

#40

4/27/66

Memorandum 66-18

Subject: Study 44 - The Fictitious Name Statute

Attached to this memorandum are two copies of a Tentative Recommendation relating to the Fictitious Name Statute. This tentative recommendation is designed to carry out the general policy decisions made at the April meeting. Please mark any revisions you believe should be made on one copy and return it to the staff at the May meeting.

Please read the preliminary portion of the tentative recommendation for a statement of the important changes to be made in existing law.

At the meeting, we plan to go through the proposed legislation section by section.

Note that we propose that the Fictitious Name Statute be moved to Part 3 ("Representations to the Public") of Division 7 ("General Business Regulations") of the Business and Professions Code.

Section 8 has been included in the proposed legislation in accordance with the suggestion made at the last meeting. However, the staff recommends that this provision be omitted from the statute. The provision unduly complicates the act and does not appear to be necessary. Since the operative date of the act would be deferred until January 1, 1968, it appears that persons would be given a reasonable time in which to acquaint themselves with the new law. Persons who would be required to comply with this act are in no different position than millions of other persons who must comply with other acts that do not even have a deferred operative date. Furthermore, few persons who do not know of the existence of the new law by its operative date are likely to learn of its existence during the following year.

Respectfully submitted,

John L. Reeve
Junior Counsel

Revised April 27, 1966

TEMTATIVE RECCMELDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
THE FICTITIOUS NAME STATUTE

The Fictitious Name Statute--Civil Code Sections 2466-2471--provides that every person or partnership transacting business in a fictitious name, or a designation not showing the names of the persons interested as partners in the business, must file a certificate with the clerk of the county in which the principal place of business is located and must subsequently have the certificate published in a newspaper once a week for four successive weeks. The certificate must show the name and place of residence of the person or partners transacting business in the fictitious name. A new certificate must be filed and published on each change in the membership of such a partnership. The county clerk is required to record the information contained in the certificates filed with him in a register maintained for that purpose. If a person fails to file and publish a certificate of fictitious name as required by the statute, he may not maintain any action on a contract made or a transaction had in a fictitious name until the fictitious name certificate has been filed and published.*

The courts have said that the purpose of the Fictitious Name Statute is to prevent fraudulent trading by providing a source--the county clerk's

*Compliance with the Fictitious Name Statute is a prerequisite to obtaining a license as a real estate broker or salesman (Business and Professions Code Section 10159.5), mineral, oil, and gas broker or salesman (Business and Professions Code Section 10522.5), or check seller and cashier (Financial Code Section 12300.2).

register--from which persons can learn with whom they are trading. There are, however, several deficiencies in the statute that prevent it from fully serving the purpose for which it was created. To remedy these deficiencies, the Commission recommends a revision (discussed in detail below) of the statute that will (1) make its provisions applicable to all persons doing business in the state under fictitious names, (2) make compliance with the statute less onerous to businesses that are subject to its terms, (3) provide a meaningful sanction for noncompliance with the statute, (4) make the registered information concerning fictitious names more accessible to the public, and (5) facilitate the administration of the statute by the public officials who are concerned therewith.

Persons subject to the act

The existing California law does not apply to all persons doing business in California under a fictitious name. Civil Code Section 2467 expressly exempts commercial and banking partnerships which are established and transacting business in a place without the United States, and the courts have construed the filing requirements of the act to exempt any person who does not maintain a place of business within the state. Moon v. Martin, 185 Cal. 361, 197 Pac. 77 (1921).

The Commission recommends elimination of the provision that excuses commercial and banking partnerships, which are established and transacting business in a place without the United States, from filing fictitious name certificates. This provision was enacted in 1872 and has remained in the code since that time with only a minor modification in 1873. It was based on a similar provision of the New York law. See the note to Section 2467 in 2 HAMMOND & BURCH, CAL. CIVIL CODE ANNOTATED 109 (1872).

