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DEERING'S CALIFORNIA CODES ANNOTATED
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THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
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PENAL CODE
Part 2. Of Criminal Procedure
Title 8. Of Judgment and Execution
Chapter 1. The Judgment

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Pen Code § 1192 (2007)

§ 1192. Court to determine degree of offense; Failure to make determination

Upon a plea of guilty, or upon conviction by the court without a jury, of a crime or attempted crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree. Upon the failure of the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.

HISTORY:

Enacted 1872. Amended Stats 1949 ch 800 § 2; Stats 1978 ch 1166 § 5.

NOTES:

Amendments:

1949 Amendment:

Substituted the section for the former section which read: "Upon a plea of guilty of a crime distinguished or divided into degrees, the Court must, before passing sentence, determine the degree."

1978 Amendment:

Added "or attempted crime" wherever it appears.

Historical Derivation:

Crimes and Punishment Act § 21 (Stats 1850 ch 99 § 21), as amended Stats 1856 ch 139 § 2.

Cross References:

Duty of court to determine and impose punishment prescribed under statutes declaring certain crimes punishable as therein mentioned: *Pen C § 12*.

How punishments determined: *Pen C § 13*.

Degrees of murder: *Pen C § 189*.

Kinds of manslaughter and respective punishments: *Pen C §§ 191.5 et seq*.

Degrees of burglary: *Pen C § 460*.

Degrees of theft: *Pen C § 486*.

Conviction for lowest degree where reasonable doubt exists as to degree: *Pen C § 1097*.

Jury to find degree in verdict: *Pen C § 1157*.

Collateral References:

Witkin & Epstein, Criminal Law (3d ed), Criminal Judgment §§ 149, 151.

Cal Jur 3d (Rev) Criminal Law § 76.

Cal Criminal Defense Prac., ch 91, "Sentencing".

Judicial Council of California Criminal Jury Instructions (LexisNexis MatthewBender), CALCRIM No. 3100, Prior Conviction: Nonbifurcated Trial

Judicial Council of California Criminal Jury Instructions (LexisNexis MatthewBender), CALCRIM No. 3101, Prior Conviction: Bifurcated Trial

Law Review Articles:

Robinson, A brief history of distinctions in criminal culpability. *31 Hast LJ 815*.

California's statutory safeguards for protecting interest of defendant who pleads guilty. *7 San Diego LR 93*.

Annotations:

Duty of court, upon plea of guilty or nolo contendere to offense involving several degrees, to hear evidence to determine degree. *34 ALR2d 919*.

Hierarchy Notes:

Pt. 2, Tit. 8, Ch. 1 Note

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NOTES OF DECISIONS 1. In General 2. Time of Determination 3. Hearing for Determination of Degree 4. Evidence 5. -Admissibility 6. -Competency 7. -Sufficiency 8. -Presumptions 9. Effect of Failure To Determine Degree 10. Review

1. In General

This section is not unconstitutional as being a denial of the right of trial by jury, since the proceeding to fix the degree of crime is not a trial. *People v. Chew Lan Ong (1904) 141 Cal 550, 75 P 186, 1904 Cal LEXIS 1017; People v. Walker (1948) 33 Cal 2d 250, 201 P2d 6, 1948 Cal LEXIS 310, cert den (1949) 336 US 940, 69 S Ct 744, 93 L Ed 1098, 1949 US LEXIS 2651.*

A plea of "guilty of murder in the first degree" is not a waiver and does not relieve the court of its duty under this section. *People v. Paraskevopolis (1919, Cal App) 42 Cal App 325, 183 P 585, 1919 Cal App LEXIS 686, superseded by statute as stated in Sanchez v. Superior Court (2002, Cal App 2d Dist) 102 Cal App 4th 1266, 126 Cal Rptr 2d 200, 2002 Cal App LEXIS 4827.*

Upon a second arraignment of a defendant, the original judgment having been vacated, the court need not determine again the degree of crime before pronouncing the second judgment. *People v. Cosgrove (1920, Cal App) 48 Cal App 710, 192 P 165, 1920 Cal App LEXIS 474.*

