#44(L) 12/12/65

Memorandum 65-71

Subject: Study No. 44(L) - Fictitious Name Statute

The attached research study deals with the fictitious name statute.

While the topics of suit in common name and the use of fictitious names are related in some respects, they are sufficiently separable so that the use of a fictitious name may be separately considered.

The question of suit in common name will be dealt with in a second study to be considered at a subsequent meeting. The two studies may be combined later into a single study.

Existing California Law (see pages 2-8 of research study)

Sections 2466-2471 of the Civil Code provide that every person or partnership transacting business in a fictitious name and every partnership transacting business in a name that does not show the names of all the persons interested in the business must file a certificate with the clerk of the county in which the principal place of business is located. The certificate must show the names and addresses of all the parties interested in the business. The only sanction directly provided for failing to file this certificate is that no action may be "maintained" on a contract made or a transaction had in a fictitious name until such time as the certificate is filed. An indirect sanction is provided by sections in the Business and Professions Code and the Financial Code that make compliance with the fictitious name statute a prerequisite to obtaining certain licenses or engaging in certain businesses in a fictitious name.

The courts have interpreted "maintained" to mean that the suit may be commenced even if no fictitious name certificate has been filed, but--if the defendant objects to the failure to file--the case will be abated until the certificate is filed. Consequently, the objection is waived if the defendant

fails to raise the objection in a timely manner, and the defect can be cured by filing the certificate at any time prior to the actual trial of the case. However, if objection is made and no certificate is filed prior to the time for trial, the action will be dismissed.

Revision of California Law (see pages 9-18 of research study)

The purpose of the fictitious name statute is to prevent fraudulent trading by providing a person with information who the individuals are with whom they are dealing.

There are three approaches which might be adopted in respect to the fictitious name statute:

(1) Repeal the fictitious name statute.

(2) Amend the statute to make it more effective.

(3) Retain the statute in substantially its present form with slight amendment to make compliance less of a burden.

Repeal of Fictitious Name Statute

The fictitious name statute was designed to protect against fraudulent trading. It is intended to provide a means whereby a person can determine the identity of the persons with whom he is dealing. To accomplish the purpose, the fictitious name certificates must be recorded and persons must check the records. Experience suggests that people neither read the publications of the fictitious name certificates in their newspapers nor check the records in the county clerk's office before entering into a transaction with someone using a fictitious name. If this is so, it is a useless burden on businesses to require the publication and filing of these certificates.

Even if the members of the public were diligent, they might not find a certificate on file. It is probable that many small businessmen operating without the benefit of counsel are unaware of this requirement and do not

comply with it. Section 2466 of the Civil Code refers to "every person" and "every partnership" in defining the coverage of the section. Consequently, any unincorporated association whose liability is determined by agency law, is not required to file a fictitious name certificate. This creates a significant gap in the coverage of the statute.

In addition, the present sanction, which prohibits a plaintiff from maintaining an action on an transaction had in a fictitious name until he has filed a fictitious name certificate, is inadequate to obtain a high level of compliance. The courts have held that the defendant's objection to the failure to file is only a plea in abatement. A plaintiff is permitted to file his certificate at any time prior to trial. This is done to avoid creating a trap that will defeat the legitimate claims of those who, through inadvertance or ignorance of the law, fail to file a certificate. Since there is no compulsion to file, many persons undoubtedly disregard the requirement.

The fictitious name statute is also burdensome and expensive in its application to large organizations. An extensive roster of names and addresses must be prepared, and every time there is a change in the membership a new certificate must be filed and published. Although these burdens can be alleviated by amendment, it may not be desirable to do so since the statute will not accomplish its purpose anyway.

If the statute is repealed, the sections in the Business and Provessions Code that require the filing of a fictitious name certificate might be amended to require filing of such a certificate with the appropriate licensing board.

Making the Fictitious Name Statute More Effective.

If the fictitious name statute is to be made more effective, its scope of coverage should be expanded to include unincorporated associations whose

liability is determined on agency principles. Of course, to do so will increase the burden of the statute without insuring compliance.

The most important change that must be made is to provide an effective sanction for failing to comply with the statute. One approach would be to make any transaction had in a fictitious name prior to filing the required certificate either void or unenforceable. A less extreme approach would be to prohibit filing, as opposed to maintaining, an action until such time as the plaintiff has complied witht the statute. The defendant's objection to failure to comply with the statute would be a ground for dismissing the suit. Each of these amendments would tend to increase the possibility that legitimate claims would be defeated. These amendments would create a trap for unwary or uninformed plaintiffs. This price that would have to be exacted for the increased effectiveness of the fictitious name statute is too high.

Retaining the Statute Substantially As Is

Although in most areas the fictitious name statute is not accomplishing its purpose, in a few areas where it has been made a prerequisite to obtaining a license or to operating a business in a fictitious name, it is operating effectively and serves a worthwhile purpose. In its other spheres of operation, it supplies a modicum of protection and may be of some assistance in the field of discovery. Consequently, it may be desirable to retain the statute, imperfect though it may be. If the statute is to be retained, certain clarifying and substantive changes should be made. These are discussed in the research study beginning at page 19.

Conclusion and Recommendation

It is the conclusion of the staff that the fictitious name statute is

not accomplishing its objective because of the gaps in its coverage and the insufficiency of the sanction provided for noncompliance. Furthermore, if the amendments necessary to make the statute more effective were adopted, they would create a trap for the uninformed that would be more harmful than the inconvenience presently caused by the fictitious name statute. Consequently, it is recommended that the fictitious name statute be repealed. If this recommendation is not acceptable, we suggest the statute be retained in substantially its present form, but the suggested revision (discussed in the research study at page 19 et seq.) should be considered.

