

#44

3/14/66

First Supplement to Memorandum 66-13

Subject: Study 44 - The Fictitious Name Statute

Attached to this supplement are two copies of an Alternative Tentative Recommendation on the Fictitious Name Statute. Please mark any revisions you believe should be made on one copy and turn it in to the staff at the April meeting.

At the February meeting, several commissioners expressed concern that the repeal of the Fictitious Name Statute would make unavailable information that would be of value in determining the persons that should be made parties to an action brought by a person who entered into a contract or other transaction with a person or firm transacting business in a fictitious name. Because we believe that this concern may be shared by others, we have prepared the attached Alternative Tentative Recommendation.

The Alternative Tentative Recommendation makes two basic changes in the Fictitious Name Statute. First, it eliminates the requirement of publication of the fictitious name certificate. Second, it provides a means whereby any interested person may compel the person or persons transacting business in a fictitious name to comply with the Fictitious Name Statute.

Attached as Exhibit I (pink sheet) is the one letter we have received in response to an informal inquiry we made to various bay area credit associations. Attached as Exhibit II (yellow pages) is a letter from the Division of Real Estate. Note that the writers recommend the repeal of the publication requirement, but they also recommend that the Fictitious Name Statute not be repealed. We will attach any additional letters we receive from various other interested persons to the basic memorandum.

Respectfully submitted,

John H. DeMouly
Executive Secretary

1st Supp Memo 63-13

EXHIBIT I

THE JEWELERS BOARD OF TRADE

ESTABLISHED 1884

EXECUTIVE OFFICES

PROVIDENCE 2.R.I.

COLLECTION DEPARTMENT
ADJUSTMENT DEPARTMENT
PROVIDENCE

TURK'S HEAD BLDG., PROVIDENCE 2
22 WEST 48TH ST., NEW YORK CITY 36
108 NORTH WABASH AVE., CHICAGO 2
593 806 MARKET ST., SAN FRANCISCO 3

March 9, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Fictitious Name Statute

Gentlemen:

In reply to the questions raised in your letter of March 4, 1966, please be advised that we see no proper purpose served by the publication requirement of the fictitious name statute, and we would favor its elimination.

However, we are of the opinion that the filing requirement should be continued in that it is useful and proper for suppliers and other commercial organizations to know the true identity of those with whom they deal.

In short, we favor repeal of the publication requirement and retention of the filing requirement of the fictitious name statute.

Very truly yours,


A. L. MAY

WCH:mln

11 Capitol Mall
Sacramento, Calif.
95814

State of California
DIVISION OF REAL ESTATE

MILTON G. GORDON, COMMISSIONER



9
March
1966

Mr. John H. DeMouilly, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

I view the fictitious name statutes (Civil Code §§ 2466-2471 and Business & Professions Code §§ 10159.5 and 10522.5) as identical in purpose. Both seek to make a public record and to identify the persons or entity utilizing a fictitious name for the benefit of those who deal with them.

In event the fictitious name statute was repealed, a person who had a basis for a civil action against a person or entity doing business under a fictitious name would find it extremely difficult to determine who should be named or served in the civil action.

I would be faced with a similar problem in the enforcement of the Real Estate Law should licensees be permitted to utilize fictitious names in their licensing activities without complying with the provisions of §§ 2466 et seq. of the Civil Code or without obtaining the issuance of a license under such name.

One possible alternative to the outright repeal of the fictitious name statute would be to retain the recordation requirement, i.e., first paragraph of § 2466, and to repeal the provisions for publication of the certificate and the filing of an affidavit within 30 days thereafter. The latter provisions with the concomitant expense do not appear to serve any useful purpose.

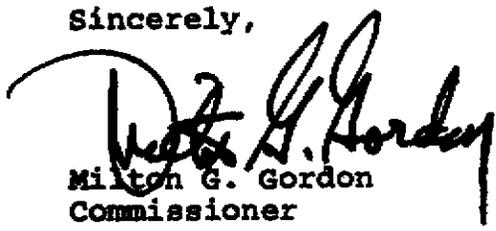
Mr. John H. DeMouilly - 3/9/66 - 2

Although I have not had an opportunity to explore all of the possible ramifications, I am inclined to believe that a central statewide system, similar to that established under the Uniform Commercial Code for the filing of security interests in personal property, would be more effective and economical than filing with the County Clerk as is now required.

