The language used by the foregoing act is susceptible of only one construction and that is, that persons under eighteen years of age may fish without a license but that no person is exempt from procuring a hunting license on account of age. The legislature has made is very clear that there are to be no exceptions to the general requirement for license to hunt, fish or trap except those specifically set out in the above and foregoing section.

GOVERNOR: Draught beer—legality of.

August 12, 1933.

Hon. Paul V. McNutt,
Governor of Indiana,
State House,
Indianapolis, Indiana.

My dear Governor:

I have before me your request for an interpretation of Chapter 80 of the Acts of the General Assembly of the State of Indiana for the year 1933 with regard to the legality of authorizing:

1. The importation, transportation, sale and delivery of alcoholic malt beverages contained in barrels, kegs, casks, or in other containers as well as in bottles or cases, by an importating agent holding a permit under said statute.

2. The transportation, sale and delivery of alcoholic malt beverages in barrels, kegs, casks, or in other containers as well as in bottles or cases, by any manufacturer or wholesaler holding a permit under said statute.

3. The purchase, receipt and possession of alcoholic malt beverages in barrals, kegs, casks, or in other containers, and the sale and service of the same to the consumer for consumption upon the premises, where the same are sold, from such barrels, kegs, casks or other containers, by certain classes of permit holders.

Since these questions are all allied, I will answer them together.

The sections of the act which deal with the manufacture, possession and sale of alcoholic malt beverages are Sections 8 to 12, both inclusive, of Chapter 80 above.
The question of sale of draught beer to proprietors of hotels and restaurants, clubs and stewards of dining cars and dining rooms on boats by manufacturers or importers presents very little question from the reading of the provisions of section 10 of the act. By the provisions of that section, the importing agent or manufacturer "may sell any such alcoholic malt beverages to any authorized wholesaler and to any authorized dealer in the State of Indiana; and to any consumer authorized to purchase alcoholic malt beverages, under and pursuant to the terms of this act." The only statement on sales in bottles contained in that section, are with reference to sales to consumers at their residences, and no other prohibition can be found as to the containers in which such alcoholic malt beverages shall be contained or from which they shall be sold.

Under section 12, certain classes of persons are entitled to sell for consumption on the premises, but nothing is contained in that or any other section that indicates from what kind of a container such alcoholic malt beverages shall be poured, drawn, or served by them, the only provision being that such consumption by the purchaser shall be in connection with the consumption of food.

By the provisions of section 12, authority is granted the excise director "to issue a permit to sell, as in this act provided," any alcoholic malt or vinous beverages to the proprietor of any hotel or restaurant, the steward of any dining room of a boat or dining car of a train. This permit to such proprietors and stewards is coupled with the privilege that the beverages may be "used and consumed upon the premises where the same are sold."

No specific authority is conferred upon such proprietors or stewards to purchase or receive alcoholic malt beverages in any other manner, than purchasers at their residences, to purchasers in retail stores, and to retail dealers who sell to purchasers, which class of purchasers have expressly conferred upon them the right to receive and purchase.

The proprietors of hotels and restaurants and the stewards of any dining room of a boat or dining car of a train, are without specific grant of any right to purchase or to receive alcoholic malt beverages. Since the act expressly authorizes a permit to such proprietors and stewards to sell upon their premises for consumption there, the right of such proprietors
and stewards to purchase and receive the same rests upon necessary implication. We therefore, have provisions within this act which are implied and not expressed.

Likewise, the right to sell such beverages to the proprietors of such hotels, or restaurants or stewards of dining rooms or cars, is nowhere expressly given to any dealer, or to any wholesaler, or to any importer, or to any manufacturer in the act. This proposition is upheld in its entirety by a critical examination of sections 10, 11 and 12. In section 12, the authority conferred upon a dealer is merely "to sell at retail, as in this act provided" and limits the issue of such permits, "unto the proprietor of any drug store, grocery store or confectionery" and limits the quantity sold at any one time "to a maximum of twenty-four bottles of a cubic content of twelve ounces each." You will note that no class of purchasers from a retail dealer is described in the act. In view of the fact, however, that clubs, proprietors of hotels and restaurants and stewards of dining cars and dining rooms on boats have the privilege of selling for consumption on the premises, it is inconceivable and very improbable that the legislature intended that they should be compelled to purchase their supply from the retail dealer in quantities at no time exceeding twenty-four bottles.

Section 11 shows that an authorized wholesaler has the right to "sell any such alcoholic malt beverages to any authorized dealer" and "to any consumer authorized to purchase," "where such delivery is made at the residence of such person," showing clearly that only the purchasers to whom the wholesalers are expressly authorized to sell such beverages, are licensed dealers and persons at their residence. You will note that there is no express authority given to the wholesaler to sell to proprietors and stewards of premises, where such beverages may be both sold and consumed. Yet, it is inconceivable that the legislature intended that these individuals should be compelled to purchase only from manufacturers or importers, and would not be permitted to purchase from bona fide wholesale dealers.