It is not necessary to fix the degree of the crime of attempted robbery, since the penalty is the same for both degrees. *In re Application of Huson (1932, Cal App) 126 Cal App 571, 14 P2d 845, 1932 Cal App LEXIS 617.*

Where a court makes a finding as to the degree of the crime, it has no power to make a second finding as to the same offense. *People v. Machen (1935, Cal App) 3 Cal App 2d 499, 39 P2d 893, 1935 Cal App LEXIS 305.*

Where a defendant pleads guilty to a charge which can only be robbery in the first degree, he pleads guilty to robbery in the first degree, and the court is not required to resort to evidence to fix the degree which the defendant has already admitted by such plea to the accusatory pleading. *People v. Mendieta (1951, Cal App) 101 Cal App 2d 788, 226 P2d 34, 1951 Cal App LEXIS 1092.*

This section is not applicable to crime of assault by means of force likely to produce great bodily injury, proscribed by § 245, and court is not required to inform defendant represented by counsel what punishment would be for such crime. *People v. Martinez (1957, Cal App 1st Dist) 154 Cal App 2d 233, 316 P2d 14, 1957 Cal App LEXIS 1614.*

Whether or not trial court has duty to make further determination of degree of defendant's crime is question of law not cognizable on writ of error coram nobis. *People v. Crawford (1959, Cal App 1st Dist) 176 Cal App 2d 564, 1 Cal Rptr 811, 1959 Cal App LEXIS 1520.*

Pen C § 1192, concerning determination of the degree of an offense on a guilty plea or on conviction by the court

without a jury, applies only to offenses divided into degrees. *People v. Baca* (1966, Cal App 2d Dist) 247 Cal App 2d 487, 55 Cal Rptr 681, 1966 Cal App LEXIS 988.

Inasmuch as the Legislature has, in *Pen C* § 1237, directed that an order granting probation may be deemed a "final judgment" from which an appeal may be taken, it must follow that trial proceedings were to be deemed concluded with the granting of that "final judgment" order, within the provisions of *Pen C* § 1192, declaring that where the degree of a convicted defendant's crime is not determined before "passing sentence" in a nonjury case, it shall be deemed to be of the lesser degree. *People v. Flores* (1974) 12 Cal 3d 85, 115 Cal Rptr 225, 524 P2d 353, 1974 Cal LEXIS 211.

Although the general language of *Pen C* § 1167, requiring the court to make factual findings at the conclusion of a nonjury trial, has been held to be controlled by the more specific language of *Pen C* § 1192, requiring the degree of a crime to be fixed before "passing sentence," in a nonjury case, such a rule is not applicable where, instead of rendering judgment by "passing sentence," the court suspends proceedings and makes an order granting probation. *People v. Flores* (1974) 12 Cal 3d 85, 115 Cal Rptr 225, 524 P2d 353, 1974 Cal LEXIS 211.

Where imposition of sentence is not contemplated, as where proceedings are indefinitely suspended and probation granted, *Pen C* § 1192, calling for fixing the degree of a convicted defendant's crime "before passing sentence" in a nonjury case, does not constitute legislative authorization for a continuing, indefinite delay until the time of sentencing before making a finding as to an important factual element of the charged criminal conduct, such as the degree of the crime. *People v. Flores* (1974) 12 Cal 3d 85, 115 Cal Rptr 225, 524 P2d 353, 1974 Cal LEXIS 211.

Under *Pen C* § 1192, applicable to juvenile proceedings, and *Cal. Rules of Court, Rule 1355 (f)(5)*, a minor's conviction in juvenile proceedings (*W & I C* § 602) of burglary (*Pen C* § 459) must be deemed to be second degree, where the trial court made no explicit finding concerning the degree of the crime, as required by *Pen C* § 1192. No finding of first degree burglary could be inferred from the fact the trial court found true the allegation the burglary was of an inhabited dwelling, or from the imposition of a six-year maximum commitment. It was immaterial the omission of an express degree finding may have been inadvertent. Strict application of the degree requirement is more compelling in juvenile cases. *In re Jacob M.* (1987, Cal App 4th Dist) 195 Cal App 3d 58, 240 Cal Rptr 418, 1987 Cal App LEXIS 2164.

Where the language of a felony information charges a defendant with only first degree murder, defendant may only plead guilty to first degree murder, and may not plead guilty to murder in an unspecified degree or utilize the procedures of *Cal. Penal Code* § 1192 to determine the degree of the offense; thus, defendant, who was charged with first degree murder, failed in attempting to force a trial court to accept his plea of guilty to an unspecified degree of murder, with the trial court determining the degree in accordance with the statute, because the statute simply did not apply. *Sanchez v. Superior Court* (2002, Cal App 2d Dist) 102 Cal App 4th 1266, 126 Cal Rptr 2d 200, 2002 Cal App LEXIS 4827, rehearing denied (Cal App 2nd Dist) 2002 Cal App LEXIS 4978, review denied (2003, Cal) 2003 Cal LEXIS 709.

2. Time of Determination

Where sentence and the determination of the degree of an offense occur practically simultaneously, the defendant is not injured. *People v. O'Brien* (1932, Cal App) 122 Cal App 147, 9 P2d 902, 1932 Cal App LEXIS 926.

Where fixing the degree of a crime is an inseparable part of pronouncing sentence, the actual verbal sequence of the two elements is immaterial. *In re Application of Huson* (1932, Cal App) 126 Cal App 571, 14 P2d 845, 1932 Cal App LEXIS 617.

Where court fixed degree of burglary as of first degree immediately following rather than before pronouncement of judgment, defendant was not prejudiced. *People v. Helm* (1957, Cal App 2d Dist) 156 Cal App 2d 343, 319 P2d 644, 1957 Cal App LEXIS 1417.

Under procedure prescribed in this section, where there has been plea of guilty to crime divided into degrees, court must, before passing sentence, determine degree; however, defendant could not be held to have been prejudiced by pronouncement of judgment of conviction of burglary during morning session of court, though court did not fix degree until afternoon session, where he did not set forth anything either showing or tending to show prejudice. *People v. McCoy* (1961, Cal App 3d Dist) 195 Cal App 2d 570, 15 Cal Rptr 924, 1961 Cal App LEXIS 1488.

On appeal from a robbery conviction in which a jury trial was waived, defendant could not complain that it was error for the court to postpone determination of the degree of the offense until the time of the probation hearing, instead of making such determination at the time defendant was found guilty, where defendant expressly stipulated to the postponement. *People v. Davis* (1969, Cal App 2d Dist) 270 Cal App 2d 841, 76 Cal Rptr 242, 1969 Cal App LEXIS 1597.

Pen C § 1192, which deals specifically with the time for determination of degree of offense when a jury trial is waived, requires only that the determination be made before passing sentence and prevails over any contrary inference drawn from the general language of *Pen C* § 1167, requiring the judge or justice before whom trial is had when a jury trial is waived to announce his findings upon the issues of fact at the conclusion of the trial. *People v. Davis* (1969, Cal App 2d Dist) 270 Cal App 2d 841, 76 Cal Rptr 242, 1969 Cal App LEXIS 1597.

3. Hearing for Determination of Degree

When a defendant pleads guilty of burglary it becomes the court's duty to inquire into facts tending to show the degree. *People v. Miller* (1902) 137 Cal 642, 70 P 735, 1902 Cal LEXIS 625.

Although proceedings to fix the degree of crime do not constitute a trial, this section does require a judicial determination based on evidence. *People v. Bellon* (1919) 180 Cal 706, 182 P 420, 1919 Cal LEXIS 544.

A court's determination of the degree of a crime, based solely on a probation report and without a hearing, is prejudicial to the defendant's rights. *People v. O'Brien* (1932, Cal App) 122 Cal App 147, 9 P2d 902, 1932 Cal App LEXIS 926.

A commitment need not show upon its face the facts upon which a court determines the degree of the crime. *People v. Bayne* (1934, Cal App) 136 Cal App 341, 28 P2d 1068, 1934 Cal App LEXIS 1032.

In determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the court's duty to consider matters in aggravation as well as in mitigation. *People v. Gilbert* (1943) 22 Cal 2d 522, 140 P2d 9, 1943 Cal LEXIS 200.