Respectfully submitted,

John Reeve
Student Legal Assistant

#44 11/18/65

A STUDY

relating to

THE FICTITIOUS NAME STATUTE

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The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

A STUDY RELATING TO THE FICTITIOUS NAME STATUTE

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A STUDY RELATING TO THE FICTITIOUS NAME STATUTE

Introduction

In 1957, the California Law Revision Commission was authorized to make a study to determine whether the law relating to the use of fictitious names should be revised.[1]

A fictitious name is one that fails to disclose the true names of all persons who are interested in the enterprise.[2] The fictitious name statute is substantive[3] in that it prescribes conditions that must be met by anyone--sole proprietor, partnership, corporation or other--before suit can be maintained to enforce transactions had in such name. The statute's purpose is to prevent fraudulent trading by enabling persons dealing with individuals using a fictitious name to know with whom they are dealing.[4]

The basic policy question to be resolved is whether the fictitious name statute should be revised, repealed, or retained. The study first discusses the present law in California and other jurisdictions. Then it analyzes the problems involved in each of the three alternatives and the subordinate policy considerations underlying an answer to the basic policy question. Since the fictitious name statute is not presently accomplishing its objective and since it would be equally undesirable to adopt the amendments necessary to make the statute effective, the study recommends that the fictitious name statute be repealed. Realizing that there may be disagreement on this conclusion, the study concludes with a discussion of the amendments that should be made in the fictitious name statute if it is to be retained.

THE PRESENT LAW IN CALIFORNIA AND OTHER JURISDICTIONS

Existing California Law

Civil Code Sections 2466-2471

Sections 2466-2471 of the Civil Code deal with the use of fictitious names. Section 2466 provides, inter alia, (1) that every person transacting business in this state[1] under a fictitious name, or a designation not showing the true names of the persons interested in the business, must file with the clerk of the county in which the business has its principal office a subscribed and acknowledged certificate stating the full name and residence of the persons comprising the business and (2) that the certificate must subsequently be published in a newspaper in the county and a certificate of publication must be later filed.[2] Section 2469 requires a new certificate to be filed and published on the occasion of every change in the membership of the firm. Section 2469.1 authorizes but does not require a person upon ceasing to use a fictitious name to file and publish a certificate of abandonment thereof.[3] The courts have said that the purpose of the fictitious name statutes is to enable persons dealing with persons using a fictitious name to know the individuals with whom they are dealing or to whom they are giving credit or becoming bound.[4]

The sole penalty provided for failure to comply with Section 2466 et seq. is stated in Section 2468: "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."[5] Originally, it was held that the filing of a complaint is an incident to "maintaining an action" so that

the certificate required by this legislation must have been filed prior to the filing of a complaint in any action involving a contract or transaction made under a fictitious name.[6] Numerous later decisions have relaxed this stringent interpretation,[7] however, so that it is now clear that the certificate may be filed and publication may be made at any time before trial after suit is brought.[8]

The fictitious name legislation does not authorize a person or group of persons doing business under a fictitious name to file suit in the fictitious name as a party plaintiff. Arguments to this effect have uniformly been rejected by the courts.[9] As a result, the statute is construed as a substantive rule of law that prevents a person from maintaining any action upon a contract or other transaction made under a fictitious name until there has been compliance with the statute.[10] However, a suit filed in a fictitious name is merely a procedural defect that must be objected to in a timely manner by the defendant or the defect is waived.[11]

Commercial or banking partnerships established outside the United States are exempted from the coverage of the fictitious name legislation.[12] The fictitious name statutes only apply to those businesses which have a "local habitation" or principal place of business in California.[13] Among the types of business organizations included within the legislation are sole proprietorships,[14] partnerships,[15] unincorporated cooperative associations,[16] joint stock companies,[17] "Massachusetts" or business trusts,[18] and corporations.[19] It should be noted that Section 2466 only mentions persons and partnerships. Consequently, Sections 2466-2471 have been applied only when the substantive liability of the members of an organization is to be determined by applying partnership law.[20] Since this result appears to be compelled by the wording of Section 2466, there appears to be no safeguard against the use of fictitious names by an organization whose members have their individual liability determined on agency principles.

The statute applies to any business name that fails to include the true

names of all interested persons. Where suffixes, conjunctions, hyphens, and the like are used in connection with a business name, the law varies with respect to the necessity for compliance with the fictitious name legislation, apparently depending upon whether a partnership or other group of persons is concerned or only a sole proprietor is involved. Thus, in the case of a partnership, the use of a surname or surnames, even when not "fictitious" in the sense of its not being the true name of the interested partners, together with words or abbreviations such as "Co.,"[21] "& Co.,"[22] "& Son,"[23] or "Bros."[24] makes it necessary to comply with the statute. Where there is no such suffix, however, a partnership name which consists of the true surnames of the partners joined by the word "and" or the symbol thereof is not an assumed or fictitious name or a designation not showing the names of the persons interested as partners; hence, compliance with the statute is unnecessary.[25] The rule apparently is less stringent in the case of an individual proprietor. Thus, where a sole proprietor's surname appears in the designation of the business name, a "fictitious" name is not involved and compliance with the statute is unnecessary.[26] For example, "Vagim Packing Company,"[27] "W.S. Wetenhall Company,"[28] and "Kohler Steam Laundry" are not fictitious names within the terms of the statute requiring the sole proprietor to comply with its terms. Apparently, the theory of these decisions is that, since the object of the fictitious name legislation is to prevent fraudulent trading,[29] the sole proprietor who in fact employs his personal name in the business designation cannot be said to be withholding information from customers regarding the person with whom they are dealing. Moreover, an individual proprietor who uses an anonymous business designation not containing his surname is not within the scope of the fictitious name legislation where in fact he either conducts all his business under his true name instead of the anonymous business name[30] or the particular transaction involved is conducted under his true name.[31]

