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Of Clocks and Things

Robert E. Rains

"The time has come," the Walrus said,
 "To talk of many things:
 Of shoes—and ships—and sealing-wax—
 Of cabbages—and kings—"
 —Lewis Carroll,
Through the Looking-Glass

The anthropologist Jane Goodall demonstrated that chimpanzees share with humans the ability to create tools to perform a task.¹ Nevertheless the sine qua non² of Homo sapiens³ is making tools and adapting existing tools to new functions. In some instances the development of the tool precedes any intended use—the supply before the demand. So it was with the portable tape player that cannot record,⁴ the adhesive that does not bond particularly well,⁵ and the surface that will not stick.⁶ Indeed in the last instance, there appear to be ever-developing new applications.⁷

Thus it was that the keen legal minds at the Dickinson School of Law,⁸ having time to spare since computers freed them from the drudgery of shepardizing,⁹ found application of the chess clock first to the teaching, thence to the practice of law. Grandmaster Larry Evans reports that crude mechanical chess clocks were first used officially at Paris in 1867.¹⁰ One hundred twenty years later they have found their way into our law school curriculum.

What, you may ask, is a chess clock? With oriental duality,¹¹ a chess clock is in fact two clocks, set together, operated by buttons in such a way that they cannot both run simultaneously. In serious chess play, each player must make a minimum number of moves in a set period of time. Each player's clock is preset to expire at a certain hour. The player with the black pieces starts play by pushing down the button over the nearer clock; this

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1. I saw this on a PBS special.
2. The obligatory Latin phrase.
3. The use of this term is intended to be gender neutral. It is also a bonus Latin phrase.
4. The walkman.
5. "Post-its"—those sticky tags that are everywhere.
6. Teflon.
7. E.g., the smooth functioning of the office of the Chief Executive.
8. The oldest independent law school in the United States. Having celebrated our 150th anniversary in 1984, we proudly look forward to celebrating our 100th anniversary in 1990. See Burton R. Laub, *The Dickinson School of Law—Proud and Independent 27* (Harrisburg, Pa., 1983). Go figure!
9. This is something law students (if not lawyers) used to do before LEXIS was invented.
10. "Clocks altered game of chess." Larry Evans, *Sunday Patriot-News*, Harrisburg, Pa., April 25, 1987, at F3.
11. As in yin and yang.

starts white's clock. After the opponent completes the first move, the hand that made the move strikes the button on the nearer clock, which stops it and starts black's clock. As one approaches the hour when time is up a small, usually red, flag is elevated by the minute hand. If the flag drops before the player completes the requisite number of moves, time is up, and even if in a superior position, the player loses. (See Figure 1.¹²) Before the introduction of chess clocks, one tournament player was said to have "sometimes dwelt on his moves till the sense of sight in the looker-on ached with the sickening of hope and expectation."¹³ But for the existence of chess clocks, it is possible that a tournament could go on literally for years.¹⁴