Under plea of guilty of crime of murder, degree of offense together with penalty to be imposed is matter which must be determined by court on competent evidence before passing sentence. *People v. Mendez* (1945) 27 Cal 2d 20, 161 P2d 929, 1945 Cal LEXIS 213.

At hearing to determine degree of crime committed by defendant who pleaded guilty to murder, he is entitled to same basic constitutional guaranties, and burden of proof is same as in case of one who pleads not guilty and is tried. *People v. Kerr* (1951) 37 Cal 2d 11, 229 P2d 777, 1951 Cal LEXIS 253.

Statutory hearing for determination of degree of offense and punishment therefor after plea of guilty is not governed by same strict rules of procedure as trial; it is duty of court to consider matters in aggravation as well as mitigation of offense, and it may examine into legal significance of established facts and consider many matters not admissible on issue of guilt or innocence. *People v. Thomas* (1951) 37 Cal 2d 74, 230 P2d 351, 1951 Cal LEXIS 261.

Where defendant has pleaded guilty to a murder charge, the court is required to take evidence for the purpose of determining the degree of the crime. *In re James* (1952) 38 Cal 2d 302, 240 P2d 596, 1952 Cal LEXIS 174.

Information charging murder in form authorized by § 951 and former § 809 is sufficient and plea of guilty authorizes court to determine degree of murder though degree is not included in charge. *People v. Atchley* (1955, Cal App 3d Dist) 132 Cal App 2d 444, 282 P2d 160, 1955 Cal App LEXIS 2210.

Hearing for determination of degree of offense is not trial in technical sense and is not governed by same strict rules of procedure as trial. *People v. Selz* (1955, Cal App 1st Dist) 138 Cal App 2d 205, 291 P2d 186, 1955 Cal App LEXIS 1307; *People v. Khans* (1958, Cal App 1st Dist) 160 Cal App 2d 603, 325 P2d 528, 1958 Cal App LEXIS 2160.

Requirement that court must take evidence to determine degree before passing sentence on guilty plea to crime divided into degrees is not dispensed with under theory that information ineradicably labels offense as first degree by alleging that defendant killed another person wilfully, unlawfully and feloniously and with malice aforethought and premeditation. *People v. Selz* (1955, Cal App 1st Dist) 138 Cal App 2d 205, 291 P2d 186, 1955 Cal App LEXIS 1307.

While a hearing to determine the degree of an offense and the punishment to be imposed is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial, the trier of fact must take evidence and a defendant is entitled to the same basic constitutional guarantees and the prosecution held to the same burden of proof as in a case in which the defendant pleads not guilty. *People v. Ward* (1967) 66 Cal 2d 571, 58 Cal Rptr 313, 426 P2d 881, 1967 Cal LEXIS 324.

4. Evidence

A judgment is defective where no evidence is taken to determine the degree of a crime, the sole basis for the court's determination being the statement by the defendant's counsel, "as far as the defendant is concerned, it will be first degree." *People v. Stratton* (1933, Cal App) 133 Cal App 309, 24 P2d 174, 1933 Cal App LEXIS 509.

It is necessary to include in judgment degree of crime of which one has been convicted, and it is proper to insert in commitment degree of crime, but it is not necessary to validity of commitment that facts upon which degree of crime depends be included therein. *People v. Fry* (1934, Cal App) 137 Cal App 525, 31 P2d 204, 1934 Cal App LEXIS 955.

A determination under this section based in part on reports received outside of court will be reversed. *People v. Giles* (1945, Cal App Dep't Super Ct) 70 Cal App 2d Supp 872, 161 P2d 623, 1945 Cal App LEXIS 1148.

Under plea of guilty to charge of second degree burglary, trial court did not err in failing to take testimony to determine degree of crime, and judgment of conviction was sufficient where it contained recital of offense with which defendant was charged, his plea of guilty thereto, and finding by court that offense charged was burglary in second degree. *People v. Martin* (1947, Cal App) 78 Cal App 2d 340, 177 P2d 813, 1947 Cal App LEXIS 1476.

Where the record shows that the court took testimony in fixing the degree of the crime, there is no violation of this section. *People v. Dale* (1947, Cal App) 79 Cal App 2d 370, 179 P2d 870, 1947 Cal App LEXIS 835.