It has been judicially suggested that partnerships and individuals were not permitted at common law to do business under fictitious names, that the

right to do so is a creature of statute, and, hence, that the Legislature has the right to prescribe certain conditions to be met before suit may be maintained on contracts and other transactions conducted under a fictitious name.[32] The historical accuracy of this suggestion may be questioned in light of similar judicial pronouncements to the effect that "a person may adopt any name, style, or signature wholly different from his own name by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued."[33] Perhaps this apparent inconsistency can be explained on the basis that the former suggestion was made in connection with a case involving a partnership whereas the latter was made in connection with a case involving only a single individual. This distinction would serve as well to explain, at least partially, the differences in result that obtain with respect to partnerships and sole proprietors who append business type designations to their true surnames.

A corporation is treated as a person for the purposes of the fictitious name statutes.[34] However, its corporate name is not a fictitious name; it is the real name of this "person." The corporation must file a fictitious name certificate only when it is doing business under a name other than its corporate name. For example, if California Mill Supply Corporation is the corporate name and the business is transacted in this name, there is no need to file a certificate. However, if the same corporation transacts its business as Berg Metals Company, it is transacting business in a fictitious name and must file a certificate.[35] Filing and amending the certificate is not particularly burdensome on the corporation since apparently the requirements of Section 2466 are satisfied if the certificate lists the name of the person doing business, e.g., California Mill Supply Corporation.[36] In the case which

suggested this conclusion, the names and addresses of two of the corporation's officers were included in the certificate. This seems to have influenced the court somewhat, but it is unclear whether the court would read this requirement into the statute even though the wording does not require it.[37]

Related Provisions--Partnerships

In addition to the fictitious name statute, there are several code provisions which make some provision for filing and publishing information relating to various types of organizations or which regulate the use of fictitious names.

Sections 2466-2471 were enacted as a part of the original Civil Code of 1872. In 1929, both the Uniform Partnership Act and the Uniform Limited Partnership Act were enacted in this state[38] and are now codified in the Corporations Code.[39] Both of these acts contain some provisions for filing and publishing information relating to partnerships.

The pertinent provisions of the Uniform Partnership Act are Corporations Code Sections 15010.5 and 15035.5. Section 15010.5[40] provides that an acknowledged and verified statement of partnership may be filed in the partnership's name or in the names of two or more of the partners in the office of the county recorder in as many counties as the partnership desires. The statement shall set forth the name of the partnership and the names of each of the partners and shall state that the partners named are all of the partners. The certificate may also state the name and date of death of any deceased partner and that such death did not dissolve the partnership because of an agreement pursuant to subdivision (4) of Corporation Code Section 15031. The truth of the matters stated in the certificate is conclusively presumed in favor of a bona fide purchaser for value of partnership real

estate in any county where the certificate or a certified copy thereof has been filed. The purpose of the section is to protect bona fide purchasers of partnership real property which is conveyed subject to Section 15010. The fictitious name statutes are intended to provide a source for discovering the identity of the persons who are behind a fictitious name; Section 15010.5, in a limited number of instances, provides another source for obtaining this information.

[41] Section 15035.5 requires the publication of a notice of dissolution at least once in a newspaper in each place in which the partnership business was regularly carried on; it also requires that an affidavit of such publication be filed with the county clerk within 30 days after the publication. Thus, although the filing of the certificate of abandonment is permissive under Civil Code Section 2469.1, the Corporations Code in effect makes the filing of such a certificate mandatory in the case of a general partnership.

[42] Corporations Code Section 15502 requires persons desiring to form a limited partnership to sign and acknowledge a certificate setting forth the names and residences of the members of the firm and a good deal of other information and requires that the certificate be filed in the county clerk's office and the county recorder's office in the county in which the limited partnership has its principal place of business, as well as in the recorder's office in each other county where it has a place of business or holds title to real property. This provides the public with another source for obtaining the names of the persons interested in a business if it is a limited partnership.

[43] Corporations Code Section 15505 provides that the surname of a limited partner cannot appear in the firm's name unless it is also the surname of a general partner or unless, prior to the time that the limited partner became

such, the business was carried on in a name including the surname of the limited partner. This provision would seem to bring every limited partnership within the scope of Section 2466 under its prohibition against transacting business under "a designation not showing the names of the persons interested as partners in such business."[44] Corporations Code Sections 15524 and 15525 set forth the procedure for amending or canceling the certificate and prescribe when such an amendment or cancellation must be made.[45] In addition to requiring amendment at other times, these sections require the certificates to be amended whenever there is a change in the membership of the limited partnership. This provision corresponds to the amendment provisions of the fictitious name statutes.[46]

Related Provisions--Certain Licenses Under Business and Professions Code and Financial Code

Business and Professions Code Section 10159.5[47] requires that any applicant for a real estate broker's or salesman's license to be issued in a fictitious name must file with his application certified copies of the entry of the county clerk and the affidavit of publication made pursuant to the fictitious name statute.

Business and Professions Code Section 8936.1[48] forbids any yacht or ship broker to conduct business under a fictitious name unless his license is issued in such name. Financial Code Section 12300.2[49] provides that a check seller or casher must conduct his business under his true name unless he has complied with the requirements of the fictitious name statutes. These provisions help enforce compliance with the fictitious name statutes.