An examination of section 10 shows that a manufacturer or an importer is expressly authorized to "sell any such alcoholic malt beverages to any authorized wholesaler and to authorized dealers in the State of Indiana; and to any consumer authorized to purchase alcoholic malt beverages under and
pursuant to the terms of this act," with the further limitation, "that sale to such consumer be in a quantity at any one time of not less than twenty-four twelve-ounce bottles nor more than twenty-four bottles having cubic content of twenty-four fluid ounces, where such delivery is made at the residence." Therefore, the authority of the manufacturer or importing agent to sell to the proprietor of a hotel, restaurant, club or steward referred to in the act, must exist by virtue of necessary implication, especially in view of the fact that such manufacturer and/or importing agent are exclusively charged with the payment of the tax on all alcoholic malt beverages.

An examination of the sections to which I have referred will disclose that the limitation as to the container being bottles, is found only as a specific limitation upon the grant of a specific right. That is to say, it is only in conjunction with the grant of a right of sales to consumers in section 10 where the same is delivered at the residence, and to authorized dealers or to consumers at their residence in section 11 and to retail sales by dealers (that is, proprietors of drug stores, grocery stores and confectioneries) that the limitation appears that such beverages must be contained "in bottles only."

The net result, therefore, is this: Purchasers at their residence, retail dealers, that is, drug stores, confectioneries and grocery stores, who in turn of course sell for consumption off the premises, can handle bottled goods only.

When we refer to the class of purchasers who do not sell in any strict sense at retail, and who sell for consumption upon the premises only, that is, clubs, the proprietors of hotels and restaurants and the stewards of dining rooms on boats, there is no express limitation as to the container in which such alcoholic malt beverage may be received by them or served by them to their customers.

It is such establishments only as those last enumerated, that is, hotels, restaurants, dining cars and dining rooms on boats where draught beer could ordinarily be sold without altering the ordinary conduct of the principal business. Drug stores, grocery stores and confectioners never have and never did handle draught beer.

The purpose of the act was to permit them to handle alcoholic malt beverages, but not in any such manner as to change the nature or ordinary conduct of their businesses. For this reason, there has been an express limitation placed upon sales
by them, that is, they alone were restricted to sales in bottles only.

Clubs, restaurants, hotels, dining cars and dining rooms on boats were not placed under any such limitation.

Consequently, unless some express limitation can be found within the act, restricting the containers from which the alcoholic malt beverage is taken where it is sold for consumption upon the premises, the same could be by necessary implication, purchased, transported and sold in any container whatsoever.

Section 2, containing the words "except as authorized in this act," therefore, means authorized expressly or by necessary implication.

Section 21 of the Act offers no objection to the sale of draught beer, because the words "manufactured, bottled and/or sold under and pursuant to the provisions of this act", permits an alternative as well as a conjunctive interpretation. The further provisions in section 21, giving an express grant to a person twenty-one years of age, to purchase any such alcoholic malt beverages in a quantity not exceeding twenty-four bottles, having cubic content of twenty-four fluid ounces and confining such right to purchase from any authorized manufacturer, agent or wholesaler, certainly does not cover the case of a purchase by the proprietor of a hotel or restaurant or steward of a dining room or dining car or a club, unless the words "authorized dealers," means such a proprietor, steward or club.

When we examine all of the sections of the Act dealing with the purchase, sale and consumption of alcoholic malt beverages, the word "dealer" as used in the various sections of the act, simply refers to one who sells at wholesale or at retail. This does not in any way describe the functions of one who sells to the patrons in a hotel, restaurant, dining car, dining room of a boat or a club, especially where the statute expressly requires that they shall be consumed on the premises and that such consumption shall be in connection with the consumption of food. The seller under such circumstances is not a dealer within the meaning of the act, in my opinion, and they are not required to make sales in bottles only. In the final analysis, there is but very little distinction between a sale of a bottle of alcoholic malt beverage that is immediately emptied into a stein or a glass at the place of consumption, and the sale directly in the stein or glass. This distinction is again clearly
evident when we note that in section 12, a hotel can become a retailer by paying an additional fee for the privilege of selling in its rooms.

Taking all of the above and foregoing into consideration, it follows, therefore, that there is no intention exhibited on the face of the act to subject the implied rights granted to proprietors, stewards and clubs to any implied or express restriction as to the container in which such beverages may be either purchased or received or delivered for consumption on the premises.

Since there is no prohibition, express or implied, against the importation, transportation, sale and delivery under the three questions contained in your request, it is my opinion that the same may be legally authorized.

VETERINARIAN, STATE: Whether trusteeship of school board is lucrative office.

August 12, 1933.

Mr. L. O. Fish,
Office of State Veterinary,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion based upon the following facts:

A trustee of the school board of the town of Spencer, receiving an annual compensation of sixty dollars, has subsequently been appointed to the office of deputy state veterinarian. The question is, whether or not the trusteeship of the school board is a lucrative office within the contemplation of Article II, section 9, of the Constitution of the State of Indiana.

Article II, section 9, of the Constitution provides:

“No person holding a lucrative office or appointment under the United States, or under this state shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time.”

It has been repeatedly held that the office of school trustee is a lucrative office within the meaning of the above section. Likewise, the courts have ruled a deputyship under a state officer is to be deemed a lucrative office, and that the amount