In event the fictitious name statutes were repealed, §§ 10159.5 and 10522.5, B & PC, would be rendered ineffective. I consider these sections essential to the effective enforcement of the Real Estate Law and would feel compelled to seek an amendment requiring brokers to file a statement with our Division setting forth all fictitious names they propose to use in the conduct of their licensed activities.

Thank you for this opportunity to present my views.

Sincerely,



Milton G. Gordon
Commissioner

CALIFORNIA LAW REVISION COMMISSION

ROOM 30, CROTHERS HALL
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

RICHARD H. KEATINGE
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SHO SATO
Vice Chairman
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JOSEPH A. BALL
JAMES R. EDWARDS
JOHN R. McDONOUGH
HERMAN F. SELVIN
THOMAS E. STANTON, Jr.
GEORGE H. MURPHY
Ex Officio

The California Law Revision Commission is a state agency that was created to study areas of the law that are in need of revision and to submit recommendations to the Legislature.

One of the topics the Commission is studying is whether the fictitious name statute (Civil Code Sections 2466-2471) should be revised or repealed. This statute requires that a person transacting business in a fictitious name 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 four times in a newspaper. The Commission is considering whether or not the fictitious name statute should be repealed. In addition to the legal fees in connection with the filing and publication of the fictitious name certificate, the cost of publication itself may impose a significant expense on a person transacting business in a fictitious name. This requirement is especially onerous because the existing law requires a new filing and the four publications each time there is a change in the membership of the firm transacting business in a fictitious name.

It would be helpful to the Commission if we could have your views on the following questions:

(1) Are you aware of any purpose served by the fictitious name statute? In this connection, it should be noted that the only sanction to compel compliance with the statute is that a person transacting business in a fictitious name may not maintain an action on a transaction had in the fictitious name until the fictitious name certificate has been filed and published. If the person commences such an action and the defendant objects to the failure to comply with the fictitious name statute, the person conducting business in the fictitious name may not publish the certificate after the action is commenced and still maintain his action.

(2) Does the requirement of publication serve any useful purpose? In other words, would it be sufficient if the information were merely required to be filed with the county clerk?

(3) Do you use the fictitious name statute to any extent in the operation of your business? Would you object to the repeal of this statute?

In order that any tentative conclusions the Commission reaches on this subject can be distributed for comment by interested persons as soon as possible, we would appreciate receiving your views on the questions set out above by March 18, if possible.

Very truly yours,

John H. DeMouilly
Executive Secretary

Sent to:

Universal Credit Rating Bureau
Retailers Commercial Agency
Retail Stores Reporting Service
Mutual Credit Exchange
Metropolitan Reporting Service, Inc.
McCord Company
The Jewelers Board of Trade
Informative Research
Financial Reports, Inc.
Dun & Bradstreet, Inc.
Credit Reporting Co.
Credit Data Corporation
Credit Bureau Reports, Inc.
Credit Bureau of Santa Clara Valley
The Credit Bureau of San Francisco, Inc.
Credit Managers Association of Northern
& Central California
Central Reporting Bureau
California Material Dealers Association
Assets Research Division of
National Business Factors, Inc.

Memo 66-13

EXHIBIT II

THE CREDIT BUREAU OF SAN FRANCISCO, INC.

15 STOCKTON STREET

SAN FRANCISCO 8

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

Gentlemen:

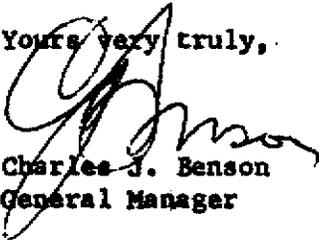
This is in response to your letter of March 4 in connection with the "fictitious name" statute.

We believe that the best interests of the public would be served if there was an official record required at either the County or State level. This would specify that anyone transacting business under a fictitious name should record with the Secretary of State or County Clerk the fact, and thus the public could look beyond the name and discover the principals of any such business.

We do not feel that the publication requirement serves any special benefit.

From the foregoing you can conclude that our answer to your question designated No. 2 is affirmative, and our answer to No. 3 is that we would object to the repeal of the statute but would not oppose a revision.