The Law in Other Jurisdictions

A number of states have enacted legislation that is not dissimilar to the California fictitious name legislation.[50] However, little assistance can be gained from other states in determining whether the California statute should be revised since the interpretation given the California statute is representative of the law generally in those states having similar legislation.[51]

REVISION OF THE CALIFORNIA LAW

Introduction

The foregoing discussion has been concerned with the present law in California and other jurisdictions. The remainder of this study is concerned with the problems that exist in the present law and the suggested solutions to those problems.

As the following discussion indicates, the basic policy question to be resolved is whether the fictitious name statute should be revised, repealed, or retained. If the statute is not to be repealed, clarifying and substantive changes in the statute should be considered and will be discussed.

Should the Fictitious Name Statute (Civil Code Sections 2466-2471) Be Retained?

The purpose of the fictitious name statute is to prevent fraudulent trading by enabling the members of the public to know with whom they are dealing when they enter into transactions with persons using fictitious names.[1] It is doubtful that the present statute is accomplishing its purpose. This raises a question concerning the necessity and desirability of retaining the fictitious name statute. There are three alternatives to be considered. First, the statute could be repealed. Second, the statute could be amended

to make it effective. Third, the statute could be retained substantially as is and could be amended to make its operation less onerous.

Repeal of the Fictitious Name Statute

The present fictitious name statute apparently is not accomplishing its purpose. It is difficult to estimate the degree of compliance with the statute. However, it seems probable that many persons doing business in fictitious names either through choice or inadvertence do not file the required certificate. Even if all the persons who are required to register did so, experience suggests that most members of the public would not consult the records before entering into a business transaction with persons using a fictitious name. In addition, it is probable that few people read the fictitious name certificates that are published in their local newspaper, to say nothing of those which are published in legal newspapers. Even if a person did read such a certificate, it is unlikely that it would be particularly meaningful or would make any lasting impression on him unless he had already had some dealings with the individuals named in the certificate; the reader would have insufficient knowledge concerning the reliability of the persons named to be aided in protecting himself against fraudulent trading.

In addition to failing to give meaningful advance notice, the statute does not contain an effective sanction to enforce compliance. The only penalty for failure to comply with the fictitious name statute is that a party cannot maintain any action upon or on account of any contracts made or transactions had under the fictitious name.[2] Torts arising out of transactions had in the fictitious name are not within this prohibition.[3] Since compliance may be had at any time before the trial of the case and since the defense

is waived by failing to object to noncompliance in a timely manner, very few causes of action are lost by failure to comply with the fictitious name statute. In fact, a dismissal of the cause of action for failure to properly file and publish the fictitious name certificate is not considered to be a decision on the merits and, if the statute of limitations has not run, a second suit may be filed on the identical cause of action after the plaintiff has complied with the requirements of the section.[4] It is probable that this interpretation of the legislation is a judicial attempt to avoid the defeat of legitimate causes of action through the use of noncompliance as a technical defense, similar in nature to the Statute of Frauds. The result is that many persons will not comply with the fictitious rame statute since there is no compelling reason to do so.

Another potential defect in the statute is that the penalty prescribed in Section 2468 may not apply to a failure to amend the fictitious name certificate as prescribed in Section 2469. Section 2468 prohibits maintaining an action in any state court "until the certificate has been filed and the publication has been made as herein required." Since Section 2469 requires a new certificate to be filed and published whenever there is a change in the organization's membership, the penalty could be applied to Section 2469 by interpreting the words "as herein required" in Section 2468 as referring to all the sections dealing with fictitious names. No cases were found deciding this question but, if the statute is to be at all effective, the penalty definitely should apply to failure to comply with Section 2469.

The California fictitious name legislation imposes requirements that are burdensome and costly in their application to large partnerships and unincorporated associations. This is primarily true because of the requirement

of Section 2469 that a new certificate be filed and published whenever there is a change in the organization's members. The fee for filing and publishing the certificate is only two dollars[5] but, if there are frequent changes in the membership, the procedure can become expensive. Considerably less hardship is imposed by the fictitious name legislation in its application to sole proprietors or small partnerships since the initial costs are reasonable and there is less likelihood of frequent change in the membership.

Except in the cases involving a corporation or sole proprietor, Sections 2466-2471 have been applied to unincorporated association only in cases where the subsantive liability of the members of the organizations involved was to be determined by applying partnership law.[6] Since this result appears to be compelled by the language of Section 2466 which refers only to "every person" and "every partnership," the statute does not restrict the use of fictitious names by organizations whose liability is determined on agency principles. This leaves a serious gap in the coverage of the sections. It also may cause uncertainty as to the necessity of filing a fictitious name certificate since it is not always clear in advance what substantive rules will be applied to determine an organization's liability.

In a limited number of instances, certain filing requirements applicable to general and limited partnerships or corporations produce an overlap in coverage with the fictitious name statute.[7] However, the overlap is insignificant and the other sections do not provide the same degree of protection as the fictitious name statute.

On the other hand, the information provided in the fictitious name certificates can serve as an aid to discovery. A plaintiff can learn which individuals comprise a particular firm and he will be able to serve these persons with process more easily. Of course, there is always the possibility

that there will be no certificate on record or that, if there is a certificate, it may not be up to date. Section 2466 is a particularly useful aid to the defendant's discovery. If the plaintiff has not filed a certificate, the defendant's objection thereto will force the plaintiff to file an up-to-date certificate in order to continue his action. However, the same information could be obtained through the use of written interrogatories with only a slight increase in cost.

