quired under the provisions of Sections 5840, et seq., General Code, to appear in person and testify at a hearing upon such claim before the township trustees, and statements as to the nature of the loss or injury complained of may be supported by affidavits rather than the oral testimony of at least two freeholders who viewed the results of the killing or injury, which affidavits may be made before any officer authorized to administer oaths. However, the township trustees may require parol testimony of the claimants and other witnesses if they so desire.

2. A dog warden has no authority to administer oaths.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2125.

PROBATE COURT—WHEN DATE OF PRESUMPTION OF DEATH ON ACCOUNT OF SEVEN YEAR ABSENCE MUST BE FIXED.

SYLLABUS:

Where property rights will depend upon an accurate determination of the date when the presumption of death arose, it is the mandatory duty of the Probate Court, under Section 10636-4, *General Code, to fix such date.*

COLUMBUS, OHIO, July 22, 1930.

HON. JAY R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication which reads:

> "I am asking you to interpret a part of Section 10636-4, which reads in part as follows: 'and the court may determine in such decree the date when such presumption arose.'
>
> Question: Is it or is it not obligatory upon the court to fix the date when the presumption of death arose, and if so how should he be guided in fixing the date of such presumption?"

The section to which you refer in your letter is a part of a group of sections which relate to proceedings in the case of presumption of death on account of an absence of seven years or more. Said section, 10636-4, reads:

> "If satisfied, upon such hearing, or upon the report of such master, that the legal presumption of death is made out, the court shall so decree; and the court may determine in such decree the date when such presumption arose; and shall forthwith cause to be published for three consecutive weeks, in the manner provided in Section 10636-1 of this act (G. C. §§10636-1 to 10636-14 a notice requiring the presumed decedent, if alive, to produce in court satisfactory evidence of his continuance in life; such evidence to be produced within twelve weeks from the date of the last publication of the notice in the case of an original application for the grant of letters, and within four weeks from such date in the case of an application for ancillary letters."

It will be observed that after such a proceeding is instituted, if the court is satisfied that the legal presumption of death is made out, he *shall* so decree. In other

words, it is the mandatory duty of the court to enter such a decree if satisfied as to the presumption of death. The statute further provides, however, that the court *may* determine in such decree the date when such presumption arose. Ordinarily the term "may", when used in a statute, signifies a term permissive in character and is not to be construed as mandatory unless there is something in the context of the section or related sections which requires such a construction in view of the public interest. On the other hand, the term "shall" is usually regarded as being mandatory unless there is something in the context which indicates that the term is only to be directory in character. It further is a well recognized principle of law in this state that where the same statute uses the terms "shall" and "may", the former is to be regarded as mandatory and the latter permissive. In examining the statute to which you refer, it will be noted that Section 10636-1, General Code, authorizes the administration of an estate in the manner therein provided "whenever any person shall be presumed to be dead on account of seven or more years absence from the place of his or her last domicile," etc.

Under the common law rule in Ohio, the presumption of death arises at the end of the seven year period and there is no presumption that the death occurred prior thereto.

In the case of *Young* vs. *Young,* 10 O. App. 351, it was held as disclosed by the headnote that:

> "Where a person mysteriously disappears and is not again heard from, a legal presumption of his death does not arise until seven years from the date of his disappearance, and in the absence of any proof showing his death the property of an ancestor dying within the seven-year period will be presumed to have descended to such absent heir."

The statutes we are considering herein were not enacted until 1923, whereas the case above mentioned was decided in 1918. It therefore may be assumed that the reference of the Legislature to the presumption of death by an absence of seven years or more had reference to such presumption as established by the common law of Ohio and that there was no intent on the part of the Legislature to change said rule. On the other hand, the said legislation in a measure is declaratory of the common law.

It is believed, therefore, that the Legislature in the use of the language "and the court may determine the date when said presumption arose" did not intend to empower the court to fix a date when such presumption arose prior to the expiration of the seven year period. In other words, it would seem that in those cases in which the evidence discloses the absence to have been for more than seven years, the court may determine the date upon which the seven year period expired. In many instances this may be important. It is not at all difficult to imagine a case wherein property would descend to certain heirs or devisees at the end of the seven year period, which would be materially changed if the presumption arose at a later period. Undoubtedly it was for the purpose of eliminating such confusion that the Legislature authorized the court to fix such date.

On the other hand, in many cases the determination of the exact date when the presumption arose would be of no importance in connection with the descent or distribution of the presumed decedent's property. I believe that because the necessity would not arise in every instance, the Legislature used the word "may". Where this

necessity does exist, however, it would seem that it should be the mandatory duty of the court to fix the exact date. In other words, the public interest requires that this step be taken. This is so for the reason that the question must of necessity be passed upon at some time. If it is not fixed at this hearing, then the court must meet it subsequently when the question arises in connection with the approval of the distribution made by the executor or administrator.

In view of what has been said, I am of the opinion that when property rights will depend upon an accurate determination of the date when the presumption of death arose, it is the mandatory duty of the Probate Court, under Section 10636-4, General Code, to fix such date.

You further inquire what should guide the Probate Court in fixing this date. As I have before indicated, the Ohio rule is that the presumption does not arise until seven years from the date of disappearance. It would extend this opinion too long to discuss all the possible circumstances which might have effect in reaching the determination of when the seven year period started to run. Each case must be controlled by its own facts. It is my suggestion that you examine the discussion of this subject contained in 17 Corpus Juris, commencing on page 1167 and continuing to page 1179. This discussion, together with the cases cited in the notes, should be helpful in the consideration of any question which you have before you.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2126.

APPROVAL, TWO LEASES IN TRIPLICATE BETWEEN SUPERINTENDENT OF PUBLIC WORKS AND PENNSYLVANIA RAILROAD COMPANY TO CANAL LANDS IN CITY OF MASSILLON, STARK COUNTY, OHIO.

COLUMBUS, OHIO, July 22, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval two certain leases in triplicate executed by you as Superintendent of Public Works and as Director of said department, by which there are leased and demised to the Pennsylvania Railroad Company, lessee of the Pittsburgh, Fort Wayne and Chicago Railway Company, two parcels of abandoned Ohio Canal lands in the city of Massillon, Stark County, Ohio, which parcels of land contain 8925 square feet and 10,876 square feet, respectfully, and are each described by metes and bounds in said respective leases.

The leases here in question, which are each for a term of 99 years renewable forever, subject to revaluation at the end of each 15 year period, and call for an annual rental during the first 15 year period of 6% upon the present appraised value of said parcels of land, have been executed by you under the authority of Section 9 and 18 of an act of the 88th General Assembly passed April 6, 1929, and which became effective upon the 25th day of July, 1929. 113 O. L. 532.

Although the leases here in question do not contain any recitals to this effect, I am informed by your office that each of these leases have been executed by you by way