The reference to banking partnerships is now obsolete since only a corporation may carry on the business of banking in California. CAL. FIN. CODE § 102. Foreign commercial partnerships should be required to comply with the Fictitious Name Statute since persons in California normally would have a more difficult time obtaining information concerning foreign partnerships than in obtaining information concerning local business enterprises. Since both foreign and domestic business enterprises would be treated equally, there would be no discrimination against foreign commerce. Only a few states have a similar provision and New York no longer has such an exception. See N.Y. PENAL CODE § 440.

The Commission also recommends extending the Fictitious Name Statute to cover persons who are doing business in California but who do not have an established place of business within the state. The need for California residents to be able to discover the identity of such persons seems at least as great, if not greater, as is the need to be able to discover the identity of persons doing business from a fixed location within the state.

Publication and filing requirements

The existing California law requires a person who is subject to its terms to file a fictitious name certificate with the county clerk of the county in which he maintains his principal place of business. Thereafter, he must publish the certificate in a newspaper once a week for four successive weeks.

The publication requirement is unduly burdensome and expensive. This is particularly true for large partnerships and associations (which are treated as partnerships for liability purposes) whose membership changes frequently, for the filing and publication requirements must be met each time the membership of the organization changes.

Since the fictitious name certificate must be filed with the county clerk and maintained by him in a fictitious name register, no purpose is served by the publication requirement that can justify the expense of publication. Many credit agencies that make extensive use of the fictitious name certificates have informed the Commission that they do not feel that the publication requirement serves a useful purpose. Similar reports have been received from various public officials whose agencies frequently use the fictitious name registers for investigative purposes. Accordingly, the Commission recommends that the publication requirement be eliminated.

The Commission recommends that the statute require the filing of a fictitious name certificate with the Secretary of State as well as with the county clerk in the county of the person's principal place of business. There is precedent in other jurisdictions for this type of dual filing requirement. The filing with the Secretary of State will make it easier for persons outside California and persons in counties other than the county of the principal place of business to obtain the information contained in the fictitious name certificates. Retaining the filing on the county level will continue to facilitate use of the fictitious name registers by the persons who use them the most.

If a person does not have a place of business within this state, he should be required to file his certificate only with the Secretary of State. Under present law, the statute does not apply to persons who do not have a place of business within the state. Moon v. Martin, 185 Cal. 361, 197 Pac. 77 (1921). The requirement of filing with the Secretary of State will end the exemption now provided to such persons, and will thus enable California residents to determine the identity of all persons doing business in California under fictitious names.

Sanctions for noncompliance

Under existing California law, the only sanction for failing to file a certificate of fictitious name as required by the statute is that no action may be "maintained" on a contract made or a transaction had in a fictitious name until the fictitious name certificate has been filed and published. The courts have interpreted this sanction to mean that such an action may be commenced even if no fictitious name certificate has been filed and published; but, if the defendant objects to the failure to comply with the Fictitious Name Statute, the action will be abated until the certificate has been filed and published. If the defendant fails to object either by answer or by demurrer, his objection is waived and the action may proceed despite the plaintiff's failure to comply with the statute.

The sanction now provided for failure to file a fictitious name certificate fails to assure that information as to the identity of a person using a fictitious name will be available in the type of case where it is most needed, i.e., where a person has a claim against a person or firm transacting business in a fictitious name and needs to know who the person or persons are who transact business under that fictitious name.

Accordingly, the Commission recommends the repeal of the sanction now provided. Instead, the Commission recommends that if a judgment is recovered against a person who had not filed a fictitious name certificate before the commencement of the action, the party recovering the judgment should be permitted to recover, in addition to the relief granted in the judgment, a civil penalty measured by the actual damages he has sustained as a result of the failure to file the certificate or \$100, whichever is greater. Under the Commission's recommendation, a person would be permitted

to file his fictitious name certificate at any time but if the certificate were not filed before the institution of an action against the person, the sanction would apply in appropriate cases. A partnership or corporation would be required to file a new certificate upon a change in the members or officers listed in its certificate and it would have 30 days in which to file a new certificate without being subject to the penalty.

The penalty provided should not be recoverable in small claims actions. The penalty is intended to be an addition to relief that would otherwise be sought and is not intended to provide an independent incentive to litigate claims. Because of the insignificant sums that are recoverable in small claims actions, however, the recovery of the penalty would frequently be the principal incentive for litigation in that forum if the statute permitted such recovery.

Maintenance of fictitious name records

At the present time, the county clerks' records contain thousands of obsolete fictitious name certificates. In the future the number of obsolete certificates will increase for the existing statute provides no system for eliminating the obsolete records. In 1965, the county clerks introduced a bill in the Legislature that would have permitted them to destroy obsolete fictitious name certificates. The bill received favorable action from both the original Assembly and Senate committees to which it was referred, but the bill was sidetracked when combined with several other bills relating to fees.

The Commission has concluded that provision should be made for determining when a fictitious name certificate becomes obsolete and for destroying

or otherwise removing the obsolete certificates from the files of the Secretary of State and the county clerks. Accordingly, the Commission recommends that a fictitious name certificate should expire after ten years. At any time before the expiration of a fictitious name certificate, a person would be permitted to file a new certificate that would supersede the earlier certificate. He also would be permitted to file a certificate of abandonment of the use of a fictitious name. After a fictitious name certificate has expired or has been superseded, or after a certificate of abandonment of use of a fictitious name has been filed, the Secretary of State and the county clerk would be permitted to destroy or otherwise remove the fictitious name certificate from their files. A record of the destroyed certificate would still be available in the fictitious name registers and the Secretary of State and the county clerks would be required to enter the fact of expiration, supersession, or abandonment in the register.

Effective date

The Commission recommends that the operative date of its proposed statute be deferred until January 1, 1968, to permit those persons who must comply with it a reasonable time in which to familiarize themselves with the new requirements. However, a person would be permitted to file a certificate in compliance with the new act at any time after the effective date of the act and the certificate so filed would be deemed to have been filed on January 1, 1968.

It should be noted that the effective date of an act normally is 91 days after the adjournment of the Legislature that passed the act; the operative date of an act is the date on which the act will begin to be applied to and enforced against the persons to whom the law applies.

The Commission also recommends that an individual, partnership or corporation that is in compliance with Civil Code Sections 2466-2471 on January 1, 1968, be deemed to be in compliance with the new provisions until the earlier of the following dates: (1) December 31, 1968, or (2) in the case of a partnership, until 30 days after a change in the membership thereof, or (3) in the case of a corporation, until 30 days after a change of president, vice president, secretary, or assistant secretary, if any, of the corporation. Although an individual, partnership, or corporation would have to file a new certificate by the earlier of the above dates, it could voluntarily comply with the new requirements at any time after the effective date of the act.

Recodification of statute

The provisions governing the use of fictitious names are a type of business regulation and are somewhat analogous to licensing provisions. The present location of the Fictitious Name Statute in the Civil Code in the Title on "Partnerships" under the Part dealing with "Obligations Arising From Particular Transactions" is an inappropriate location for this statute. The Fictitious Name Statute deals with corporations and individuals as well as with partnerships. Furthermore, the sections governing partnerships which were once located in the Civil Code are now mostly located in other codes. The Commission recommends that the provisions dealing with fictitious names be moved to Part 3 of Division 7 of the Business and Professions Code which prescribes "General Business Regulations" relating to "Representations to the Public." Sections 2466-2471 of the Civil Code which now govern the use of fictitious names would be superseded and should be repealed.

Miscellaneous revisions

In addition to the changes discussed above, the Commission recommends several other technical, nonsubstantive changes in the interest of clarity. These changes are indicated in the Comments to the statutory provisions that follow this recommendation.

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to repeal Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code and to add Chapter 5 (commencing with Section 17900) to Part 3 of Division 7 of, and to amend Sections 10159.5 and 10522.5 of, the Business and Professions Code and to amend Section 26848 of, and to add Section 12193.5 to, the Government Code and to amend Section 12300.2 of the Financial Code, relating to fictitious names,

The people of the State of California to enact as follows:

SECTION 1. Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code is repealed.

Comment. This chapter, consisting of Sections 2466-2471, is superseded by Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code (added in this tentative recommendation).

Note. The sections to be repealed read as follows:

§ 2466. [User of fictitious name to file and publish certificate: Contents: Affidavit of publication.] Except as otherwise provided in the next section every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate subscribed and acknowledged in the manner provided in Section 2468 of the Civil Code, stating that name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence.

Such subscribed and acknowledged certificate must be published subsequent to the filing thereof with the county clerk pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate as in this section provided shall be filed with the county clerk within 30 days after the completion of such publication, but in no event shall such publication be made prior to the filing of such certificate with the county clerk.

§ 2467. [Exception: Foreign commercial or banking partnership.] A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate or making the publication prescribed in the last section, use in this state the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

§ 2468. [Signing and acknowledgment of certificate: Time for filing and publication: Action not maintainable until certificate filed.] The certificate filed with the clerk as provided in Section 2466 must be signed by the person therein referred to, or by the partners, as the case may be, and acknowledged before some officer, authorized to take the acknowledgment of conveyances of real property, by personally appearing before such officer notwithstanding the provisions of Section 1195 of the Civil Code. Where a business is hereafter commenced by a person under a fictitious name or a partnership is hereafter formed, the certificate must be filed and the publication designated in that section must be made within one month after the commencement of such business, or after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership. Where the business has been heretofore conducted under a fictitious name or where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this act. No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this State until the certificate has been filed and the publication has been made as herein required.

§ 2469. [New certificates on change of partner.] On every change in the members of a partnership transacting business in this state under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned in section twenty-four hundred and sixty-seven, a new certificate must be filed with the county clerk, and a new publication made as required by this article on the formation of such partnership.

§ 2469.1. [Certificate of cessation of doing business under fictitious name: Filing and publication: Affidavit of publication.] Every person and every partnership transacting business in this State under a fictitious name, or designation not showing the names of the persons interested as partners in such business, who has filed a certificate and caused the publication and filing of the affidavit of publication thereof according to the provisions of this chapter, may, upon ceasing to use that name, file a certificate of abandonment of name, stating the name in full and the place of residence of such person, and stating the names in full of all the members of such partnership and their places of residence. Such certificate shall be signed by the person therein referred to, or by one or more of the partners, as the case may be.

Such certificate must be published pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate shall be filed subsequent to the certificate with the county clerk within 30 days after the completion of such publication.

§ 2470. [Register of fictitious names: Entry of abandonment of fictitious name.] Every county clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him pursuant to this article, entering in alphabetical order the name of every such person who does business under a fictitious name, and the fictitious name, and the name of every such partnership, and of each partner therein.

Upon the abandonment of the use of a fictitious name, the clerk shall enter the fact of abandonment in the register.

§ 2471. Certified copies of register, and proof of publication, to be evidence. Copies of the entries of a county clerk, as herein directed, when certified by him, and affidavits of publication, as herein directed, made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

SEC. 2. Chapter 5 (commencing with Section 17900) is added to Part 3 of Division 7 of the Business and Professions Code, to read:

CHAPTER 5. FICTITIOUS NAMES

Comment. This chapter supersedes Civil Code Sections 2466-2471 (repealed in this tentative recommendation) and governs the use of fictitious names in transacting business.

17900. "Fictitious name" defined

17900. As used in this chapter, "fictitious name" means:

(a) In the case of an individual, a name other than the name of the individual.

(b) In the case of a partnership, a name other than the names of all the members of the partnership.

(c) In the case of a corporation, a name other than its corporate name as set out in its articles of incorporation.

Comment. This section codifies the existing definition of "fictitious name" as developed by the courts in interpreting Civil Code Section 2466 (repealed in this tentative recommendation). See Vagin v. Brown, 63 Cal. App.2d 504, 146 P.2d 923 (1944)(individual); Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928)(partnership); Berg Metals Corp. v. Wilson, 170 Cal. App.2d 559, 339 P.2d 869 (1959)(corporation).

17901. "Person" defined

17901. As used in this chapter, "person" means an individual, partnership, or corporation.

Comment. This definition is added for clarity.

17902. - Persons transacting business under a fictitious name to file certificate

17902. (a) Every person who transacts business in this state under a fictitious name shall file a fictitious name certificate in accordance with this chapter.

(b) A partnership shall file a new fictitious name certificate in accordance with this chapter within 30 days after any change in the membership thereof. The new certificate supersedes the earlier certificate.

(c) A corporation shall file a new fictitious name certificate in accordance with this chapter within 30 days after any change of the corporate officers named in the fictitious name certificate previously filed. The new certificate supersedes the earlier certificate.

(d) A person who has filed a fictitious name certificate shall file a new fictitious name certificate in accordance with this chapter before continuing to transact business in this state under a fictitious name after the date of expiration of the earlier certificate. The new certificate supersedes the earlier certificate.

(e) Nothing in this section invalidates a fictitious name certificate that is filed after the time it is required by this section to be filed.

Comment. Section 17902 continues the requirement, contained in California law since 1872, that a person transacting business within the state under a fictitious name must file a fictitious name certificate.

Subdivision (a) requires every individual, partnership, or corporation transacting business in the state under a fictitious name to file a certifi-

cate. Under the prior law, commercial and banking partnerships, established and transacting business in a place outside of the United States were exempted from the certificate filing requirement. CIVIL CODE § 2467 (superseded by this act). And, under prior law, persons who did not maintain a place of business within the state were exempted from the certificate filing requirement. Mocn v. Martin, 185 Cal. 361, 197 Pac. 77 (1921). Under subdivision (a), there are no exceptions, and all persons doing business in the state under a fictitious name must comply with the certificate filing requirement.

Subdivision (a) requires that a fictitious name certificate be filed before transacting business in this state under a fictitious name. This changes the previous law which permitted the certificate to be filed within one month after the commencement of the business or, in the case of a partnership, within one month from the date designated in the agreement for the commencement of the business.

Subdivision (b) restates the requirement of Civil Code Section 2469 requiring a partnership to file a new certificate after any change in the membership thereof. Subdivision (c) adds a requirement that a corporation file a new certificate after a change in the officers listed in its certificate. These subdivisions provide a means for keeping the information in the certificates current without imposing an unreasonable burden on the persons required to file the certificates. Although individuals, partnerships, and corporations are not required to file new certificates when there are changes in the other information contained in their certificates, nothing in this section or chapter precludes them from doing so.

Subdivision (d) requires a new certificate to be filed before a person

continues to transact business under a fictitious name after the expiration of the previously filed certificate. This requirement is new. Under previous law, a fictitious name certificate never expired. See the Comment to Section 17906.

Subdivision (e) makes it clear that a filing after the time specified in Section 17902 is nonetheless an effective filing. Failure to file within the time limits specified, however, may result in the imposition of a civil penalty if an action is commenced during the period the certificate is not on file as required. See Section 17912 and the Comment thereto.

17903. Place where certificate to be filed

17903. (a) A person having a place of business within this state shall file his fictitious name certificate with the Secretary of State and with the county clerk of the county in which his principal place of business in this state is located.

(b) A person who does not have a place of business located within this state shall file his certificate with the Secretary of State.

Comment. Subdivision (a) retains existing law to the extent that it requires a fictitious name certificate to be filed with the appropriate county clerk. The requirement that a fictitious name certificate be filed with the Secretary of State is new. This additional filing is required so that one roster listing all persons transacting business under fictitious names in this state can be compiled. Such a roster will make it easier for persons who do not reside in the county of the principal place of business of the person filing the certificate to obtain the information contained in the fictitious name certificates.

Under existing law, a person who does not have a place of business in this state does not have to comply with the Fictitious Name Statute. Moon v. Martin, 185 Cal. 361, 197 Pac. 77 (1921). Subdivision (b) requires such a person to file a certificate with the Secretary of State. Since it is usually more difficult to obtain information about a firm that does not have an office in this state than it is to obtain information concerning a local firm, this requirement is necessary to afford adequate protection to persons dealing with such firms.