The fact that the public is not always apprised of whom it is doing business with, is caused as much by the public's apathy as it is by the defects in the statute. Public diligence cannot be legislated. However, if it can be done without imposing too great a burden on the registrants, it is desirable to provide protection against fraudulent trading for those who are sufficiently diligent to avail themselves of it. The particular features of the fictitious name legislation which now impose significant burdens on registrants can be amended to alleviate these burdens. Some degree of protection, even though an imperfect one, may be better than no protection at all.

Finally, the fictitious name statute is incorporated into the operation of Sections 8936.1 and 10159.5 of the Business and Professions Code and Section 12300.2 of the Financial Code. In respect to the occupations mentioned in these sections, the licensing requirements work as a second sanction for failing to comply with the fictitious name statute. If the fictitious name statute is repealed, it might be considered to be necessary to amend each of these other sections to provide some new sanction to protect against the use of fictitious names in the occupations regulated therein.

Making the Fictitious Name Statute Effective

Since the purpose of the fictitious name statute is to permit the public to know the persons with whom they are dealing, the key to making the statute effective is to have as many types of business organizations as possible within the ambit of the sections and to provide a sanction that will insure that these organizations will register as required.

At the present time, the biggest deficiency in the coverage of the statute is that the language used has been interpreted not to extend the coverage of the sections to unincorporated associations whose liability is determined by agency law. The courts have also defined "fictitious name" in such a manner that sole proprietors doing business under names, such as Kohler Steam Laundry, and partnerships doing business under common names which include the names of all the interested partners are not within the ambit of the sections.[8] Of course, these latter gaps in coverage are not serious since the names of all the interested parties appear in the firm names and one is only dealing with a few individuals. However, if the statute is to give meaningful protection, it should be amended to cover other unincorporated associations whose liability is determined by agency law. Of course, it is in its application to large associations that the fictitious name statute is the most costly and burdensome.

If the penalty for noncompliance with Sections 2466-2471 were made more stringent, it is likely that a high degree of registration would be achieved.

The only sanction directly provided for in the case of noncompliance with the sections is that no action may be maintained to enforce a contract made or transaction had in a fictitious name. This, of course, has reference

to suing by joining all the interested parties as individual plaintiffs and has no relation to the common name statute. However, if Section 388 is amended to permit suit to be brought in common name, this sanction, or whatever sanction is adopted, should apply to an action brought in common name under Section 388. In addition, as previously mentioned, an indirect sanction exists where it is necessary to show compliance with the fictitious name statute before certain licenses will be issued in a fictitious name.

One alternative to stiffening the sanction would be to make void any contract or transaction entered into in a fictitious name prior to complying with the sections. If the public generally became aware of the filing requirement and the penalty provided for disregarding it, there would be an extremely high level of compliance. However, many legitimate claims would be defeated in those cases where, either through inadvertence or ignorance of the law, persons failed to register. The small businessman operating without benefit of legal advice would be the person most seriously hurt even though he really is not the person causing the problem that the statute is designed to meet. This amendment would tend to create problems similar to those created by the Statute of Frauds and its numerous exceptions. The courts' interpretation of the penalty now provided by Section 2468 as only providing a matter to be pleaded in abatement is an attempt to avoid just such a result on a smaller scale. This price is too high to pay for increased effectiveness of the fictitious name statute.

Another approach would be to make a contract or transaction unenforceable instead of void if entered into in a fictitious name prior to filing the required certificate. Although this penalty is less harsh, the dangers of defeating legitimate claims and creating a technical defense are still prevalent; such a proposal should not be adopted.

A less extreme amendment would be to provide that no action may be brought on a contract or transaction in a fictitious name until the plaintiff has filed a fictitious name certificate. Then, instead of treating the plaintiff's failure to file the certificate as a matter to be pleaded in abatement, defendant's timely objection to failure to file could be made a ground for dismissing the action. The defendant still could be required to raise the objection by answer or demurrer, or he could be permitted to raise the objection at any time up to some point in the litigation, for example until commencement of the trial or until the plaintiff completes the presentation of his case. Such a provision would create much less of a trap than would be created by making the contract or transaction void or unenforceable. Of course, a plaintiff still would be deprived of his cause of action if the action were dismissed after the statute of limitations had run. The longer the defendant is permitted to wait before he is required to raise his objection, the greater the danger is that the plaintiff may be trapped. Since it is doubtful that this type of amendment would sufficiently encourage compliance, its adoption is not recommended.

Another method of strengthening the statutory sanction would be to apply it to tort actions arising out of the transaction of business in a fictitious name. Of course, this prohibition would apply only to torts committed against the entity and not to torts committed against an individual while he is working for the entity. If Section 388 were amended to permit suit to be brought in common name, this provision would be particularly applicable to tort actions brought in common name. However, if this proposal were adopted, it would seem to extend greater protection to the public than was originally intended. The public is to be protected from fraudulent trading in its legitimate and innocent transactions with firms using fictitious names, but

the public cannot claim the right to use this protection as a technical defense to protect itself from its own tortious acts. To so extend the sections would be unwise.

In determining whether or not to adopt any of these amendments to make the fictitious name statute more effective, it should be remembered that the decision depends on whether the increased effectiveness to be gained is considered to be sufficiently important to offset the danger of defeating legitimate claims by creating a technical defense.

Retaining the Fictitious Name Statute Substantially As Is

The remaining alternative is to retain the statute in substantially its present form.

Although the fictitious name statute generally is not effective, it has been made effective in certain areas by making compliance with the statute a prerequisite to obtaining a license or carrying on a particular business.[9] In these areas, the statute operates effectively and serves a worthwhile purpose. Therefore, it may be undesirable to repeal the fictitious name statute. If it is repealed, it might be necessary to amend the other code sections which now incorporate the fictitious name statute to provide some new sanction.

