The charge in *Commonwealth v. Tuey* was originally given by Judge Ebenzer Hoar, to break a deadlocked jury.

Commonwealth v. Tuey
62 Mass. 1

> "The only mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

The Allen charge arises from *Allen v. US* (164 U.S. 492) — the judge in the trial court read the Tuey charge to break a deadlock, and SCOTUS approved the charge

in the Allen case. Note that the charge itself was not repeated in this decision, but the text was provided in the Howard case.

Original Allen Charge (per research in Howard)

> "The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acqui[e]s[c]ence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must, at some time, be decided; that you are selected in the same manner, and from the same source from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it; or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practicable the law imposes the burden of proof on one party or the other in all cases.' In the present case the burden of proof is upon the Government of the United States. 'But in conferring together you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the the [sic] minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

Some states have found the Allen charge to be too coercive (Arizona for example), so in Ohio we have the Howard charge:

Howard Charge (Ohio v. Howard, 42 Ohio St. 3d 18)

> "The principal mode, provided by our Constitution and laws, for deciding questions of fact in criminal cases, is by jury verdict. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors."

This, as you know, was what was read in the (failed) attempt to break the deadlock in McCoy.

There are multiple texts of the charges, so if you look for Howard charges in Ohio, the text might differ a bit. In *State v. Carson*, 2005-Ohio-902 (a pretty new case, check the Ohio SC web page), they address the verbatim issue, saying:

> "As for Carson's claim that the trial court did not read the *Howard* charge verbatim, the court noted on the record that it read the charge straight from the *Howard* opinion. Any differences were trivial at best. In formulating the *Howard* charge, the Ohio Supreme Court has stated that the supplemental instruction must not be coercive. Numerous Ohio courts have held that a trial court is not required to give a verbatim *Howard* charge, as long as the changes do not coerce the jury into a finding of guilt or innocence. "

Whether that is true (that it doesn't matter) remains to be seen.