certificate is issued pursuant to the provisions of section 451, Burns Annotated Indiana Statutes of 1926, which provides among other things that:

“In the event such appointment” (that is, appointment of a special judge upon the filing of a motion for change from judge) “is not made within five (5) days by said regular judge, the clerk of the court in which said action is pending shall forthwith, upon the request of either party, certify the facts to the governor, and thereupon the governor shall appoint another special judge who shall have like jurisdiction.”

The clerk in this particular case certifies that an affidavit for a change of judge was filed on January 23, 1933, and that no appointment has been made at the time of the certificate, which is shown to be January 30, 1933. The clerk further certifies that the certificate is made pursuant to the request of the defendants.

While this certificate is not in the best of form, it apparently contains all the essential facts authorizing you as governor to appoint a special judge in said cause pursuant to the above statute.

HIGHWAY COMMISSION: Right of highway commission to certify statement of cost of bridge across Whitewater Canal to canal company or one holding fee simple title to canal property at point of crossing.

January 31, 1933.

Hugh A. Barnhart, Director,
State Highway Commission,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of January 27, which is as follows:

“In 1930, the Indiana state highway commission under the authority conferred by chapter 13, Acts of 1929, constructed a bridge to carry state road 1, across the Whitewater Canal at a point approximately two miles north of Connersville.

“This act provides that the director of the state highway commission shall certify to the auditor of state and
to the canal company, or its lessee, grantee, trustee or receiver, a statement of the cost of such bridge, but further provides in Sec. 5 that 'If at the time when the cost of any such bridge so constructed by the state highway commission shall have been ascertained, there is pending in any of the courts of this state any litigation which is designed to determine and fix the rights and liabilities of any such canal company or any of its lessees, grantees, trustees or receivers, the cost so ascertained shall not be certified to such company or to its lessee, grantee, trustee or receiver, or to the auditor of state, until such litigation shall have been finally adjudicated, fixed and determined.'

"When the cost of the bridge was determined there was pending litigation affecting the liability of the various partial owners of the canal in the case of City of Connersville v. Connersville Hydraulic Co., etc. (77 Ind. App. 184). From newspaper and other reports, it appears that pursuant to the first Appellate Court decision, this cause was retried by the Henry Circuit Court, and this court's decision affirmed by the Appellate Court, and that a petition for transfer was recently denied by the Supreme Court.

"We respectfully request that you investigate the status of this litigation and inform us whether in your opinion under this act, we may now properly proceed to certify the cost of this bridge, and who is the party or parties upon whom the result of this litigation fixed the responsibility for the cost of such bridge."

Upon receipt of the above letter, I investigated the case referred to and find that when the same reached the Appellate Court the second time, an opinion was written by Judge McMahan affirming the decree of the lower court. The opinion is reported in 173 N. E. beginning at page 641. From my reading of the foregoing opinion, I conclude that the liability attaches to the holder of the fee simple title to the canal property in the first instance to erect the necessary bridge across the canal. I further find, that on December 7, 1932, a petition to transfer this cause to the Supreme Court was denied.

It is my opinion, therefore, that if the procedure provided for in chapter 13 of the Acts of 1929, were followed by the
highway commission in the construction of this bridge across
the Whitewater Canal, that you should now, under the pro-
visions of section 3 of said act, certify a statement of the cost
of such bridge to the canal company or to the one holding the
fee simple title to the canal property at the point of crossing.
Should there be any failure on the part of the owner of the
canal property at the point of crossing to pay the costs of the
bridge under the provisions of the act, it would be your duty
to certify the same to the auditor of state, who in turn would
assess the penalty provided in the act and refer the matter to
this department for legal proceedings necessary to recover the
amount of the expenditure made by the highway department
in the construction of the bridge.

GOVERNOR: Whether governor is required to look further
than to contents of certificate of clerk of court upon appli-
cation for appointment of special judge.

February 2, 1933.

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

My dear Governor:

In the matter of the appointment of a special
judge in cause No. 8192 In the Delaware Su-
perior Court.

I have before me the original of a certification by the clerk
of the Delaware Superior Court with reference to the appoint-
ment of a special judge in the above entitled cause.

Section 449 of Burns Annotated Indiana Statutes of 1926,
provides that:

"In all civil actions, where a change of venue is taken
from the regular judge of any circuit or superior court
of this state, it shall be the duty of said regular judge,
within five days after such change of venue is AP-
PLIED FOR, to appoint a special judge to hear and
try such action." (Our italics and capitals.)

The certificate above referred to, is issued pursuant to the
provisions of section 451, Burns Annotated Indiana Statutes
of 1926, which provides among other things that: