

#44

5/21/66

Memorandum 66-23

Subject: Study 44 - The Fictitious Name Statute

Attached to this memorandum are two copies of a Tentative Recommendation relating to a Fictitious Name Statute. Please mark any revisions you believe should be made on one copy and return it to the staff at the May 28 meeting. We hope to be able to distribute the Tentative Recommendation for comments after the meeting.

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

Section 1 (Repeals existing fictitious name statute)

Approved at prior meeting (May 5-7).

Section 17900

Approved at prior meeting.

Section 17901

Subdivision (a) approved at prior meeting.

Subdivision (b) added to define term used in various sections of the statute.

Section 17902

This section has been substantially revised in form but not changed in substance. This section, together with Section 17906 (expiration of certificate), reflects the substance of the decisions made at the prior meeting.

Section 17903

Approved at prior meeting.

Section 17904

Approved at prior meeting, except that "if the person has a place of business in this state" is added at the beginning of subdivision (b).

Section 17905

Approved in substance at prior meeting. Exact language not approved.

Section 17906

This section has been substantially revised in form, but this section (together with Section 17902(b)) reflects the substance of the decisions made at the prior meeting.

Section 17907

Approved at prior meeting except that a specific reference to "under subdivision (a) of Section 17906" has been added.

Section 17908

Approved at prior meeting except that subdivision (c) has been revised to pick up the procedure prescribed in Section 17905 rather than duplicating the provisions of that section in subdivision (c).

Section 17909

Approved at prior meeting except for the following:

(1) The address of the principal place of business is required to be entered in the register.

(2) The date the certificate was filed is required to be entered in the register.

(3) The specific reference to the appropriate subdivisions of Section 17906 has been inserted and the date of expiration is to be entered in the register.

Section 17910

Subdivision (a) is new.

Subdivision (b) was approved in substance at the prior meeting.

Section 17911

Approved in substance at prior meeting.

Section 17912

Subdivision (a) has been amended to make it clear that the penalty will apply only to a violation of Section 17902 that requires a fictitious name certificate to be filed. Section 17902 is the only section that requires a registrant to do anything.

Subdivision (b) includes a provision that a person who fails to comply with Section 17902 within 40 days after being convicted of violating that section is guilty of a misdemeanor punishable by a fine of not more than \$500. Such a provision is necessary to avoid making a conviction under Section 17912 the equivalent of selling a licence to operate in a fictitious name without having to file a fictitious name certificate. A higher penalty is prescribed for this violation since the person would be willfully violating the statute.

Sections 3, 4, 5, and 6

Approved at prior meeting.

Section 7 (adds Government Code Section 12193.5)

We have reduced the fee for filing and indexing a certificate of abandonment of use of a fictitious name to \$2 (we increased the fee for filing a fictitious name certificate to \$3 to provide money to cover the cost of mailing the notice of expiration).

We have revised the section to indicate that the fee covers the cost not only of filing and indexing the fictitious name certificate but also the cost of mailing notice of expiration of the certificate.

Section 8

Approved at prior meeting.

Respectfully submitted,

John L. Reeve
Junior Counsel

TEMPERATIVE RECOMMENDATION

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 individuals, partnerships, and corporations regularly 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 more effective penalty for failure to comply 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 statute

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 that the Fictitious Name Statute be extended to cover persons who are regularly doing business in California but have no 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 their 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 a person who has a place of business within this state to file 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 regularly doing business in California under fictitious names.

Penalty 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 business operating under a fictitious name and needs to know who the person or persons are who are conducting that business.

Accordingly, the Commission recommends the repeal of the sanction now provided. Instead, the Commission recommends that failure to file a fictitious name certificate within the time allotted and in the manner prescribed by the Fictitious Name Statute be made a misdemeanor punishable by a fine not to exceed \$300. If a person fails to comply with the Fictitious Name Statute within 40 days after being convicted of violating the statute, he would be guilty of another misdemeanor that would be punishable by a fine not to exceed \$500. Failure to comply with the Fictitious Name Statute

would not, however, void or make unenforceable any transaction entered into by a person while he was not in compliance with the statute.