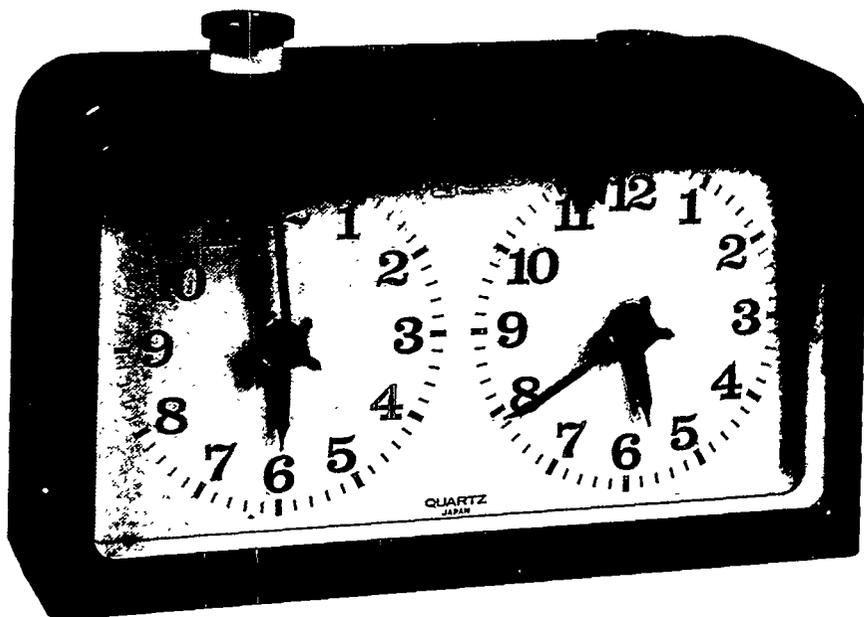


Figure 1. In this position, the left-hand clock is moving, its flag has begun to rise and will drop in approximately one minute. The right-hand clock is not moving. It is obviously the turn of the player on the left. A standard time control is two hours per player for forty moves. If both clocks were initially set at 4:00, then a player who does not complete forty moves (if the game lasts that long) by 6:00 on his clock will lose. The player on the left is in "time trouble." This handsome and useful timepiece is available (for a price) from the U.S. Chess Federation, 186 Route 9W, New Windsor, NY 12550.

12. A picture is certainly worth this paragraph.
13. Related in C. H. O'D. Alexander, *A Book of Chess* 74 (Westerham, England, 1973).
14. Imagine a world chess championship between two nearly evenly-matched Russians starting in 1984 in Moscow, lasting forty-eight games over 159 days, ending without decision, recommencing in 1985 in Moscow for another twenty-four games, and continuing on with a forced rematch in London, then Leningrad, in 1986. Imagine the same two Soviet grandmasters going at it again in Seville in 1987. Imagine all this without chess clocks. Imagine the siege of Leningrad.

This is all terrifically interesting, I trust you are saying to yourself, but what does it have to do with the Socratic method?¹⁵ Perhaps little. But it has much to do with moot court trials. Our proud and independent law school¹⁶ boasts an intensive trial advocacy program¹⁷ that culminates in mock trials conducted by third-year students. In these trials, the student attorneys on each side have a set period of time to present their entire case, including opening statement, direct examination, cross examination, objections and motions, responses to objections and motions, and closing arguments.

Pity the poor timekeeper! In the olden days, B.C.C.,¹⁸ this worthy soul wore pencil and fingers to the nub, trying to keep precision time to the angstrom.¹⁹ Here is plaintiff's counsel conducting a direct examination, plaintiff's time is running, jot it down. Wait! Defense counsel has lodged an objection and, having done so, is trying to dredge up from Evidence class just what the objection is. Stop plaintiff's time and start defendant's. Now plaintiff's counsel argues against the objection: back to plaintiff's time. Now the judge is trying to get a word in edgewise: free time. And so it goes. No rest for the weary. We could never get volunteers to time a second trial.

Now all that has changed. We are on chess-clock time. No stop watch. No pad and pencil. No haggard look. No mathematics. Our happy time keepers just do what the rest of the world does—punch a time clock. Only more often. Our analysis of the timekeepers using the chess clock over two terms indicates a 43-percent drop in muscle strain, 31-percent drop in eye fatigue, 100-percent drop in reported cases of carpal tunnel syndrome, and a 57-percent drop in angst.²⁰

It was inevitable that news of this breakthrough would leak to the outside (real) world. Thus it came as little surprise that we have been called on to furnish technical expertise (and one of our chess clocks) to the United States District Court for the Middle District of Pennsylvania. Realizing the ramifications of chess-clock practice, the Honorable Sylvia Rambo entered an order in a civil matter whereby, *inter alia*: "Each party shall have twenty-five (25) hours in which to present its case . . ."²¹ Although the judge was not explicit as to her authority for this order, it is presumed that she relied upon the last sentence of Federal Rule of Civil Procedure 83, to wit: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."²²

The implications are obviously profound. The Director of the Administrative Office of the United States Courts continues to report appalling backlogs before the federal judiciary. In 1987 the pending civil caseload

15. A teaching method law professors say they are using when their students fail to understand a thing they are saying.

16. See *supra* note 8.

17. Winner of the American College of Trial Lawyers 1983–84 Emil Gumpert Award for Excellence in the Teaching of Trial Advocacy.

