time of payment of wages any employee shall be absent from the regular place of labor, he shall be entitled to such payment at any time thereafter. Provisions of this section shall not apply to any professional, supervisory or technical employees, who by custom, receive their wages earned at least once monthly." (Emphasis supplied.)

Section 41-1302, R. C. M., 1947, provides:

"Whenever any employer, as such employer is defined in this Act, fails to pay any of his employees, as provided in the preceding section, he shall be guilty of a misdemeanor. A penalty shall also attach to such employer and become due such employee as follows: A sum equivalent to a penalty of five (5%) per cent of the wages due and not paid, as herein provided, as liquidated damages, and such penalty shall attach and suit may be brought in any court of competent jurisdiction to recover the same and the wages due.

"It shall be the duty of the commissioner of labor to inquire diligently for any violations of this Act, and to institute the actions for penalties provided for herein, in such cases as he may deem proper, and to enforce generally the provisions of this Act. . . ."

Section 41-1303, R. C. M., 1947, applies to discharged employees, and states:

"Whenever any employee is discharged from the employ of any such employer, on leaving said employment, then all the unpaid wages of such employee shall immediately become due and payable on demand, and if such employer fails to pay any such discharged employee, within seven (7) days after such discharge and demand, all the wages due and payable to him, then the same penalties as provided for in the preceding section shall attach, provided, however, that if the employer shall, within the period herein specified, tender in money to such discharged employee, the full amount of the wages lawfully due such employee, the penalties herein provided shall not attach."

A search of the decisions of the Supreme Court of our state has failed to reveal a Montana decision in which this precise question has arisen. However, the language of the statutes is clear and convincing. Section 41-1301, supra, is all inclusive and contains no exception for an employer who has a claim against an employee except that, " . . . reasonable deductions may be made for for board, room, and other incidentals supplied by the employer, whenever such deductions are a part of the conditions of employment. . . ."

Also, Section 41-1301, supra, proclaims that payment must be made in ". . . lawful money of the United States, or checks on banks convertible into cash on demand at the full face value thereof . . ." Again the phrase is not open to construction, and prevents

the use of any other media as payment. The obvious intent of the legislature was to bar the practice of issuing credit slips and similar tokens as payment for services, thereby forcing the employee to make expenditures with designated vendors.

Section 41-1301, supra, is clear and unambiguous and not susceptible of a construction modifying its terms. (Bennett vs. Meeker, 61 Mont. 307, 202 Pac. 203.) Also, it is a general rule of statutory construction that provisions for the forfeiture of wages are to be strictly construed against the employer. (Cross vs. Detroit Baseball Club, 84 Mo. App. 526.) This rule has been adopted in a more stringent form by our legislature. Section 41-1305, R. C. M., 1947, declares:

"Any contract or agreement made between any person, copartnership, or corporation, and any parties in his, its, or their employ, whose provision shall be in violation, evasion, or circumvention of this Act, shall be unlawful and void; but such employee may sue to recover his wages earned, together with such five per cent penalty, or separately to recover the penalty, if the wages have been paid."

A related question was decided in McAdams v. Ellis, 5 Ga. App. 262, 62 S. E. 1001. In that case the laborer was employed by the garnishee, and the court held that the wages were exempt from garnishment as long as the jury found that the laborer was in fact employed as such.

Our statutes provide for exemption from attachment for personal services. To allow an employer to confiscate the wages due for services rendered would, in fact, deprive the employee of the right to claim his legal exemption. Section 93-5816, R. C. M., 1947, provides:

"The earnings of the judgment debtor for his personal services rendered at any time within forty-five days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family, supported in whole or in part by his labor, are exempt; but where debts are incurred by any such person or his wife or family for gasoline and for the common necessaries of life, then the one-half of such earnings above mentioned are nevertheless sbject to execution, garnishment, and attachment, to satisfy debts so incurred. The words 'his family,' as used herein, are to be construed with the words 'head of family,' as used in Section 33-125."

Whether or not this statute would apply necessarily depends on the facts involved in each instance. However, it is not for the employer to determine whether the employee is eligible for exemptions from attachment. This is the function of a court of law.

It is therefore my opinion that an employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages to an account which the employee has with the employer, unless the account existing between the employer and the employee is for board, room or other incidentals which the employee has agreed may be deducted as a condition to the employment.

Opinion No. 12

Township Officers—Justices of the Peace—Office Hours—Court, Holding of.

HELD: Justices of the peace in a township, the population of which does not exceed ten thousand (10,000) people, are not required to maintain fixed and definite office hours; however, all justices of the peace must be reasonably available to hold court at all times, and must not place themselves in such a position that a party who wishes to secure their services will be unable to do so.

March 28, 1953.

Mr. Irving C. Pearson
County Attorney
Deer Lodge County,
Anaconda, Montana

Dear Mr. Pearson:

You have requested that I issue an official opinion relative to the hours which a justice of the peace must main-