In other areas, retaining the statute in substantially its same form would provide at least a modicum of protection against fraudulent trading. Some assistance also might be provided in the area of discovery. Finally, the procedural problems which are responsible for most of the burdens presently imposed by the statute can be largely solved by amendment.

Conclusion and Recommendation

The fictitious name statute either should be repealed or, if its substance if to be retained, some procedural amendments should be made to reduce the burden of compliance. The price to be paid in the defeat of legisimate claims is too high to justify adopting the severe sanctions needed to make the statute more effective. The trap that would be created outweighs the necessity of protecting the public.

An acceptable result would be to retain the statute substantially as is. Retaining the statute would result in continued protection in those areas where licensing and regulatory provisions in the Financial and Business and Professions Codes have made the fictitious name statute effective. It also might provide a modicum of protection in other areas and might provide some assistance in discovery. If the statute is retained, it should be revised to clarify some matters and to reduce the burden of compliance. The revisions that would be needed if the statute is retained are discussed below.

The best result would seem to be to repeal the sections. There are gaps in the statute's coverage; there is no effective penalty to force compliance; filing and particularly amending the certificate is burdensome and expensive; and there is no way of legislating diligence into the general public. The most significant obstacle to repealing the sections is that amendments probably would have to be made in several other statutes which are the only areas where the fictitious name statute is accomplishing its objective. However, since the statute is not accomplishing its objective generally and since changing it to enforce general compliance would create an even worse situation, the statute should be repealed.

Needed Modifications if the Fictitious Name Statute is to Be Retained

Expanding the Scope of Coverage

A serious gap in the protection which the fictitious name statute is intended to provide is caused by the fact that unincorporated associations whose liability is determined by agency principles are not within the ambit of the statute.[10] If protection is to be provided against fraudulent trading, it is desirable to have available a record of the members of all types of business organizations, regardless of the method used to determine their liability. Therefore, if the fictitious name statute is to be retained, it may be desirable to include these additional organizations within its scope.

Although such an amendment theoretically would provide additional protection against fraudulent trading, it should be noted that as a practical matter there is no assurance that this would be the result since there is no effective sanction to assure compliance with the requirement. In addition, the burdens imposed by the fictitious name statute are greatest when the statute is applied to large organizations, many of which are not presently covered by the statute but would be covered if this particular amendment were adopted. Consequently, since there is no assurance that the newly covered groups will comply with the filing requirement, it probably is not desirable to subject them to the potential costs and burden involved.

Publication

Section 2466 requires that the fictitious name certificate be published in a newspaper once a week for four weeks and that an affidavit of such publication be filed with the county clerk within 30 days after completion

of the publication. Such publication also is required whenever a change is made in the membership of the filing organization. This latter provision is extremely burdensome on large associations with fluctuating memberships. At the very least, this provision should be amended to permit the publication of an up-to-date certificate on an annual or semiannual basis. In fact, publication should be dispensed with entirely; it serves no useful purpose as a practical matter since a public record can be maintained as effectively upon the basis of the original affidavits without the additional time and expense caused by publication.

Where Should the Fictitious Name Certificate Be Filed?

Section 2470 requires every county clerk to keep a register of the certificates filed with him and a certified copy thereof is presumptive evidence of the facts stated therein. The person or organization filing the certificate need do so only in the county of its principal place of business. Filing only in the county of the principal place of business does not afford adequate protection to those who deal with the person or organization elsewhere in the state.

One solution might be to require the maintenance of a duplicate record in a state office such as the office of the Secretary of State.[11] This provision could apply to all businesses covered by Section 2466 or only to those businesses doing business in more than one county. It would seem to be better to limit the application of this provision to this latter group since it would minimize the additional burden. The main objection to this approach is that it would be costly and, even if it were adopted, it is unlikely that a high degree of compliance would be realized.

Another approach that would provide more protection for the public would be to require the filing of a fictitious name certificate with the county clerk in each county where the firm transacts business in a fictitious

name. However, this system would substantially increase the cost, the inconvenience to the registrant, and the possibility of noncompliance.

In view of the lack of any effective sanction to insure compliance with the registration requirement, it would not appear to be desirable to make that requirement more onerous than it now is.

Updating the Fictitious Name Certificate

Section 2469 requires a new publication and filing upon each change of membership in a business organization subject to the fictitious name legislation. The requirement no doubt is intended merely as a means of keeping the original certificate up-to-date. However, it is an imposing burden in cases of large groups where membership frequently changes. The burden imposed is less significant when the group involved is smaller and more stable. However, if the fictitious name statutes are to protect the public against fraudulent trading and are to informally aid discovery, they must be kept reasonably current. The problem is to achieve this result and, at the same time, to minimize the burden imposed. There does not seem to be a solution that will fully solve both problems at the same time so that it must be attempted to achieve as rational a balance as possible.

If a new statement is required only at specified intervals, it is desirable that the statement be an up-to-date list of members. This would obviate the necessities of maintaining past rosters and requiring persons using the rosters to update them by going through a number of periodic statements. If the present system of amendment is retained, it might be possible to file only each change in membership as it happens and then to file a new, up-to-date roster annually or simiannually.

The simplest approach would be to permit all organizations to file an

up-to-date certificate annually or semiannually. However, this may not keep the certificates sufficiently current to protect the public and to aid in discovery. If the coverage of the fictitious name statute is extended to organizations whose liability is determined by agency law, the procedure that is adopted to update the certificates should not be based on a distinction as to what substantive law is to be applied to a particular organization. Often it is difficult to know in advance whether agency or partnership law will apply. A better approach would be to have several different procedures that would be applied to groups on the basis of their size and the nature of their business relationship.

