in part: "* * * The person, firm or corporation on whose property such fire exists and *from whose property such fire spreads* is hereby made responsible," and held that a "Statute rendering owner of property liable for cost of extinguishing forest fire thereon is intended to place responsibility of guarding against fire upon person whose ownership includes right of possession since he is the person presumably nearest the fire contemplated by the statute. * * *" (Our emphasis).

This case involved the interpretation of the phrase *"on whose property"* such fire exists and in interpreting the statute in the light of its manifest purpose (which was to prevent forest fires) the court thought it clear that the statute intended to place responsibility upon the person whose ownership was nearest the land and who was enjoying the right of possesion.

I feel that the same interpretation would apply in this instance and it is my opinion that a lease holder in possession would be liable under the statute. This opinion is restricted to the precise question propounded.

OFFICIAL OPINION NO. 34

June 18, 1947.

Mr. Joe McCord, Director,
Dept. Financial Institutions,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of May 2, 1947 which reads as follows:

> "I have been requested by the Members of the Department of Financial Institutions to ask for your opinion upon the following questions concerning the rights and responsibilities of the department in its supervision of private banks.
>
> "1. Would the department have the authority under Section 10 (c) of the Indiana Financial Institutions Act to promulgate rules and regulations

defining what is a safe or an unsafe manner and a safe or unsafe condition for conducting and transacting business by private banks?

"2. Would the department have the authority to take possession of the business and property of a private bank under the powers granted in Section 41 of the Indiana Financial Institutions Act?

"3. May the owners of private banks pay dividends, or make withdrawals from capital accounts for any purpose when such dividend payments or withdrawals are in conflict with the provisions of Section 215 of the Indiana Financial Institutions Act?

"4. Are private banks subject to the capital ratio requirements as set forth in Section 217 of the Indiana Financial Institutions Act?

"Your consideration of these questions will be greatly appreciated."

The Indiana Financial Institutions Act was passed in 1933. Since that time the Act has been subjected to numerous amendments. However, Section 2 (18-102 Burns' 1933) and a portion of Section 3 (18-103 Burns' 1933 Pocket Supplement) quoted herewith from Part 1, Article 1 remain as originally enacted.

"This Act shall apply to every financial institution enumerated in subsection (a) of Section 3 (18-103) of this act, and to such other corporations and individuals as may hereafter by law be subjected to the provisions of this act."

"As used in this act, and unless a different meaning appears from the context:

"(a) The term 'financial institution' means any bank and/or trust company, building and loan association or credit union organized or reorganized under the provisions of this act; any bank of discount and deposit, private bank, and loan and trust and safe deposit company, trust company, building and loan association, rural loan and savings association, guaranty loan and savings association, mortgage guaran-

> tee company or credit union organized under the provisions of any law enacted prior to the passage of this act; and any savings bank or small loan company heretofore or hereafter organized under the provisions of any law of this state. * * *."

In view of these express provisions, it is quite clear the Act is intended to be applicable to private banks.

It was the holding in Lindley v. Seward (1937), 103 Ind. App. 600; 5 N. E. (2d) 998 that private banks are governed largely by the laws of partnerships and that the private banking law of 1907 (Chapter 113, page 174, Acts 1907) did not abrogate the governing principles but was cumulative and merely added to and strengthened the then existing laws. The Financial Institutions Act of 1933 expressly applied to private banks. It does not indicate any intention on the part of the legislators to repeal the private banking law of 1907 or to exclude the application of other laws or common law principles except those in conflict with these provisions. It would, therefore, seem to be logical to assume that the courts in construing this law would consider it to be cumulative as they did the private banking law of 1907. If this reasoning is correct, the various regulations imposed upon financial institutions by this act would merely add to and strengthen the regulations pertaining to private banks and other types of financial institutions and there would be no conflict either in intention or in practice with other applicable laws and common law principles. It is well settled that repeals of statutes by implications are not favored by our courts (Rosenbloom v. Hutchins (1944), 222 Ind. 590, 55 N. E. (2d) 315) and that the courts will enforce the spirit and intention of the laws passed by our legislators whenever possible.

Sockett v. State *ex rel.* Foremen (1881), 74 Ind. 486.

Where a law is regulatory in nature and purports to protect the public from some danger or evil it is to be construed most strongly in favor of the public and against the few.

Ryan v. Vanlandingham (1856), 7 Ind. 416;
Board of Commissioners Vigo Co. v. Davis, (1893), 136 Ind. 503, 36 N. E. 141.