Yours very truly,


Charles J. Benson
General Manager

CJB/mw

cc Mr. Robert C. Kopriva

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21	
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COUNTY OF SACRAMENTO

EXHIBIT III

MEMO 66-13
COUNTY CLERK, CLERK OF SUPERIOR COURT,
REGISTRAR OF VOTERS
WILLIAM N. DURLEY

ROOM 103, COUNTY COURT HOUSE
720 NINTH STREET
SACRAMENTO, CALIFORNIA 95814

March 14, 1966

Mr. John H. DeMouilly, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

In answer to your letter of March 11, 1966 regarding the use of the fictitious name register (Civil Code Section 2470) by persons visiting this office, we would estimate this register is used from thirty to fifty times each day by persons desiring a variety of information.

Most of our inquiries concern whether or not a particular fictitious name is now in use, usually by persons desiring to file on such a fictitious name. However, we also have many inquiries concerning the names and addresses of the owners of such business and other related information.

If we can be of further assistance in this matter, please do not hesitate to call on us.

Very truly yours,

W. N. DURLEY, COUNTY CLERK

By *W. N. Durley*
Deputy

WND:bjs

CALIFORNIA LAW REVISION COMMISSION

ROOM 30, CROTHERS HALL
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

March 11, 1966



RICHARD H. KEATINGE
Chairman
SHO SATO
Vice Chairman
SENATOR JAMES A. COBEY
ASSEMBLYMAN ALFRED H. SONG
JOSEPH A. BALL
JAMES R. EDWARDS
JOHN R. McDONOUGH
HERMAN F. SELVIN
THOMAS E. STANTON, Jr.
GEORGE H. MURPHY
Ex Officio

Mr. Paul R. Teilh
County Clerk
County Court House
San Jose, California

REPLY: "Use in Santa Clara County varies
from rarely to occasionally."
Paul R. Teilh, County Clerk

Dear Mr. Teilh:

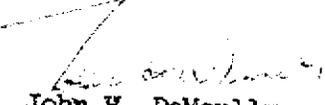
The California Law Revision Commission is a state agency that was created to study areas of the law that are in need of revision and to submit recommendations to the Legislature.

One of the topics the Commission is studying is whether the fictitious name statute (Civil Code Sections 2466-2471) should be revised or repealed. This statute requires that a person transacting business in a fictitious name 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 four times in a newspaper. The Commission is considering whether or not the fictitious name statute should be repealed. In addition to the legal fees in connection with the filing and publication of the fictitious name certificate, the cost of publication itself may impose a significant expense on a person transacting business in a fictitious name. This requirement is especially onerous because the existing law requires a new filing and the four publications each time there is a change in the membership of the firm transacting business in a fictitious name.

It would be helpful to the Commission if you could give us some idea of the extent to which the fictitious name register (Civil Code Section 2470) is used by persons who visit your office to obtain information contained in the register. Is the register used only rarely, occasionally, frequently, or to a great extent?

In order that any tentative conclusions the Commission reaches on this subject can be distributed for comment by interested persons as soon as possible, we would appreciate receiving your estimate of the use now being made of the fictitious name register by March 18 if possible.

Very truly yours,


John H. DeMouly
Executive Secretary





Memo 66-13

EXHIBIT V

Dun & Bradstreet, Inc.

PUBLICATIONS AND SERVICES FOR MANAGEMENT

March 15, 1966

LOUIS M. MARZLUFT
REGIONAL REPORTING MANAGER
P. O. BOX 232 TERMINAL ANNEX
LOS ANGELES, CAL. 90054
TELEPHONE: AREA CODE 213 620-1250

Mr. John H. De Moully,
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

RE: California Law Revision Commission
Study On
Fictitious Name Statute

Dear Mr. De Moully:

This letter is in response to your letter of March 4, 1966, which invited certain views in connection with the possible revision or repeal of the "Fictitious Name Statute".

We feel that the interests of the members of the business community would be best served by a statute of this nature. A strong fictitious name law is an aid to the free flow of goods and services and the continued economic health of the states even more than sound sureties between businesses. Service Organizations, wholesalers and manufacturers when they receive orders from a concern doing business under an assumed name expect and need to know the identity of those persons conducting such enterprises, to effectively reach a sound business decision. Access to a central source of information within the State on all such names can best serve the mutual interests of both of the parties to such a transaction. A central location for recording such data would prevent less technical difficulties in recording and obtaining such data.

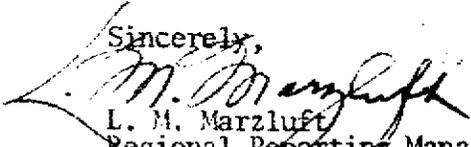
The publication requirement is less apparent today than heretofore and as your letter suggests, this requirement often presents an undue financial burden upon persons transacting business under an assumed name. Public filing obviates the necessity of publication.

A statute of this nature is less effective when there is frequent non-compliance. As presently constituted, the non-compliance may be effectively rectified even after bringing a legal action. Other states have effectively reduced this possibility by treating violations of such a statute as a misdemeanor. Prosecutions under such statutes are reportedly practically non-existent.

We recommend a revision of the Statute and feel that if such a revision is enacted within the guidelines suggested above, it would be in the best public interest.

We appreciate your inviting our views on this significant legislative matter.

Sincerely,


L. M. Marzluft
Regional Reporting Manager

LMM:kb

CITY AND COUNTY OF SAN FRANCISCO

COUNTY CLERK
CLERK OF THE SUPERIOR COURT

March 15, 1966

Mr. John H. DeMouilly,
Executive Secretary,
Clif. Law Revision Comm.
30 Crothers Hall,
Stanford University, Calif.

Re: Fictitious Names
Statute.

Dear Mr DeMouilly:

This refers to your letter of inquiry of March 11th, 1966 regarding the fictitious name statute.

We will answer your question immediately by saying that this register is used to a great extent. In fact, next to the Civil and Probate indexes, it is by all odds, the most frequently used index in the office. The general public, as distinguished from attorneys, make especially heavy use of this index.

In San Francisco County, all business plaintiffs in the Small Claims Court must furnish a certificate attesting to the fact that their firm is registered either in the Fictitious Names register or the Corporations Register. If they cannot do so, their filing is refused. The number of these small claims actions is constantly increasing.

We feel strongly that from a public service viewpoint, the fictitious name statute should be left "as is".

Very truly yours,

Martin Mongan
MARTIN MONGAN
County Clerk-Recorder.

MCCORDS DAILY NOTIFICATION SHEET

Published by McCord Company • Established 1910

1581 MISSION STREET • SAN FRANCISCO 3, CALIFORNIA • TELEPHONE MARKET 1-4674

March 15, 1966.

Mr. John H. DeMouilly, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

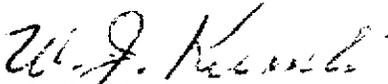
In answer to question one of your letter regarding the fictitious name statute; I know without a doubt that it aids business in general, from a practical point of view. Any credit grantor carrying the account under the DBA must know the names of the owners if he is to be prudent in the extension of credit. Additionally, if the account goes sour he must have the names and addresses of the owners in order to best effect collection of any monies due. Another purpose is to prevent the confusion that would be caused by several different people using the same fictitious trade name.

The publication of the filing serves a very useful purpose for the reasons stated above and from the point of view of the various trade publications and credit reporting agencies. They are frequently asked; "Who is the owner of the Corner Grocery at Vallejo?", and need to be in a position to adequately answer such a question. Also, the publication acts as a "check" for reporting agencies for verification of a report it may have received from a County Clerk's office or a correspondent. The publication also contains all of the information, such as the residence addresses of owners; which is important for verification purposes.

Additionally, as a business man, if we were a corporation, partnership or individual, we want the advantages of the fictitious name statute for the purpose of filing any fictitious trade names we would desire to use and I would strongly object to the repeal of this statute.

Sincerely,

MC CORD COMPANY


W. J. Kumli
President
WJK/ofc

99 South Van Ness Avenue • San Francisco 3, California

MArket 1-5400



Office of the Editor

March 15, 1966

Dear Mr. DeMouly:

Within recent weeks I have been informed by several persons -- editors of legal newspapers, county clerks and credit company executives -- that the California Law Revision Commission has under consideration a plan to amend, if not repeal Civil Code Sections 2466-2471 which require filing and publishing of notices of doing business under a fictitious name.

Without exception, my informants are opposed to amendment or repeal, and I hasten to join them.

Several years ago a similar proposal was presented. Objections came from many sources, particularly banks, credit houses, collection bureaus and newspapers. One of the strongest objectors was Bank of America, which, so I am told, required public notice, through fictitious name procedures, when business loans are under consideration.

Yesterday I conferred with our County Clerk Martin Mongan, and I learned that not alone is he against disturbance of statutory provisions as extant, but that his objection is general throughout the County Clerks' Association of California.