17904. Form of certificate

17904. The fictitious name certificate shall be on a form prescribed by the Secretary of State and shall include:

- (a) The fictitious name being used, or to be used, by the person.
- (b) The person's principal place of business.
- (c) In the case of an individual registrant, the full name and place of residence of the individual.
- (d) In the case of a partnership registrant, the full names and places of residence of all the members of the partnership.
- (e) In the case of a corporate registrant, the name of the corporation as set out in its articles of incorporation and the full names and places of residence of the president, vice president, secretary, and the assistant secretary, if any, of the corporation.
- (f) The name of the person to whom, and the address to which, the Secretary of State is to mail the notice required by Section 17907.
- (g) Such other information as the Secretary of State requires in order to administer this chapter.

Comment. This section specifies certain information that must be contained in a fictitious name certificate. It also permits the Secretary of State to require the inclusion in the certificate of additional information necessary to enable him to administer the chapter.

Subdivisions (a) through (d) restate existing law.

Subdivision (e) states the information that must be filed by a corporation. The corporate officers required to be named in the certificate are those who may be served with process under Section 411 of the Code of

Civil Procedure. Subdivision (e) will clarify the law by stating what appears to be the existing practice. Berg Metals Corp. v. Wilson, 170 Cal. App.2d 559, 339 P.2d 869 (1959).

The information required by subdivision (f) is needed to enable the Secretary of State to mail a notice of expiration of the certificate. See Section 17907. Although a person is not required to file a new certificate when there is a change in the person to whom or the address to which the notice of expiration is to be sent, he may do so if he wishes.

17905. Signing and acknowledging certificate

17905. Notwithstanding the provisions of Section 1195 of the Civil Code, the fictitious name certificate shall be signed by the individual, the partners, or two or more of the corporate officers referred to in the certificate and shall be acknowledged by personally appearing before some officer who is authorized to take the acknowledgment of conveyances of real property.

Comment. The acknowledgment provision is adopted from Civil Code Section 2468 (repealed in this tentative recommendation). The section retains existing law relating to the signing of certificates by individuals or partners. The section also prescribes the method in which a corporation shall sign its fictitious name certificates, a matter which is not provided for by the existing law.

17906. Expiration of certificate

17906. A fictitious name certificate expires ten years from January 1 of the year following the date it was filed.

Comment. Under existing law, a fictitious name certificate is effective for an unlimited duration unless there is a change in the members of the partnership or a certificate of abandonment of use of the fictitious name is filed. The ten year period which is imposed by this section will force persons to periodically review their certificates and to bring them up to date. On the other hand, the certificate will remain effective for a sufficient period of time to avoid the imposition of an unreasonable burden on persons who are required to file fictitious name certificates.

This section also is an integral part of the procedure by which a county clerk or the Secretary of State is to be permitted to destroy or otherwise remove obsolete fictitious name certificates from his files.

17907. Notice of expiration

17907. Between the first day of October and the first day of December immediately preceeding the expiration of a fictitious name certificate, the Secretary of State shall mail a notice, indicating the date on which the certificate will expire, to the person designated in the certificate to receive such notice. Neither the failure of the Secretary of State to mail the notice as provided in this section, nor the failure of the notice to reach the person to whom it was sent shall operate to continue the fictitious name certificate in effect after the date of its expiration. Neither the state nor any officer or employee of the state is liable for damages for failure to mail the notice as required by this section.

Comment. Although notice will be sent only by the Secretary of State, the notice will apply to both the certificate on file with the Secretary of State and the certificate on file with the county clerk. The second sentence makes it clear that the requirement that notice be sent is directory rather than mandatory. The last sentence makes it clear that no tort liability will arise out of the negligence of the state or one of its officers or employees in sending or failing to send the notice as required by this section.

17908. Abandonment of use of fictitious name

17908. (a) A person who has filed a fictitious name certificate may, upon ceasing to use that fictitious name, file a certificate of abandonment of use of a fictitious name. The certificate shall be filed with the Secretary of State and, if the person has a principal place of business in this state, with the county clerk of the county in which his principal place of business is located;

(b) The certificate shall be on a form prescribed by the Secretary of State and shall include:

(1) The fictitious name being abandoned;

(2) In the case of an individual who is abandoning the use of a fictitious name, the full name and residence of the individual.