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 ten years after it is filed if it has not expired previously. It should also expire if a certificate of abandonment of the fictitious name is filed by the registrant or if the registrant files a new fictitious name certificate to supersede the former one. After ten years, after the filing of a new certificate or after the filing of a certificate of abandonment of fictitious name, the Secretary of State and the county clerk would be authorized to remove the fictitious name certificate from their files and destroy or otherwise dispose of it. 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 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. All persons, including those who are in compliance with Civil Code Sections 2466-2471, would become subject to the act on this date. 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.

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.

*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.

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 12300.2 of the Financial Code, and to amend Section 26848 of, and to add Section 12193.5 to, the Government 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

17900. "Fictitious name" defined

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

(a) In the case of an individual, a name which does not include the surname of the individual.

(b) In the case of a partnership, a name which does not include the surnames 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. Section 17900 codifies the definition of "fictitious name" developed by the courts in interpreting Civil Code Section 2466 (superseded by this chapter). 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" and "registrant" defined

17901. As used in this chapter:

(a) "Person" means an individual, partnership, or corporation.

(b) "Registrant" means a person who is filing or has filed a fictitious name certificate.

Comment. These definitions are designed to eliminate needless repetition in the rest of the statute.

17902. Person transacting business in fictitious name to file certificate

17902. Every person who regularly transacts business in this state under a fictitious name shall:

(a) File the fictitious name certificate in accordance with this chapter not later than 40 days from the time he commences to transact business in this state under a fictitious name; and

(b) File a new fictitious name certificate in accordance with this chapter on or before the date of expiration of his fictitious name certificate.

Comment. Section 17902 requires every individual, partnership, and corporation that regularly transacts business in this state in a fictitious name to file a fictitious name certificate. The language of the section-- "person who regularly transacts business in this state"--excludes from the coverage of the statute any person who only occasionally transacts business in California.

Section 17902 continues a requirement that has been contained in the California law since 1872. However, two exemptions from the certificate filing requirement that were recognized under prior law are not continued: CIVIL CODE § 2467 (superseded by this chapter)(commercial or banking partnership established and transacting business in a foreign country); Moon v. Martin, 185 Cal. 361, 197 Pac. 77 (1921)(person not maintaining a place of business in this state).

The 40-day period provided for filing the initial fictitious name certificate conforms to the 40-day period provided in Corporations Code Section 15700 for the designation of an agent to receive service of process on behalf of a foreign partnership.

See Section 17906 and the Comment thereto for a description of the circumstances under which a fictitious name certificate expires.

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. Section 17903 retains prior 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 certificate.

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) If the person has a place of business in this state, the complete address of his principal place of business in this state.
- (c) In the case of an individual registrant, the full name and complete residence address of the individual.
- (d) In the case of a partnership registrant, the full names and complete residence addresses 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.
- (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.

Comment. Subdivisions (a), (c), and (d) of Section 17904 restate the substance of prior law. Although the information required by subdivisions (b) and (e) was not explicitly required by the statutes superseded by this chapter, the requirements of these subdivisions conform to the generally prevailing practice under the prior law.

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. See Section 17906(e) and the Comment thereto.

17905. Execution of certificate

17905. (a) The fictitious name certificate shall be signed, verified under penalty of perjury, and acknowledged:

(1) In the case of an individual registrant, by the individual.

(2) In the case of a partnership, by two or more members of the partnership.

(3) In the case of a corporation, by two or more of the officers of the corporation.

(b) Each person acknowledging the certificate shall do so before an officer who is authorized to take the acknowledgement of conveyances of real property and shall personally appear before such officer.

Comment. Section 17905 continues the requirement of prior law that the fictitious name certificate be acknowledged. CIVIL CODE § 2468 (superseded by this chapter). The verification requirement is new and is included primarily to prevent a person from executing a false certificate that names as a partner a person who has no interest in the partnership filing the certificate.