The obvious intention of the Financial Institutions Act is to protect the public. Recent cases have sustained this theory and have justified the action of the legislature in establishing a method of supervision and regulation for all the financial institutions organized under the laws of this state.

> Carey v. State *ex rel* Dept. of Financial Instituitions (1938), 213 Ind. 181, 12 N. E. (2d) 131;
>
> Hiatt v. Howard (1937), 104 Ind. App. 167, 8 N. E. (2d) 136.

Your first question requires construction of Section 10 (c) which is found in Part 2 of Article 1 of the Act. (18-201 Burns' 1933 Pocket Supplement). This article creates:

> "* * * a department which shall be known as 'The Department of Financial Institutions,' which shall have charge of the organization, supervision, regulation, examination and liquidation of the several financial institutions to which this act is applicable, and the enforcement, administration and execution of the provisions of this act and the provisions of any other act applicable to any such financial institution, and shall exercise such other powers and perform such other duties as may at any time be conferred or imposed by law. * * *."

Section 10 (18-207 Burns' 1933 Pocket Supplement provides:

> "The department is hereby authorized, by a majority vote of the members, to make, promulgate, alter, amend or repeal rules and regulations for any or all of the following enumerated purposes:
>
> "* * *
>
> "(c) Defining what is a safe or unsafe manner and a safe or an unsafe condition for conducting and transacting business by any financial institution to which this act is applicable. * * *."

The language of the statutes quoted is capable of only one construction and that is that a private bank, being a financial institution, is subject to the provisions of Section 10, paragraph (c) and that the department has the authority and duty to act and function as necessity requires.

It is a primary rule of statutory construction that where a statute is clear and explicit the obvious intent of the legislature shall govern.

> Hyland v. Rochelle (1913), 179 Ind. 671, 100 N. E. 842;
>
> Williams v. Michigan City (1934), 100 Ind. App. 136; 192 N. E. 103.

Your second question deals with Section 41 (18-301 Burns' 1933 Pocket Supplement) of Article 2, part 2 of the act. This section reads as follows:

> "In addition to any and all other powers conferred by this act, the department is hereby authorized to take possession of the business and property of any financial institution to which this act is applicable, except small loan companies, whenever it shall appear to the department that such financial institution:
>
> "* * *."

Since the only exception to be found in this section applies to small loan companies and since a private bank is by statutory definition a "financial institution to which this act is applicable" it cannot be seriously contended that the department is without power to take possession of the business and property of a private bank in those cases where proper cause exists.

In Todd v. Brock (1938), 214 Ind. 639 which involved a suit by the creditors of a private bank in voluntary liquidation the court seems to assume that had the private bank been insolvent the Department of Financial Institutions would have been the only entity authorized to enforce liability imposed by law upon shareholders but concludes that since it was not insolvent the creditors could maintain an action against the partners and shareholders.

In answering your third query, it is necessary to determine whether private banks are bound by the provisions of Section 215 of the Indiana Financial Institutions Act. This section is the first section in Article 6 of Part 4 of the Act. Section 170 (18-1101 Burns' 1933) which is the first section of Part 4 provides:

> "In addition to the general rights, privileges and powers conferred by Part 3 (chapters 4 to 10 herein) of this act, and subject to the limitations and restrictions contained in this act, and in the articles of incorporation, every bank or trust company shall possess and may exercise the rights, privileges and powers hereinafter enumerated in this article. Unless the language used specifically indicates otherwise, the terms 'bank or trust company' and 'bank and trust company' as used in Part 4 (chapters 11 to 20 herein) of this act means and includes any bank and/or trust company organized under the provisions of this act and any bank of discount and deposit, loan and trust and safe deposit company, trust company or private bank organized under the provisions of any law enacted prior to the passage of this act, except that articles 1 (§§ 18-1101—18-1113) and 2 (§§ 18-1201—18-1212) and section 240 (§ 18-1902) of article 9 of Part 4 shall not apply to private banks."