Defendant is not limited to admitting or stipulating to fact which determines degree of crime but may also stipulate as to degree as such. *People v. Selz* (1955, Cal App 1st Dist) 138 Cal App 2d 205, 291 P2d 186, 1955 Cal App LEXIS 1307.

Court merely considers evidence in aggravation or mitigation of offense. *People v. Khans* (1958, Cal App 1st Dist) 160 Cal App 2d 603, 325 P2d 528, 1958 Cal App LEXIS 2160.

Court is not required to resort to evidence to fix degree, where defendant enters plea of guilty, specifying that he pleads guilty to murder of first degree. *People v. Khans* (1958, Cal App 1st Dist) 160 Cal App 2d 603, 325 P2d 528, 1958 Cal App LEXIS 2160.

On plea of guilty to crime divided into degrees court, before passing sentence, must determine degree and is

required to take evidence, though determination is not in fact at trial; where this has not been done, defendant should be recalled and evidence taken on degree of offense and she should again be sentenced. *People v. Harris* (1959, Cal App 4th Dist) 175 Cal App 2d 678, 346 P2d 442, 1959 Cal App LEXIS 1397.

Where defendant, accompanied by counsel, entered plea of guilty to charge of armed robbery, there was no need for court to resort to evidence in order to fix degree which he had already admitted by plea. *People v. Crawford* (1959, Cal App 1st Dist) 176 Cal App 2d 564, 1 Cal Rptr 811, 1959 Cal App LEXIS 1520.

While a hearing to determine the degree of an offense and the punishment to be imposed is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial, the trier of fact must take evidence and a defendant is entitled to the same basic constitutional guarantees and the prosecution held to the same burden of proof as in a case in which the defendant pleads not guilty. *People v. Ward* (1967) 66 Cal 2d 571, 58 Cal Rptr 313, 426 P2d 881, 1967 Cal LEXIS 324.

In determining the appropriate sentence to be imposed on a convicted defendant who had failed to appear at the prior sentencing date, the court was entitled to consider such failure and defendant's patently false explanation of the failure. *People v. Smith* (1974, Cal App 2d Dist) 42 Cal App 3d 706, 117 Cal Rptr 88, 1974 Cal App LEXIS 1259.

5. -Admissibility

Since a hearing under this section is not a trial, the court may consider many matters not admissible on the issue of guilt or innocence. *Steve* (1946, Cal App) 73 Cal App 2d 697, 167 P2d 243, 1946 Cal App LEXIS 895.

A hearing to determine the degree of an offense under this section is not a trial in its full technical sense and the court may consider matters not admissible on the issue of guilt or innocence; but the court should take evidence in the presence of the defendant to determine the degree of the crime. *People v. Verdier* (1950, Cal App) 96 Cal App 2d 29, 214 P2d 433, 1950 Cal App LEXIS 1313.

Defendant who pleaded guilty to murder charge was not deprived of due process because court, at hearing to determine degree of offense and punishment therefor, considered series of tape recorded statements made by defendant after his arrest, among other things, during hearing defendant indicated that he had said more than appeared on tape, where he then testified as to matters supposedly excluded from tape which related to argument with deceased just before her death, and where, in course of this argument it appeared that deceased used foul language in reference to defendant, which evidence court considered as mitigating circumstance. *People v. Khans* (1958, Cal App 1st Dist) 160 Cal App 2d 603, 325 P2d 528, 1958 Cal App LEXIS 2160.

Court may consider many matters not admissible on issue of guilt or innocence. *People v. Khans* (1958, Cal App 1st Dist) 160 Cal App 2d 603, 325 P2d 528, 1958 Cal App LEXIS 2160.

