if not impossible, to obtain conveyances from those members of the society who may still be living. And even if deeds could be procured, their right to convey might seriously be questioned.

It may be suggested that the state could obtain a good title by exercising its power of eminent domain. However, the rule is:

"The general power of condemnation conferred by statute is not applicable to cemetery property, especially if the cemetery is a public one, and that express authorization is necessary for the exercise of eminent domain against such property."


It is, therefore, my further opinion that the most efficacious way of securing this title would be by legislative action authorizing the state to condemn this property.

TEACHERS' RETIREMENT FUND BOARD: Status of teachers who have retired under previous law. Status of teachers who have been under previous law but who have not had sufficient years of service to retire. Right of teachers who are not eligible to retire under old law to qualify under amended act.

October 28, 1938.

Mr. Robert B. Houghan,
Executive Secretary,
Teachers' Retirement Fund Board,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter calling attention to the provisions of chapter 109 of the Acts of 1937, p. 906, and requesting an official opinion in answer to the following questions:

Question 1. In your opinion do the provisions of the Act as amended in 1921 remain in effect after July 1, 1939, thereby making it optional with members to select the new amendment or continue under the old law.
Question 2. Assuming that the provisions of the Act as amended in 1921 remain in effect, can a teacher continue to make contributions under this section and receive an annuity of $700 after 40 years of service.

Question 3. Does a person now receiving an annuity of $700 receive an annuity of $900 after July 1, 1939.

Question 4. If the provisions of the 1921 amendment remains in effect, and are optional with teachers now members of the fund, will their contributions cease after 35 years of service, or will they continue as now, for 40 years.


I call attention to the character of chapter 189, supra, as an amendatory Act for the reason that the same has a very direct bearing upon the proper answer to your questions, most of which in their first analysis present the general question as to what happens to an Act or a section of an Act after its amendment in the constitutional manner. I think the rule is well settled as to what is the proper answer to this preliminary question. In the comparatively early case of Blakenmore v. Dolen, et al, 50 Ind. 194, the court said on page 204:

"It is settled by the adjudication of this court, that when a section in an existing law is amended in the mode prescribed by the constitution, it ceases to exist, and the section as amended, supersedes such original Act, and the section as amended, becomes incorporated in and constitutes a part of the original Act; and the original section is as effectually repealed and obliterated from the statute as if it had been repealed by express words; and it is upon this principle that it has been held that a section which has been once amended cannot again be the subject of amendment, but the section as amended must be amended."

This decision was followed by the court in the case of Walsh, Treasurer, et al v. The State, ex rel., Soules, Auditor, 142 Ind. 357, in which case, on page 362, the court used the following language:

"It is firmly settled that where a section in an exist-
ing law is amended in the mode prescribed by the constitution, it ceases to exist, and the action, as amended, supersedes the original, and becomes incorporated in, and constitutes a part of, that Act.”

Later, in the same case, on page 362, the court said:

“A statute, amending a former Act, operates as to matters thereafter occurring precisely as if the amendatory Act had been added to the original Act at the time of its adoption, and the two Acts must be construed together, and as one statute.”

Again, in the case of Stiers v. Mundy, 174 Ind. 651, at page 655, the court said:

“It is a rule of statutory construction that the amendment of a statute by a subsequent Act operates from that time precisely as if the subject-matter of the amendment had been incorporated in the prior Act at the time of its adoption; for the amendment becomes a part of the original Act, from the date such amendment is in force, whether it be the change of a word, figure, line or entire section, or a recasting of the whole language.”

I think the foregoing is sufficient to show that when a section of an existing law is amended, it ceased to exist; that it is effectually repealed and obliterated from the statute and that as to matters thereafter occurring, it will be construed and applied as if the section, as amended, had been a part of the original Act.

I shall, therefore, proceed with the further discussion of your questions upon the above basis. It follows that insofar as your first question inquires as to whether the provisions of the 1915 Act, as amended in 1921, remain in effect after July 1, 1939, that the same must be answered that it does not remain in effect if the amendment of 1937 is valid legislation.

The condition attached to the last statement above raises a very important question. I think it will be readily conceded that the Amendatory Act as to persons becoming members of the fund, after its effective date, is valid legislation. Likewise, as to persons who elect to come under said Amendatory Act of 1937, such persons have, under well settled principles, placed themselves in a position where they cannot attack the
constitutionality of such legislation. There remains the group who do not elect to come under the 1937 amendment but who desire to continue as members of the fund upon the basis provided by the prior Act. It seems to me that as to this group, the 1937 Amendatory Act would be invalid as impairing the obligation of a contract, and as to them the provisions of the old Act, as it stood prior to the amendment of 1937, would still be effective. The net result of this conclusion is that as to those members of the fund who are members prior to the effective date of the 1937 amendment, and who do not elect to come under and accept its terms, the prior law or laws remain effective for the purpose of enabling them to realize upon their contracts under the law as it existed when they became members of the fund, or under which they subsequently elected to be bound. As to those who elect to come under the 1937 Amendatory Act and as to persons becoming members of the fund after the effective date of the 1937 Amendatory Act, the law governing would be the Amendatory Act of 1937. Your first question is answered accordingly.

It follows from the foregoing that, in my opinion, a teacher, member of the fund, who declines to come under the 1937 Act and who was a member of the fund prior to the effective date of said Act, may continue to comply with the 1921 Act and at the end of 40 years of service be entitled to receive an annuity of $700. Your second question is answered accordingly.

As this law is written, I do not think that a person who has retired on an annuity of $700 under the existing laws, will, after July 1, 1939, be entitled to receive an annuity of $900.00. After the member of the fund, in accordance with its terms, retires on an annuity, I think the obligations of the parties have become fixed. The answer to your third question is in the negative.

Your fourth question, I think, has already been answered in the answers to the first, second and third questions. However, as already pointed out, the contribution of teachers who are under the 1937 Amendatory Act will cease after 35 years of service. That is the specific provision of the statute which provides that "no teacher who has received credit under this Act for 35 years of service shall be further assessed."