It will be noted that Section 215 (18-1601 Burns' 1933 Pocket Supplement) is not one of the sections which is expressly excepted in its applicability to private banks. Section 215 provides:

> "No bank or trust company shall declare, or pay dividends to its shareholders in any form, unless the amount of its capital shall be unimpaired, and, unless a surplus fund equal to twenty-five (25) per cent of such capital stock, shall have been set apart and the amount thereof retained unimpaired. If a part of the sound capital of any such bank or trust company consists of the proceeds of the sale of debentures, no dividends shall be paid, without the consent of the department, until all of such debentures shall have been retired. Thereafter, such bank or trust company may, annually, semiannually or quarterly, but not more frequently, declare a dividend of so much

> of the undivided profits of the bank or trust company as shall be deemed expedient, but the rate of such dividend shall not exceed six (6) per cent per annum upon the book value of the shares of stock, until after the unimpaired surplus fund of such bank or trust company is equal to the amount of the capital stock, and such capital shall have been maintained unimpaired. The book value shall be ascertained by dividing the number of issued and outstanding shares of stock of such bank or trust company into the aggregate amount of its unimpaired capital and unimpaired surplus. The limitation of the payment of dividends contained in this section shall not apply to any bank or trust company when its common capital is unimpaired, unimpaired surplus is equal to twenty-five (25) per cent of its common capital and its sound capital is in excess of twenty (20) per cent of the average daily deposit liability computed on an annual basis. The surplus of any bank or trust company shall not be reduced at any time without the written consent of the department."

The formula which must be followed in declaring dividends seems just as reasonable when applied to private banks as to corporate banks.

In the McNicholas v. Tedrick (1937) Ohio, 15, N. E. (2d) 550—the Ohio banking code provided that in the case of an unincorporated bank, board of directors, as used in the code, should include the owners. The code also gave superintendents of banks the power, authority and duty.

> "7. To institute and maintain against directors, officers or employees of such banks, or any of them, any suit or action etc. * * *."

The court held that in view of the definition of the term Board of Directors and since the code provided a comprehensive method to liquidate all banks, the language quoted above included owners of an unincorporated bank.

Certain articles and one section of Part 4 of the Act are specifically excepted from applying to private banks but since Section 215 is not one of them the presumption necessarily follows that the legislature intended the provisions of that section to apply. Since the intention of the legislature governs, I am of the opinion Section 215 applies to private banks as well as corporate banks. In arriving at that result I have not overlooked the personal liability of owners of a private bank which is added protection to creditors but am of the opinion that the protective features of the banking code are cumulative to the personal liability.

My answer to your fourth question is the same as to question three. Section 217 (18-1603 Burns' 1933 Pocket Supplement) is in the same part and article as Section 215 and is not excepted from applying to private banks. Section 217 reads as follows:

> "Every bank or trust company shall, on such dates and as of such designated periods as may be directed by the department, file a verified statement of the total average daily deposits of all kinds payable by such bank or trust company during the preceding calendar year or during the designated period. If at any time it shall appear that the average daily deposits of any bank or trust company for the preceding calendar year or the designated period, are in the excess of ten (10) times the sound capital, the department may, if it deems it necessary for the protection of the depositors, require such bank or trust company to increase its sound capital or to reduce the amount of its deposits. In the event that the department shall determine that an increase in the sound capital or decrease in the deposits is necessary, it shall enter an order fixing the amount of such incease or decrease, which order shall be complied with within one (1) year from the date such order is entered. A copy of such order shall be served on the bank at its principal office. No order shall be entered by the department pursuant to the terms of this section at any time when any such bank or trust company holds cash and/or securities issued by or fully guaranteed by the United States government unpledged in an aggregate amount equal to at least fifty (50) per cent of its total aggregate deposit liability. The department may authorize a bank or trust com-

> pany having capital debentures outstanding, to retire any or all of such debentures from reserves or accumulated earnings without regard to the ration (ratio) or capital to deposit liability, provided that such bank or trust company holds cash and/or securities issued or fully guaranteed by the United States Government unpledged in an aggregate amount equal to at least fifty (50) per cent of its total deposit liability."

I am of the opinion this section gives the Department of Financial Institutions authority to require sufficient unimpaired capital and surplus in a private bank for the adequate protection of the depositors.

One of the leading Indiana cases in affirming the right of the legislature to regulate private banking holds:

> "The right of banking in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is unquestionably settled, that the sovereign authority of the State may regulate and restrain the exercise of such right."

State v. Richcreek (1906), 167 Ind. 217; 77 N. E. 1085.

OFFICIAL OPINION NO. 35

July 2, 1947.

Hon. Thomas E. Bath,
Secretary of State,
State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of June 16, 1947 has been received as follows:

> "I hereby request an official opinion as to whether the Secretary of State has authority to issue corporate