Mr. Mongan informs me that at least five requests are received by his department each day for information relative to companies operating under fictitious names.

Credit companies would find it extremely costly, if not impossible to obtain proper and sufficient information for their clients if the Statute were to be amended or repealed.

The cost of filing and publishing a fictitious name notice is minimal, a properly deductible and pro-rated expense, therefore not a financial burden to the large or small businessman.

Mr. DeMouilly - 2

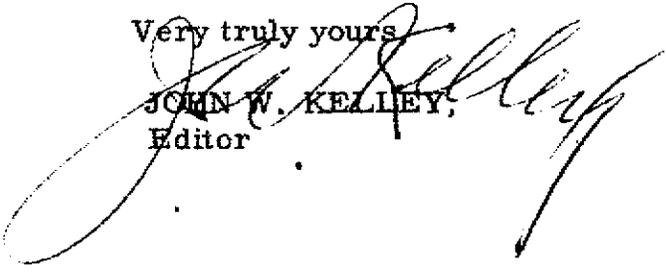
And -- I believe this is most important, too -- through filing and publication of a fictitious name an individual, or partnership protects business title.

Mr. DeMouilly, I am certain your Commission is concerned with equities and advantages, otherwise you would not seek an expression of opinion as you are now doing.

Therefore, may I suggest that a copy of the letter you sent to County Clerk Mongan and William Kumli, President of McCord's Dily Notification Sheet, be forwarded to the executive secretary of the Credit Managers' Association of Northern and Central California. His address is 989 Market Street, San Francisco, California.

I am certain he will be a source of sound and factual reasons why statutory provisions of Civil Code Sections 2466 - 2471 are beneficial in business operations and should be retained.

Very truly yours,


JOHN W. KELLEY,
Editor

JWK: sn
1 enc.

STATE OF CALIFORNIA—BUSINESS AND COMMERCE AGENCY

EDMUND G. BROWN, Governor

DEPARTMENT OF INVESTMENT

DIVISION OF CORPORATIONS

JERALD S. SCHUTZBLANK
CommissionerSACRAMENTO 95814—PRINCIPAL OFFICE
1020 N STREETSAN FRANCISCO 94103
1460 MISSION STREETLOS ANGELES 90012
107 SOUTH BROADWAYSAN DIEGO 92101
8068 STATE OFFICE BLDG.Los Angeles, California
March 15, 1966

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

This is in reply to your letter of March 2, 1966, addressed to Commissioner Rickershauser, my predecessor, and to your letter of the same date addressed to Mr. Hans A. Mattes, the Assistant Commissioner in charge of my San Francisco Office.

The four questions posed in each of the foregoing letters are the same, and for that reason, the following is intended to be in reply to both of the letters mentioned above:

1. We are aware of the information set forth in the first of your questions.
2. It would appear to be highly desirable, in the event that the fictitious name statute were repealed, for the Check Sellers and Cashers Law to be amended, so as to require that information similar to that now required pursuant to the Civil Code be furnished directly to our agency, in order that a roster of check sellers and cashers operating under fictitious names could be maintained. In this regard, you may be interested in Sections 22405 and 24405 of the Financial Code, which provides that no licensee under the Personal Property Brokers Law or Small Loan Law may transact any business under any name other than that which is named in the license granted to such licensee.
3. It does not appear to me that the requirement of publication serves any useful purpose. It would appear entirely sufficient if the information required were to be instead filed with the County Clerk.

Mr. John H. DeMouilly

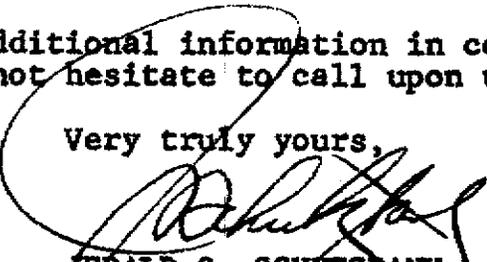
-2-

March 15, 1966

4. We are in the process of attempting to determine whether our investigators make extensive use of the fictitious name statute in its present form. It would appear that from time to time, any investigative unit would find it necessary to use the fictitious name statute in order to determine the real name of an enterprise being operated under a fictitious name. Such information is, of course, essential in many situations where it is necessary to determine the true parties in interest who are operating a given enterprise. It would appear that a revised statute which provided for the filing of information, as opposed to the publication of such information, would be entirely as satisfactory for such investigative purposes. It must also be borne in mind, as alluded to in your letter, that the present statute only affords information to our investigators when by some chance the fictitious name has already been published. As you indicate in your letter, such publication need be made only in the event that litigation is undertaken. As a personal observation, it would seem that if any type of fictitious name statute is desirable, it should be one which requires the filing of the fictitious name information prior to the commencement of the business under the fictitious name, so that such information will be available to all persons who may have use for it, without the necessity of waiting until the fictitious name has been filed in connection with litigation, since the latter event may never occur.