A corporation should be required to amend its certificate only when it changes its corporate name or when the names and addresses of its officers or directors change if these items have been included in the certificate.

It is recommended that true partnerships still be required to amend their certificate every time there is a change in the members of the partnership. This provision is not particularly burdensome since the nature of the partnership is conducive to stable membership relationship.

If other unincorporated asscciations are small enough--for example, those with ten or fewer members--it would not be too burdensome to require them to file an amended certificate every time there is a change in the membership. However, a real problem is presented in respect to a large association. The necessity of keeping the membership list current is the most acute when a large association is involved; but this is also the situation where frequent amendment imposes the greatest burden. The only solution balancing these two considerations seems to be one requiring amendment at regular intervals, for example quarterly or semiannually.

Finally, it should be made clear that the penalty provided in Section 2468 applies to failure to properly amend the fictitious name certificates as well as to failure to file and publish the original certificate. If no sanction is provided for failing to amend the certificate, it is unlikely that the certificates will be kept up-to-date and their value will be greatly reduced.

Abandonment of Fictitious Names

Section 2469.1 provides that a person or organization abandoning a fictitious name in which it is doing business may file a certificate of abandonment. However, there is no requirement that such a certificate must be filed.

It is not crucial that filing a certificate of abandonment be made mandatory, but the present rule contributes to the maintenance of stale records. Of course, there is no effective sanction for not filing a certificate even if the filing were to be made mandatory. However, any effective sanction would tend to create another trap for unwary or uninformed businessmen. Consequently, it is probably best to rely on persons to comply voluntarily with this mandatory filing provision.

FOOTNOTES

Introduction--p. 1

1. Cal. Stats. 1957, Res. Ch. 202, p. 4589. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, 1957 Report at 18-19 (1957).
2. See CAL. CIVIL CODE § 2466 et seq.
3. See generally 35 CAL. JUR.2d §§ 9-15.
4. Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928); Bank of America v. Nat'l. Funding Corp., 45 Cal. App.2d 320, 114 P.2d 49 (1941).

The Present Law in California and Other Jurisdictions--pp.2-9

1. Section 2467 of the Civil Code exempts from this requirement a commercial or banking partnership established outside the United States.
2. Section 2468 of the Civil Code specifies in detail how and when the certificate is to be prepared and filed.
3. Section 2470 requires the county clerk to keep a register of the names of firms mentioned in the certificates filed with him and Section 2471 makes certified copies of the entries of a county clerk in such register presumptive evidence of the facts therein stated.
4. Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928); Bank of America v. Nat'l. Funding Corp., 45 Cal. App.2d 320, 114 P.2d 49 (1941).

5. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW, Partnership § 4 (7th ed. 1960).

6. Byers v. Bourret, 64 Cal. 73, 28 Pac. 61 (1883).

7. Nicholson v. Auburn Gold Mining & Milling Co., 6 Cal. App. 547, 92 Pac. 651 (1907).

8. Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

9. Ibid.

10. Bryant v. Wellbanks, 88 Cal. App. 144, 263 Pac. 332 (1927).

11. Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

12. See CAL. CIVIL CODE § 2467.

13. Moon v. Martin, 185 Cal. 361, 197 Pac. 77 (1921).

14. See, e.g., Wetenhall v. Chas. S. Mabrey Const. Co., 209 Cal. 293, 286 Pac. 1015 (1930).

15. See, e.g., Messick v. Houx Bros., Inc., 105 Cal. App. 637, 288 Pac. 434 (1930); cf. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659 (1890).

16. Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

17. Old River Farms Co. v. Roscce Haegelin Co., 98 Cal. App. 331, 276 Pac. 1047 (1946).

18. Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

19. Berg Metals Corp. v. Wilson, 170 Cal. App.2d 559, 339 P.2d 869 (1959); Bank of America v. Nat'l Funding Corp., 45 Cal. App.2d 320, 114 P.2d 49 (1941).

20. Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946); Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal. App. 331, 276 Pac. 1047 (1929).

21. Messick v. Houx Bros., Inc., 105 Cal. App. 637, 288 Pac. 434 (1930). See also Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928).

22. Byers v. Bourret, 64 Cal. 73, 28 Pac. 61 (1883).

23. Schwarz & Gottlieb, Inc. v. Marcuse, 175 Cal. 401, 165 Pac. 1015 (1917).

24. North v. Moore, 135 Cal. 621, 67 Pac. 1037 (1902).

25. Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659 (1890). See also Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928); McLean v. Crow, 88 Cal. 644, 26 Pac. 596 (1891).