(3) In the case of a partnership that is abandoning the use of a fictitious name, the full names and residence addresses of all the members of the partnership.

(4) In the case of a corporation which is abandoning the use of a fictitious name, the name of the corporation as set out in its articles of incorporation and the full names and places of residence of the president, vice president, secretary, and the assistant secretary, if any, of the corporation.

(5) Such other information as the Secretary of State requires in order to administer this chapter.

(c) Notwithstanding the provisions of Section 1195 of the Civil Code, the certificate shall be signed by the individual, by one or more of the partners, or by two or more of the corporate officers referred to in the certificate and shall be acknowledged by personally

appearing before some officer authorized to take the acknowledgement of conveyances of real property.

Comment. This section retains the substance of Civil Code Section 2469.1 (repealed in this tentative recommendation), states more clearly the information required to be included in the certificate, and eliminates the requirement of publication.

17909. Registers of fictitious names

17909. The Secretary of State and each county clerk shall maintain a register of the fictitious names mentioned in the certificates filed with him under this chapter. The fictitious names shall be entered in the register in alphabetical order. The name of the individual, or the names of the partners, or the name of the corporation and the names of its officers, as listed in the certificate, shall be entered in the register under the fictitious name of the business. When a certificate of abandonment of use of a fictitious name has been filed or a fictitious name certificate has expired or has been superseded, the Secretary of State and the county clerk shall enter that fact in the register.

Comment. This section retains and clarifies existing law. See Civil Code Section 2470 (repealed in this tentative recommendation). The last sentence is included to make certain that the fictitious name registers contain a complete record of the circumstances justifying the destruction or removal of obsolete fictitious name certificates. See Section 17910.

See also Sections 17902(b), (c)(new certificates which supersede earlier certificates), 17906 (expiration of certificate), and 17908 (certificate of abandonment of use of a fictitious name).

17910. Destruction of obsolete certificates

17910. The Secretary of State and the county clerk may destroy or otherwise dispose of a fictitious name certificate if:

(a) The fictitious name certificate has expired or has been superseded by a new certificate.

(b) A certificate of abandonment of use of a fictitious name has been filed by the person who filed the fictitious name certificate.

Comment. This section provides a method for purging obsolete certificates from the public records. See also Section 17909 and the Comment to that section.

17911. Certified copies of certificates

17911. A copy of a fictitious name certificate filed with the Secretary of State or a county clerk under this chapter, when certified by the Secretary of State or county clerk, is prima facie evidence of the existence and content of the original fictitious name certificate and of its execution by each person by whom it purports to have been executed. The presumption created by this section is a presumption affecting the burden of producing evidence.

Comment. This section restates the substance of Civil Code Section 2471 (repealed in this tentative recommendation) and clarifies the presumptive effect of a certified copy of a fictitious name certificate. See Evidence Code Sections 601, 602, 603, 604.

17912. Civil penalty for failure to comply with chapter

17912. (a) If a plaintiff recovers a judgment against a defendant who was not in compliance with this chapter on the date of the commencement of the plaintiff's action, the plaintiff is entitled to recover, in addition to any other relief he obtains in such action, a civil penalty in the amount of the actual damages he has sustained as a result of the defendant's failure to comply with this chapter or \$100, whichever is the greater amount.

(b) The civil penalty provided in subdivision (a) may also be recovered by a person who recovers a judgment on a cross-action against a plaintiff who was not in compliance with this chapter on the date the plaintiff commenced the original action.

(c) This section does not apply to an action commenced in a small claims court.

Comment. This section provides the only sanction for failure to comply with the requirements of the Fictitious Name Statute. A party recovering a judgment against a person who failed to comply is entitled to collect \$100 in any event and need prove his damages only if they are in excess of that amount. The penalty can be recovered only when the person attempting to collect it has won his original suit. Subdivision (b) makes it clear that the penalty may be collected both in an original action and in a cross-action.