This section changes prior law in that it requires that a fictitious name certificate be executed by two or more, rather than all, of the members of the partnership. The section also prescribes the persons who may execute the certificate on behalf of a corporation, a matter that was not covered by prior law.

17906. Expiration of certificate

17906. (a) Unless the certificate expires earlier under subdivision (b), (c), (d), (e), or (f), a fictitious name certificate expires ten years from January 1 of the year following the date it was filed in the office of the Secretary of State.

(b) If a fictitious name certificate states the registrant's principal place of business within this state, the fictitious name certificate expires 40 days after a change in the address of the principal place of business in this state. If a fictitious name certificate does not state the registrant's principal place of business within this state, the fictitious name certificate expires 40 days after the registrant acquires a place of business within this state.

(c) A fictitious name certificate that has been filed by a partnership expires 40 days after a change in the membership of the partnership.

(d) A fictitious name certificate that has been filed by a corporation expires 40 days after a change in the name of the corporation as set out in its articles of incorporation.

(e) A fictitious name certificate expires upon the filing of a new fictitious name certificate by the same registrant for use of the same fictitious name.

(f) A fictitious name certificate expires when the registrant files a certificate of abandonment of the fictitious name described in his fictitious name certificate.

Comment. Section 17906 is designed to insure that the information contained in the fictitious name registers (see Section 17909) is kept current and to provide a means whereby the county clerk and the Secretary of State can dispose of obsolete certificates in their files (see Section 17910).

Subdivision (a). Under prior law, a fictitious name certificate never expired unless there was a change in the membership of the partnership or a certificate of abandonment of use of the fictitious name was filed and published. Subdivision (a) provides for the expiration of a fictitious name certificate after approximately ten years (unless prior to that time one of the circumstances listed in subdivision (b), (c), (d), (e), or (f) occurs). Thus, it is unnecessary under Section 17906 to retain obsolete certificates for an unlimited period as under the former law. No certificate need be retained for more than ten years from the January 1 following the date the certificate was filed. See Section 17910.

Subdivision (b). Under prior law, a new certificate was not required to be filed when there was a change in the address of the registrant's principal place of business. However, to insure that the register of fictitious names will contain current information concerning the registrant's principal place of business in this state, subdivision (b) requires that a new certificate be filed when either the registrant changes his principal place of business in this state or, in a case where he had none previously, the registrant acquires a place of business in this state.

Subdivision (c). This subdivision, together with Section 17902(b), continues the requirement of prior law that a new certificate be filed upon any change in the membership of a partnership. See CIVIL CODE § 2469 (superseded by this chapter).

Subdivision (d). Section 17902(d) requires a corporation to file a new fictitious name certificate if it continues to regularly transact business under a fictitious name after a change in its true corporate name. Whether a new certificate was required in this case under prior law was uncertain.

Subdivision (e). Subdivisions (a) through (d) describe the circumstances under which a person who has filed a fictitious name certificate is required to file a new certificate in order to comply with the provisions of Section 17902(b). Even when not required to do so, however, a person may file a new certificate at any time. In this manner, he may change the name or address of the person to whom the expiration notice is to be sent under Section 17907. And, in this manner, he may acquire a new ten-year life for his certificate under subdivision (a). Subdivision (e) makes it clear that the old certificate expires and may be destroyed as provided in Section 17910 whenever a person files a new certificate for use of the same fictitious name.

Subdivision (f). Subdivision (f) makes it clear that a registrant is no longer in compliance with Section 17902 if he continues to do business under his fictitious name after filing a certificate of abandonment.

17907. Notice of expiration

17907. Between the first day of October and the first day of December immediately preceding the expiration of a fictitious name certificate under subdivision (a) of Section 17906, 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 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. Section 17907 directs the Secretary of State to send an expiration notice whenever his records indicate that a fictitious name certificate is about to expire from lapse of time under the provisions of subdivision (a) of Section 17906. Although the 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 fictitious name. The certificate shall be filed with the officers with whom the fictitious name certificate was filed.

(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 complete residence address of the individual.

