

LICENSE OR AUTHORITY

I. WHERE THERE IS SUCH EVIDENCE

In this case, there has been evidence about whether the defendant had legal authority to do what he (she) is charged with doing because he (she) allegedly (held a license to _____) (came within the exception to the statute which permits _____) (_____*[other claim of authority or appointment]*_____).

Now that such evidence is before you, the burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant did *not* (hold such a license) (come within that exception to the statute) (_____*[other claim of authority or appointment]*_____).

If the Commonwealth has proved all of the elements of the offense beyond a reasonable doubt, and also proved beyond a reasonable doubt that the defendant did *not* (have such a license) (come within that exception to the statute) (_____*[other claim of authority or appointment]*_____), then you should find the defendant guilty.

If the Commonwealth has failed to prove any of the elements of the crime beyond a reasonable doubt, or if it has failed to prove that the defendant did *not* (have such a license) (come within that exception to the

statute) ([other claim of authority or appointment]), then you must find the defendant not guilty.

“A defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized.” G.L. c. 278, § 7. This statutory provision is applicable only where “the prohibition is general, the license is exceptional,” and therefore absence of license, appointment or authority is not an element of the crime. *Commonwealth v. Nickerson*, 236 Mass. 281, 305, 128 N.E. 273, 283 (1920).

In such circumstances, there is no jury issue as to license, appointment or authority unless the defendant introduces evidence of such. If the defendant does, the burden is then on the Commonwealth to prove the absence of license, appointment or authority beyond a reasonable doubt. *Commonwealth v. Pero*, 402 Mass. 476, 481, 524 N.E.2d 63, 67 (1988) (applicable to physician’s prescription for controlled substance); *Commonwealth v. Jones*, 372 Mass. 403, 406, 361 N.E.2d 1308, 1310-1311 (1977) (applicable to license to carry a firearm in G.L. c. 268, § 10[a] prosecution); *Commonwealth v. Brunelle*, 361 Mass. 6, 9, 277 N.E.2d 826, 829 (1972) (applicable to license to practice medicine); *Nickerson, supra* (applicable to license to sell liquor).

However, the statute is *not* applicable to operating a motor vehicle without insurance [G.L. c. 90, § 24J] “because insurance is an element of the crime charged, not a mere license or authority,” and thus must be proved as an element. *Commonwealth v. Munoz*, 384 Mass. 503, 507, 426 N.E.2d 1161, 1163 (1981). Nor is the instruction applicable to using a motor vehicle without authority [G.L. c. 90, § 24(2)(a)]; see Instruction 5.660 (Use of Vehicle Without Authority).

A defendant who intends to rely on a defense based on license, claim of authority or ownership, or exemption, must provide advance notice of such defense to the Commonwealth and the court. Mass. R. Crim. P. 14(b)(3).

II. WHERE THERE IS NO SUCH EVIDENCE

In this case there is no evidence before you suggesting that the defendant may have had legal authority to do what he (she) is charged with doing on the grounds that he (she) allegedly (held a license to _____) (came within the exception to the statute which permits _____) ([other claim of authority or appointment]). Since there is no evidence on that question,

you are not to consider it. Please put it out of your minds, since it is not an issue in this case.

In the absence of evidence, the jury should not be permitted to consider the issue of license, appointment or authority. *Commonwealth v. Walker*, 372 Mass. 411, 412, 361 N.E.2d 1313, 1314 (1977); *Jones*, 372 Mass. at 410, 361 N.E.2d at 1313. Where there is no such evidence, normally the issue need never be mentioned to the jury. This instruction may be used where a cautionary instruction is necessary because the issue has been raised before or by the jury, even in the absence of evidence.