Trial court in murder case did not commit prejudicial error in receiving in evidence mannikin which was used to illustrate path of bullets fired into police officer's body by defendant, photographs of deceased officer, and evidence showing some of defendant's past crimes and illegal activities, where evidence was admitted during trial on issue of degree of crime and defendant was not being tried by jury on this issue, it having been stipulated by both parties that, since defendant pleaded guilty to murder, jury would act only in advisory fashion on question of degree, and that actual question of what degree of murder defendant had committed was to be decided by trial judge, thereby rendering irrelevant question whether evidence was inflammatory to jury. *People v. Robillard* (1960) 55 Cal 2d 88, 10 Cal Rptr 167, 358 P2d 295, 1960 Cal LEXIS 138, 83 ALR2d 1086, cert den (1961) 365 US 886, 6 L Ed 2, 81 S Ct 1043, 1961 US LEXIS 1367, overruled *People v. Morse* (1964) 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33, 1964 Cal LEXIS 274, 12 ALR3d 810.

6. -Competency

After a plea of guilty, where a defendant without objection submits to questioning and makes an unsworn statement, it is competent evidence and the court may consider it in fixing the degree of crime. *People v. Bellon* (1919) 180 Cal 706, 182 P 420, 1919 Cal LEXIS 544.

Since proceedings under this section do not constitute a trial, a defendant's confession may be received in evidence without a prior showing as to voluntariness. *People v. Hall* (1930, Cal App) 105 Cal App 359, 287 P 533, 1930 Cal App LEXIS 792.

Defendant is competent to stipulate as to degree of crime, especially where he is represented by counsel. *People v. Selz* (1955, Cal App 1st Dist) 138 Cal App 2d 205, 291 P2d 186, 1955 Cal App LEXIS 1307.

There is no substantial difference between stipulating that crime charged is of certain degree and stipulating that crime committed is of certain degree, insofar as concerns defendant's competency to make stipulation and of court to use it as basis for determination of degree. *People v. Selz* (1955, Cal App 1st Dist) 138 Cal App 2d 205, 291 P2d 186, 1955 Cal App LEXIS 1307.

7. -Sufficiency

An admission by defense counsel that the defendant was armed with a gun is a sufficient basis for the court's determination of the degree of the crime of robbery. *People v. Brown* (1934, Cal App) 140 Cal App 616, 36 P2d 194, 1934 Cal App LEXIS 1085.

Where the court fails to fix the degree of the crime upon a plea of guilty, a subsequent determination of this question may be based on the defendant's admission as shown by the record of the original proceeding. *People v. Hammond* (1938, Cal App) 26 Cal App 2d 145, 78 P2d 1172, 1938 Cal App LEXIS 1008.

A stipulation that a burglary was committed between the hours of 11:30 p.m. and 7:30 a.m. justifies a finding of burglary in the first degree. *People v. Martin* (1941, Cal App) 48 Cal App 2d 514, 119 P2d 1008, 1941 Cal App LEXIS 831.

Where counsel for defendants conceded that, at time of robbery to which they pleaded guilty, they were armed with unloaded gun, there was sufficient admission of fact that defendants were armed to support court's determination of degree of crime. *People v. Raner* (1948, Cal App) 86 Cal App 2d 107, 194 P2d 37, 1948 Cal App LEXIS 1591.

In a murder case there was sufficient evidence of deliberation and premeditation to support the court's determination that the murder was of the first degree, where testimony as to the defendant's behavior, after the deceased had told him not to come to her house any more, disclosed several attempts to enter her home by forcing open or breaking down the doors, persistent harassment of the deceased, continued efforts to obtain a gun before being successful, returning armed to the deceased's home though he had been ordered repeatedly to stay away and twice agreed to do so, and persistent efforts to shoot the deceased despite the protest and physical resistance of her children. *People v. Hooper* (1950) 35 Cal 2d 165, 216 P2d 876, 1950 Cal LEXIS 324.

Where on defendant's arraignment, district attorney, defendant and latter's counsel indicated assent that defendant's plea be taken at that time, prosecutor then requested court to fix degree of murder as first degree and court said "such will be the order," defendant then pleaded guilty and court said "degree has been fixed as murder in first degree," and defendant then agreed that judgment be pronounced against him, there is sufficient basis for court's determination that crime was first degree murder. *People v. Selz* (1955, Cal App 1st Dist) 138 Cal App 2d 205, 291 P2d 186, 1955 Cal App LEXIS 1307.