If we may provide any additional information in connection with this matter, please do not hesitate to call upon us.

Very truly yours,


GERALD S. SCHUTZBANK
Commissioner of Corporations

JSS:fa

WILLIAM G. SHARP
COUNTY CLERK

COUNTY OF LOS ANGELES
COUNTY CLERK AND CLERK OF THE SUPERIOR COURT

E. G. HATCHER
CHIEF DEPUTY

111 NORTH HILL STREET
MAILING ADDRESS: P. O. BOX 151
LOS ANGELES, CALIFORNIA 90053
MADISON 5-3414

March 17, 1966

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

There is considerable use of the fictitious name index referred to in your letter of March 11, 1966. In 1965, we had a total of 77,417 index searches, including both fictitious and corporate names. These included 42,974 telephone searches, 32,116 counter searches, and 2,327 responses by mail for which a fee was charged. The telephone lines to the fictitious indexes have been some of the most crowded in the Courthouse causing us to arbitrarily limit the number of searches per call and the amount of information we will give by telephone. (We limit information to that contained on the index.) There was also considerable use of the files at the counter where additional information was requested.

In 1965, we filed approximately 21,000 certificates of business. There are approximately 345,000 separate business names on file. The number of firms would exceed this since similar names are given existing file numbers.

This information affords the public the means of determining the names of owners against whom it has a claim. It is used extensively by various credit service bureaus, Dunn and Bradstreet, collection agencies, Post Office, U.S. Treasury Department, and various state and local agencies.

The County Clerk's Association of California proposed an amendment to several code sections relating to this subject which was incorporated in A.B. 1043 introduced at the 1965 Regular Session, copy of which bill is enclosed. This amendment was prompted by the fact that the County Clerk's records contained thousands of names of firms no longer in existence which is confusing to the public particularly in determining whether a proposed name should be adopted for a new business. The amendment would have updated the file and purged it of many firms which had ceased business. The bill had favorable action from both the original Assembly and Senate committees to whom it was referred but

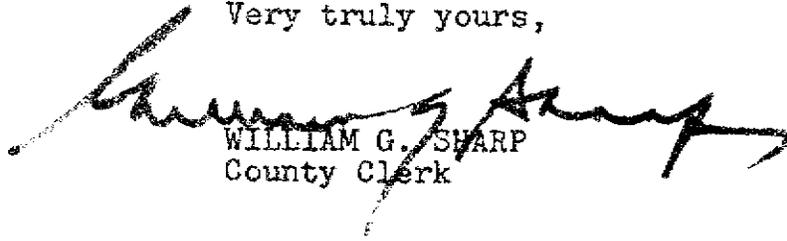
Mr. John H. DeMouilly
March 17, 1966

Page 2

finally got sidetracked when combined with several other bills relating to fees.

I hope this information will be of assistance to your commission. Please advise if we can be of any further help to you.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'William G. Sharp', is written over the typed name and title. The signature is fluid and cursive, with a long horizontal stroke at the end.

WILLIAM G. SHARP
County Clerk

WGS:gq

Enclosure

Introduced by Assemblyman Wilson

February 9, 1965

REFERRED TO COMMITTEE ON PUBLIC UTILITIES AND CORPORATIONS

An act to amend Section 2470 and to add Sections 2469.2 and 2469.3 to the Civil Code and to amend Section 26848 of the Government Code, relating to certificates of fictitious names.

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

1 SECTION 1. Section 2470 of the Civil Code is amended to
2 read:

3 2470. Every county clerk must keep a register of the names
4 of firms and persons mentioned in the certificates filed with
5 him pursuant to this article, entering in alphabetical order the
6 name of every such person who does business under a fictitious
7 name, and the fictitious name, and the name of every such
8 partnership, and of each partner therein.