The section is not applicable in actions commenced in a small claims court to insure that the civil penalty will be imposed only in actions of some consequence.

SEC. 3. Section 10159.5 of the Business and Professions Code is amended to read:

10159.5. Every person applying for a license under this chapter who desires to have such license issued under a fictitious name shall file with his application a certified copy of ~~both the entry of the county clerk and the affidavit of publication made pursuant to the provisions of Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code~~ his fictitious name certificate filed with the Secretary of State pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code .

Comment. This section, which relates to real estate salesmen and brokers, is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code.

SEC. 4. Section 10522.5 of the Business and Professions Code is amended to read:

10522.5. Every person applying for a license under this chapter who desires to have such license issued under a fictitious name shall file with his application a certified copy of ~~both the entry of the county clerk and the affidavit of publication made pursuant to the provisions of Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code~~ his fictitious name certificate filed with the Secretary of State pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code .

Comment. This section, which relates to mineral, oil, and gas brokers and salesmen, is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code.

SEC. 5. Section 12300.2 of the Financial Code is amended to read:

12300.2. Every person engaging in the business of a check seller or cashier shall conduct such business under his true name unless he has complied with ~~the provisions of Chapter 2, Title 10, Part 4, Division 3 of the Civil Code~~ Chapter 5, Part 3, Division 7 of the Business and Professions Code .

Comment. This section is amended to reflect the fact that the provisions in the Civil Code have been superseded by provisions in the Business and Professions Code.

SEC. 6. Section 26848 of the Government Code is amended to read:

26848. The fee for filing and indexing a ~~certificate--of fictitious-name,-including-affidavit-of-publication,~~ fictitious name certificate or a certificate of abandonment of use of a fictitious name is two dollars (\$2).

Comment. Section 26848 is amended to conform to the new Fictitious Name Statute (Business and Professions Code Sections 17900-17912) which does not require publication of a fictitious name certificate. The section adds a fee for filing and indexing a certificate of abandonment of use of a fictitious name, for which no fee is prescribed under existing law.

SEC. 7. Section 12193.5 is added to the Government Code
to read:

12193.5. The fee for filing and indexing a fictitious name
certificate or a certificate of abandonment of use of a fictitious
name is three dollars (\$3).

Comment. Section 12193.5 prescribes the fee for filing and indexing
certificates filed with the Secretary of State under Business and Professions
Code Sections 17900-17912.

SEC. 8. This act becomes operative on January 1, 1968, except that prior to that date an individual, partnership, or corporation may file a fictitious name certificate as provided in Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code, and the certificate so filed shall be deemed to have been filed on January 1, 1968.

Comment. The new Fictitious Name Statute (Business and Professions Code Sections 17900-17912) becomes operative on January 1, 1968, but certificates may be filed prior to that date under the new statute so that the persons covered by the new statute will be in compliance with the new statute on January 1, 1968.

SEC. 9. (a) An individual, partnership, or corporation that on January 1, 1968, has a fictitious name certificate on file with a county clerk in compliance with Civil Code Sections 2466-2471 shall be deemed to be in compliance with Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code until the earlier of the following dates:

(1) December 31, 1968.

(2) In the case of a partnership, 30 days after a change in the members of the partnership.

(3) In the case of a corporation, 30 days after any change in the president, vice president, secretary, or assistant secretary of the corporation.

(b) An individual, partnership, or corporation to whom subdivision (a) applies shall file a fictitious name certificate not later than the earlier of the dates mentioned in subdivision (a).

(c) Nothing in this section prevents an individual, partnership, or corporation from filing a certificate in accordance with Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code at any time after the effective date of this act.

Comment. Individuals, partnerships, and corporations that are in compliance with the existing Fictitious Name Statute (Civil Code Sections 2466-2471) on January 1, 1968, will be treated as if they have complied with the requirements of the new Fictitious Name Statute for a limited period of time. In most instances, they will not be required to comply with the new statutory requirements until December 31, 1968. However, a partnership or corporation will be required to comply with the new statute if there is a change in the members of the partnership or a change in certain corporate officers after January 1, 1968.