A determination of the degree of the offense made by the court at the time of a probation hearing must be based on the evidence at the trial and not on the probation report. *People v. Davis* (1969, Cal App 2d Dist) 270 Cal App 2d 841, 76 Cal Rptr 242, 1969 Cal App LEXIS 1597.

8. -Presumptions

If defendant pleads guilty to indictment for murder which does not specify degree, and court imposes sentence of confinement in state prison, judgment is not nullity, for presumption is that court by testimony ascertained degree of crime. *In re Brown (1867) 32 Cal 48, 1867 Cal LEXIS 22.*

A judgment reciting that the defendant has been convicted of burglary in the first degree will not be disturbed, merely because the record is silent as to whether or not evidence was heard in fixing the degree. *Woods, Ex parte Woods (1895) 5 Cal Unrep 149, 41 P 796.*

Where the record is silent as to whether or not evidence was received in the determination of degree under this section, it will be presumed that such was the case. *Ex parte Haase (1907, Cal App) 5 Cal App 541, 90 P 946, 1907 Cal App LEXIS 285.*

Where the record is silent as to whether or not evidence was taken in fixing the degree of crime, but where depositions taken at the preliminary examination were a part of the record, it will be assumed that the trial court examined them in making its finding. *People v. Rhodes (1934, Cal App) 137 Cal App 385, 30 P2d 1026, 1934 Cal App LEXIS 813.*

Where the record is silent as to whether or not evidence was received in determining the degree of the crime, the presumption is that the finding was made on competent evidence. *People v. Rhodes (1934, Cal App) 137 Cal App 385, 30 P2d 1026, 1934 Cal App LEXIS 813.*

9. Effect of Failure To Determine Degree

A judgment pronounced without first fixing the degree of the crime will be reversed. *People v. Jefferson (1877) 52 Cal 452, 1877 Cal LEXIS 151.*

Where judgment is reversed because the court fails to fix the degree of the crime, the defendant is not entitled to discharge, but a new trial will be ordered. *People v. Travers (1887) 73 Cal 580, 15 P 293, 1887 Cal LEXIS 718,* superseded by statute as stated in *People v. Mendoza (2000) 23 Cal 4th 896, 98 Cal Rptr 2d 431, 4 P3d 265, 2000 Cal LEXIS 5821.*

Where neither the court nor the jury fixes the degree of crime, the resulting verdict and judgment are void for uncertainty. *In re Application of Colford (1924, Cal App) 68 Cal App 308, 229 P 63, 1924 Cal App LEXIS 180.*

Failure of the court to determine the degree of crime, being a "mere irregularity," does not invalidate the judgment. *In re Application of Stroff (1933, Cal App) 132 Cal App 351, 22 P2d 770, 1933 Cal App LEXIS 384.*

Where a judgment is defective for uncertainty under this section, the case will be sent back for the taking of testimony as to degree and for a new pronouncement of judgment. *People v. Stratton (1933, Cal App) 133 Cal App 309, 24 P2d 174, 1933 Cal App LEXIS 509.*

Failure of the court to make a finding under this section does not warrant discharge of the prisoner, but only entitles him to a hearing as to the degree of the crime. *In re Application of Hammond (1937, Cal App) 24 Cal App 2d 18, 74 P2d 308, 1937 Cal App LEXIS 16.*

The 1949 amendment to *Pen C § 1192*, providing that if the court fails to determine the degree of a crime it shall be deemed to be of the lesser degree, is applicable to the correction of such errors of omission, and the fact that such an error was committed prior to 1949 confers no discretion to depart from the statutory mandate. Thus, a 1946 conviction of murder of an undetermined degree accompanied by a life sentence must, on habeas corpus brought after 1949, be

corrected to one of murder of the second degree and a sentence to prison for the term prescribed by law. *In re Harris* (1967) 67 Cal 2d 876, 64 Cal Rptr 319, 434 P2d 615, 1967 Cal LEXIS 273.

The legislative policy behind the 1949 amendments to *Pen C* § 1192, providing that if the court fails to determine the degree of a crime it shall be deemed to be of the lesser degree, is that the state's interest in securing a conviction of higher degree should give way to the administrative convenience of terminating litigation. *In re Harris* (1967) 67 Cal 2d 876, 64 Cal Rptr 319, 434 P2d 615, 1967 Cal LEXIS 273.