9 Upon the abandonment of the use of a fictitious name, or
10 upon the expiration of the certificate of fictitious name, the
11 clerk shall enter the fact of abandonment or expiration in the
12 register.

13 SEC. 2. Section 2469.2 is added to said code, to read:

14 2469.2. Every certificate of fictitious name filed under the
15 authority of this chapter shall expire and be of no further
16 force and effect at the end of five years following the first day
17 of January next after the filing of a certificate of fictitious
18 name with the county clerk in accordance with Section 2466
19 unless during the month of December immediately preceding
20 said date of expiration a renewal certificate containing all in-
21 formation required in the original certificate and subscribed

LEGISLATIVE COUNSEL'S DIGEST

AB 1043, as introduced, Wilson (P.U. & C.). Certificate of fictitious name.
Amends Sec. 2470 and adds Secs. 2469.2 and 2469.3, Civ.C. Amends Sec. 26848,
Gov.C.

Provides that certificates of fictitious names filed with county clerk shall expire
within certain period unless renewal certificate is filed. Authorizes county clerk to
destroy certificates which have expired. Establishes \$2 fee for filing and indexing
renewal certificate of fictitious name.

1 and acknowledged as required by that section is filed with the
2 county clerk with whom said original is on file. No such re-
3 newal certificate need be published.

4 Every certificate of fictitious name heretofore filed with the
5 county clerk pursuant to Section 2466 shall expire and be of
6 no further force and effect on and after January 1, 1971 unless
7 at any time on or after January 1, 1970, but not later than
8 December 31, 1970, a renewal certificate in accordance with
9 this section is filed with said county clerk.

10 Sec. 3. Section 2469.3 is added to said code, to read:

11 2469.3. Upon the filing of a certificate of abandonment
12 pursuant to Section 2469.1 or upon the expiration of a certifi-
13 cate of fictitious name pursuant to Section 2469.2 and follow-
14 ing the making of the entry required by Section 2470 the
15 county clerk may destroy the certificate of fictitious name the
16 use of which was so abandoned or which has expired.

17 Sec. 4. Section 26848 of the Government Code is amended
18 to read:

19 26848. The fee for filing and indexing a certificate of ficti-
20 tious name, including affidavit of publication, *and the fee for*
21 *filing and indexing a renewal certificate of fictitious name,* is
22 two dollars (\$2).

ALTERNATIVE

TENTATIVE 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.

The only sanction provided for failing to comply with the Fictitious Name 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 "maintained" to mean that an action may be commenced even if no fictitious name

*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).

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. The objection is waived if the defendant fails to make it either in his answer or by demurrer. If the defendant objects, the defect can be cured by filing the certificate and making the necessary publication prior to the actual trial of the case. If objection is made and the required filing and publication are not made, the action must be dismissed.

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 register--from which persons can learn with whom they are trading. But because the statute lacks any significant sanction for noncompliance, it fails to assure that this information will be available in the type of case where it is most needed, i.e., where a person has a claim against a person or firm transacting business in a fictitious name and needs to know who the person or persons are who transact business under that fictitious name. In such a case, if the requirements of the Fictitious Name Statute have not been met, there is no means by which the person seeking the information can compel the person or persons transacting business in a fictitious name to comply with the Fictitious Name Statute.

The Commission has concluded that the Fictitious Name Statute should be amended to include a provision whereby any interested person could compel a person transacting business in a fictitious name to comply with the Fictitious Name Statute. Accordingly, the Commission recommends that any person should be permitted to serve a demand that a person or partner transacting business in a fictitious name comply with the Fictitious Name Statute. Failure to file the fictitious name certificate with the county

clerk within 10 days after service of the demand should result in a forfeiture of fifty dollars and all damages which the person serving the demand may sustain by reason of the failure to comply with the statute, which forfeiture and damages should be recoverable in a civil action. This sanction is based on Code of Civil Procedure Section 1992 which provides a somewhat similar sanction when a witness disobeys a subpoena.

The Commission also recommends that the publication requirement of the Fictitious Name Statute be eliminated. The publication requirement is burdensome and expensive, especially for large partnerships and those unincorporated associations which are treated as partnerships for the purpose of determining liability. This is particularly true with respect to the requirement that a new certificate be published once a week for four successive weeks on each change in the memberships of the organization. Moreover, where the certificate was not filed and published, a large partnership with a fluctuating membership apparently would be required, as a condition to maintaining an action, to file and publish a series of certificates reflecting each change in membership during the period covered by the transaction upon which the action is based. 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.