26. Vagim v. Brown, 63 Cal. App.2d 504, 146 P.2d 923 (1944).

27. Wetenhall v. Chas. S. Mabrey Const. Co., 209 Cal. 293, 286 Pac. 1015 (1930).

28. Kohler v. Stephenson, 39 Cal. App. 374, 178 Pac. 970 (1919).

29. See Andrews v. Glick, 205 Cal. 699, 272 Pac. 587 (1928).

30. Messick v. Houx Bros., Inc., 105 Cal. App. 637, 288 Pac. 434 (1930).

31. Dennis v. Overholtzer, 178 Cal. App.2d 766, 3 Cal. Rptr. 193 (1960).

32. Hixson v. Boren, 144 Cal. App.2d 547, 301 P.2d 615 (1956).

33. Cal. Packing Corp. v. Kandarian, 62 Cal. App. 729, 731, 217 Pac. 805, 806 (1923).

34. Berg Metals Corp. v. Wilson, 170 Cal. App.2d 559, 339 P.2d 869 (1959).

35. Ibid.

36. Ibid.

37. See CAL. CIVIL CODE § 2466.

38. Cal. Stats. 1929, Ch. 864, § 1, p. 1896; Cal. Stats. 1929, Ch. 865, § 1 p. 1912.

39. CAL. CORP. CODE §§ 15001-15045, §§ 15501-15531.

40. Corporations Code Section 15010.5 provides:

> 15010.5. (1) A statement of partnership, in the name of the partnership, signed, acknowledged and verified by two or more of the partners, or such a statement signed by two or more of the partners as individuals, acknowledged and verified by each signing partner, may be recorded in the office of the county recorder of any county. Such recorded statement, or a copy thereof certified by any recorder in whose office it or a copy thereof so certified is recorded, may be recorded in any other county or counties. The statement shall set forth the name of the partnership and the name of each of the partners, and shall state that the partners named are all of the partners. If a partnership is not dissolved by the death of a partner by reason of an agreement provided for in subdivision (4) of Section 15031 the statement or amended statement may state the name and date of death of such deceased partner and that the partnership was not dissolved by reason of such death because of the existence of such agreement.
>
> It shall be conclusively presumed, in favor of any bona fide purchaser for value of the partnership real property located in a county in which such statement or such certified copy thereof has been recorded, that the persons named as partners therein are members of the partnership named and that they are all of the members of the partnership, and that any partner stated to be dead is deceased and that the partnership was not dissolved by reason of such death, unless there is recorded by anyone claiming to be a partner a statement of partnership, verified and acknowledged by

the person executing it, which shall set forth the name of the partnership, a statement that such person claims to be a member of such partnership or a statement that any of the persons named in a previously recorded statement of partnership are not members of such partnership.

(2) As used in this section and in Section 15010, "conveyance" includes every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills; "convey" includes the execution of any such instrument; and "purchaser" includes any person acquiring an interest under any such instrument.

See also Corporations Code Section 15010.6 which provides:

15010.6. Where no statement of partnership as provided in Section 15010.5 has been recorded prior to the death of one or more of the partners, such statement may be signed, acknowledged and verified by two or more of the surviving partners, in the form and manner specified in said section; provided that if all of the partners except one are deceased, the statement may be signed, acknowledged and verified by the last survivor of the partners only; and provided further that such statement shall specify the date of creation of the partnership, which of the partners are deceased and the date of death of each deceased partner.

Nothing in this section shall be construed to affect the provisions of Section 15031 of this code.

41. Corporations Code Section 15035.5 provides:

15035.5. Whenever a partnership is dissolved, a notice of the dissolution shall be published at least once in a newspaper of general circulation in the place, or in each place if more than one, at which the partnership business was regularly carried on, and an affidavit showing the publication of such notice shall be filed with the county clerk within thirty days after such publication.

42. Corporations Code Section 15502 provides:

15502. (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and acknowledge a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated.

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement, or insanity of a general partner,

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution, and

XV. The right, if given, of a limited partner to vote upon any of the matters described in subdivision (b) of Section 15507, and the vote required for election or removal of general partners, or to cause other action to be effective as to the limited partnership.

(b) Record said certificate in the office of the recorder of the county in which the principal place of business of the partnership is situated.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph one.

(3) If the partnership has places of business situated in, or holds title to real property in, different counties, it shall cause either such recorded certificate, or a copy of such recorded certificate, certified by the recorder in whose office it is recorded, to be recorded in the office of the recorder of each such different county.

(4) Recording of the certificate in accordance with (1)(b) above or recording of the recorded certificate or a copy thereof in accordance with (3) above shall create the same conclusive presumptions as provided in Section 15010.5 of this code; any other person claiming to be a partner who has been omitted from any such statement shall have the right to record a corrective statement as provided in said Section 15010.5.

43. Corporations Code Section 15505 provides:

15505. (1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph one is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

44. These sections provide:

15524. (1) The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies, or becomes insane, and the business in continued under Section 15520,

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate,

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them, or

(k) There is a change in the right to vote upon any of the matters described in subdivision (b) of Section 15507.

15525. (1) The writing to amend a certificate shall

(a) Conform to the requirements of subdivision 1a of Section 15502 as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and acknowledged by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs one and two as a person who must execute the writing refuses to do so, may petition the superior court in the county where the principal place of the partnership is situated to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the county recorder of the county in which the original certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or canceled when there is recorded in the office referred to in paragraph (1)(b) of Section 15502 of this code:

(a) A writing in accordance with the provisions of paragraph one or two, or

(b) A certified copy of the order of court in accordance with the provisions of paragraph four. Provided, however, that such amendment or cancellation shall be void as against a purchaser or encumbrancer in good faith and for value of real property in a "different county" referred to in paragraph (3) of Section 15502 of this code, whose conveyance is duly recorded before such recorded writing, or a copy thereof certified by the recorder in whose office it is recorded, or a certified copy of such court order, has been recorded in the office of the recorder in such different county.

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this act except as to a purchaser or encumbrancer in good faith and for value under the circumstances set forth in the proviso to paragraph (5).

45. See also CAL. CORP. CODE § 15516.

46. See CAL. CIVIL CODE § 2469.

47. Business and Professions Code Section 10159.5 provides:

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.

48. Business and Professions Code Section 8936.1 provides:

8936.1. No fictitious name shall be used by a broker in the conduct of any business for which a license is required under this chapter unless a license bearing such fictitious name has been issued to said broker.

49. Financial Code Section 12300.2 provides:

12300.2. Every person engaging in the business of a check seller or casher 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.

50. See Annot., 45 A.L.R. 198 (1926).

51. Ibid.