On appeal from a robbery conviction tried to the court, the trial court's judgment that defendant had been found guilty of first degree robbery and that he was armed was required to be modified to show that he had been found guilty of second degree robbery only, where, though the clerk's minutes indicated that the robbery was determined to be of the first degree and that defendant was armed at the time of the commission of the offense, the reporter's transcript merely showed that the court said: "The defendant will be found guilty of Count III..." of the information (charging robbery in the customary language and adding that at the time of the offense defendant was armed with a deadly weapon) and failed to show that the court made a separate finding that defendant was armed. *People v. Blackburn* (1968, Cal App 2d Dist) 261 Cal App 2d 554, 67 Cal Rptr 918, 1968 Cal App LEXIS 1776.

On appeal in a criminal case in which the clerk's transcript showed that certain robbery count convictions had been determined to be in the first degree, but it appeared from the reporter's supplemental transcript that, after announcing the degree as "first" at the sentence hearing, the court declared "We will have to vacate and start over," and that the degree as to those counts was not thereafter fixed, the apparent conflict would be resolved in favor of the trial court's statement as reflected in the reporter's supplemental transcript, with the result that *Pen C* § 1192, declaring that on failure to fix the degree, it will be presumed to be the lesser, came into operation and established the degree as "second." *People v. Stephenson* (1974) 10 Cal 3d 652, 111 Cal Rptr 556, 517 P2d 820, 1974 Cal LEXIS 352.

The trial court's amendment of defendant's sentence on his conviction of robbery, fixing the robbery in the first degree, was reversible error and the robbery became fixed as second degree by operation of law (*Pen C* §§ 1157, 1192), where, in a trial before the court, the trial court made no finding as to the degree of the robbery before passing sentence. The finding of the degree of robbery may not be implied, and thus the trial court's further finding that defendant had used a firearm in the commission of the offense within the meaning of *Pen C* § 12022.5, did not manifest a specific finding that defendant had committed armed robbery and that the robbery was of the first degree. Since the degree of robbery is established at the time the verdict is entered in the minutes, the fact that the judge, as distinguished from a jury, returned the verdict was of no moment. Moreover, the order amending the sentence was of no effect as it sought to correct a judicial and not a clerical error. Furthermore, a comment by the trial court during argument on the day of sentencing that the robbery was an armed robbery was not made as a judicial finding, other than by implication, that the robbery was in the first degree. *People v. Thomas* (1978, Cal App 2d Dist) 84 Cal App 3d 281, 148 Cal Rptr 532, 1978 Cal App LEXIS 1864.

The trial court failed to determine the degree of the murder of which defendant was convicted in a court trial where it stated it found defendant guilty as charged in the information of murder in violation of *Pen C* § 187, but where no reference was made in the information to first or second degree murder. Accordingly, modification of the first degree murder conviction was necessary in order to comply with *Pen C* §§ 1157 and 1192. The statutes must be applied when the court or the jury inadvertently fails to fix the degree of a defendant's conviction before sentence is imposed. The statutes also apply, even if the court or jury returns a specific finding which would warrant a conviction of the higher degree as a matter of law. A first degree finding could not be implied by the fact the trial court found two special circumstances to be true. *People v. Williams* (1984, Cal App 4th Dist) 157 Cal App 3d 145, 203 Cal Rptr 562, 1984 Cal App LEXIS 2186.

10. Review

In proceedings under this section, procedural irregularities or minor errors do not warrant reversal. *People v.*

Williams (1939) 14 Cal 2d 532, 95 P2d 456, 1939 Cal LEXIS 356.

Where the trial judge in a murder case referred to the hearing as to one in "mitigation of the punishment and for determination of the degree," the supreme court could not assume that such reference indicated a misapprehension as to the laws concerning the burden of proof of the degree of the offense, but assumed in favor of the judgment of conviction of first degree that the court performed its duty in considering matters in aggravation as well as in mitigation of the offense. *People v. Hooper (1950) 35 Cal 2d 165, 216 P2d 876, 1950 Cal LEXIS 324.*