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

An act to amend Sections 2466, 2467, 2468, 2469, 2469.1, 2470, and 2471
of the Civil Code, Sections 10159.5 and 10522.5 of the Business and
Professions Code, and Section 26848 of the Government Code, relat-
to fictitious names.

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

SECTION 1. Section 2466 of the Civil Code is amended to read:

2466. Except as otherwise provided in ~~the next section~~ Section 2467, 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~~ shall 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 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 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 publi-~~

~~ation, but in no event shall such publication be made prior
to the filing of such certificate with the county clerk.~~

Comment. The amendment eliminates the requirement of publication
and makes other technical, nonsubstantive changes.

SEC. 2. Section 2467 of said code is amended to read:

2467. 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~~ Section 2466 , use in this state the partnership name used by it there, although it be fictitious, or ~~it~~ does not show the names of the persons interested as partners in such business.

Comment. The amendment deletes the reference to publication and makes technical, nonsubstantive changes.

SEC. 3. Section 2468 of said code is amended to read:

2468. (a) The certificate filed with the clerk as provided in Section 2466 ~~must~~ shall 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~~ .

(b) Where a business is hereafter commenced by a person under a fictitious name or a partnership is hereafter formed, the certificate ~~must~~ shall 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.~~

(c) 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 chapter , 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 by Sections 2466 and 2469 .

(d) Any person may serve a demand that the required certificate be filed on any person or partner that has failed to file the

certificate as required by Section 2466 or 2469. The demand shall be in writing and may be served either (1) by delivering a copy to the person or partner personally or (2) if the person or partner is not found at his usual place of business, by leaving a copy of the demand with a person having charge thereof and sending a copy of the demand through the mail addressed to the person or partner at his usual place of business. If the required certificate is not filed within 10 days after service of the demand, the person or partner failing to file the certificate so demanded forfeits to the person who served the demand the sum of fifty dollars and all damages which such person may sustain by reason of the failure to file the certificate, which forfeiture and damages may be recovered in a civil action.

Comment. The amendment deletes the reference to publication, makes a number of technical, nonsubstantive changes, and deletes an obsolete sentence. The amendment also adds subdivision (d) which provides a sanction designed to make the Fictitious Name Statute an effective means of obtaining information needed by a person having a claim against or a dispute with a person or partnership transacting business under a fictitious name. The sanction provided for violation of subdivision (d) is based on Code of Civil Procedure Section 1992 which provides a somewhat similar sanction for a witness disobeying a subpoena.

SEC. 4. Section 2469 of said code is amended to read:

2469. On every change in the members of a partnership trans-acting 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~~ Section 2467, a new certificate ~~must~~ shall be filed with the County Clerk ~~, and a new publication made~~ as required by this ~~Article~~ chapter on the forma-tion of such partnership.

Comment. The amendment deletes the reference to publication and makes several technical, nonsubstantive changes.

SEC. 5. Section 2469.1 of said code is amended to read:

2469.1. 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.~~

Comment. The amendment eliminates the requirement of publication.

SEC. 6. Section 2470 of said code is amended to read:

2470. 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~~ chapter , 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.

Comment. The amendment makes a technical, nonsubstantive change.

SEC. 7. Section 2471 of said code is amended to read:

2471. 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. The presumption created by this section is a presumption affecting the burden of producing evidence.

Comment. The amendment eliminates the reference to affidavits of publication and clarifies the presumptive effect of the certificate of the county clerk. See EVIDENCE CODE §§ 601, 603, 604.

SEC. 8. 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 licence 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.

Comment. This section, which relates to real estate salesmen and brokers, is amended to delete the reference to the affidavit of publication. The Fictitious Name Statute (Civil Code Sections 2466-2471) has been amended to eliminate the requirement of publication.

SEC. 9. 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.

Comment. This section, which relates to mineral, oil, and gas brokers and salesmen, is amended to delete the reference to the affidavit of publication. The Fictitious Name Statute (Civil Code Sections 2466-2471) has been amended to eliminate the requirement of publication.

SEC. 10. 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,~~ is two dollars (\$2).

Comment. The amendment deletes the reference to the affidavit of publication. The Fictitious Name Statute has been amended to eliminate the requirement of publication.