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

(c) A certificate of abandonment of use of fictitious name shall be signed, verified, and acknowledged in the same manner as is prescribed in Section 17905.

Comment. This section retains the substance of the prior law. See Civil Code Section 2469.1 (superseded by this chapter).

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 address of the principal place of business in this state, if any, and the name of the individual, or the names of the partners, or the name of the corporation, as listed in the certificate, together with the date the certificate was filed, shall be entered in the register under the fictitious name of the business. When a certificate has expired under subdivision (a), (e), or (f) of Section 17906, the Secretary of State and the county clerk shall enter that fact in the register together with the date of such expiration.

Comment. This section retains and clarifies prior law. See Civil Code Section 2470 (superseded by this chapter). 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 17906 (expiration of certificate) and 17908 (certificate of abandonment of use of fictitious name).

17910. Files of fictitious name certificates

17910. (a) The Secretary of State and each county clerk shall place the fictitious name certificates filed with him in chronological order in files maintained for that purpose. The Secretary of State may, in lieu of retaining the original certificates, retain copies thereof in accordance with Government Code Section 14756. A county clerk may, in lieu of retaining the original certificates, retain copies thereof in accordance with Government Code Section 26205.

(b) The Secretary of State and each county clerk may remove from the files of fictitious name certificates and destroy or otherwise dispose of a fictitious name certificate if the fictitious name certificate has expired under the provisions of subdivision (a), (e), or (f) of Section 17906.

Comment. Section 17910 requires the Secretary of State and each county clerk to maintain, in addition to the fictitious name register prescribed by Section 17909, a file containing the fictitious name certificates in the chronological order in which the certificates are filed with him. In addition, the section provides the Secretary of State and each county clerk with authority to purge their files of fictitious name certificates as the certificates become obsolete. See also Section 17909 and the Comment thereto.

17911. Certified copy of fictitious name certificate

17911. (a) 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 all of the following:

(1) The existence of the original fictitious name certificate.

(2) The execution of the certificate by each person by whom it purports to have been executed.

(3) The truth of the information listed in Section 17904 that is stated in the certificate.

(b) The presumptions created by subdivision (a) are presumptions affecting the burden of producing evidence.

Comment. Section 17911 restates the substance of Civil Code Section 2471 (superseded by Section 17911) and clarifies the presumptive effect of a certified copy of a fictitious name certificate. See Evidence Code Sections 601, 602, 603, and 604.

17912. Penalty for violation of chapter

17912. (a) Any person who regularly transacts business in this state under a fictitious name and fails to comply with the requirements of Section 17902 is guilty of a misdemeanor and, upon conviction, shall be fined not more than \$300.

(b) Any person who, after being convicted of violating Section 17902, regularly transacts business in this state under a fictitious name and fails to comply with the requirements of Section 17902 within 40 days after such conviction becomes final is guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500.

(c) No contract or transaction is void or unenforceable because a party to the contract or transaction has violated this chapter.

(d) Nothing in this chapter prevents a person from filing a fictitious name certificate at any time after the time prescribed in Section 17902 or in subdivision (b) of this section.

Comment. Section 17912 provides the only sanction for failure to comply with the requirements of the Fictitious Name Statute. A person who does not comply with the statute is guilty of a misdemeanor that is punishable by a fine not to exceed \$300. A person has 40 days after being convicted under this section in which to comply with the statute; if he then fails to comply, he is guilty of another misdemeanor.

Subdivision (c) makes it clear that failure to comply with the Fictitious Name Statute has no effect on the validity of a contract or other transaction.

Subdivision (d) permits a person to comply with the provisions of this chapter at any time after the times prescribed in Section 17902 and subdivision (b) of this section for complying with the statute. Such compliance will not serve as a defense to prosecution for failure to comply with the Fictitious Name Statute in a timely manner.

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. (a) The fee for filing, indexing, and mailing notice of expiration of a fictitious name certificate is three dollars (\$3).

(b) The fee for filing and indexing a certificate of abandonment of use of fictitious name is two dollars (\$2).

Comment. Section 12193.5 prescribes the fee in connection with 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.