18. Before Chess Clocks.

19. A real "word power" word. Look it up yourself. I did and was forced to realize that this is a mixed metaphor.

20. These figures are, of course, wholly fictitious.

21. Civil Action No. 84-0427, Order of January 4, 1988. *Not* fictitious.

22. See also Fed. R. Civ. P. 16(e).

stood at 342,159.²³ There were 19,782 civil cases pending three years or more as of June 30, 1987.²⁴ I am reliably informed that many state courts suffer similarly.²⁵ If, armed with the new chess-clock technology, federal and state judges can impose time limitations on civil trials,²⁶ these hitherto intractable problems may soon be a thing of the past. And if a twenty-five-hour time limit does not get the job done, the courts may have to impose yet shorter time limits.

Aware of the awesome potential of Judge Rambo's order, I was eager to learn its effect. Her law clerk²⁷ reported to me, somewhat disappointedly, that the judge was not able to fulfill the experiment because neither side came close to running out of time. But that is precisely the point! By imposing the chess-clock-enforced time limitation, the court seeks to ensure that neither side will risk using up its clock. How long would the trial have taken without Judge Rambo's revolutionary order? One can only speculate.

Suffice it to say that the Great Experiment was such a success that Judge Rambo has sought and obtained approval from the Clerk of Courts to purchase a chess clock for the court:

I have found that giving each side a specific amount of time during a trial is a great time saver for the court. The clock keeps an accurate account of the time each side has spent during trial, thereby eliminating possible miscalculation and disagreement, and is readily available for all parties to refer to during the course of the trial.²⁸

Now that it is clear that the federal courts will use chess clocks to time trials, the nagging issue remains: What happens to a party whose flag drops? Unfortunately, there appears to be a lack of congruence between the *Federal Rules of Civil Procedure* and the *Official Rules of Chess* (compiled and sanctioned by the U.S. Chess Federation). The chess rules state: "The game is lost by the player who has not completed the prescribed number of moves in the allotted time."²⁹ Perhaps the nearest equivalent in the *Federal Rules* is Rule 55(b)(2) governing the entry by the court of default judgment.³⁰ Is this sufficient authority for the court to enter judgment by

23. Annual Report of the Director of the Administrative Office of the United States Courts 1987, at 10.

24. *Id.* at 11.

25. *L.A. Law* addressed this issue in a hard hitting episode on May 5, 1988.

26. The constitutional implications of time limitations imposed on criminal trials are beyond the scope of this paper. Suffice it to say that chess-clock practice may lead to remarkable amendments to 18 U.S.C. § 3161-74, the Speedy Trial Act.

27. Timothy A. Hoy, Dickinson School of Law, Class of '86.

28. Letter of May 9, 1988, from U.S. Judge Sylvia H. Rambo to Donald R. Berry, Clerk, United States District Court for the Middle District of Pennsylvania. I am informed that other judges have become aware of this momentous breakthrough and will soon be jumping on the chess-clock bandwagon.

29. Rule I.12.L. of U.S. Chess Federation, *Official Rules of Chess*, effective May 1, 1987, at 16. For excruciating detail on the clock flag's falling and challenges thereto, see U.S.C.F. Rule I.14. One supposes that it is not happenstance that a significant number of chess players are lawyers. E.g., Paul Morphy.

30. Rule 55. Default.

.....
(b) JUDGMENT. Judgment by default may be entered as follows:

.....
(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general

default when there is a pretrial order setting a time limit and one party's flag drops? The standard texts do not appear to speak to the issue. If Rule 55(b)(2) does apply, there would admittedly be technical problems with enforcing it if the flag drops in the middle of a trial. The three-day notice provision would be particularly troublesome, if not self-defeating. No doubt amendments to the Rule will be required in light of the new technology.

But what if? What if, in trial as in chess, the price of delay were defeat? Imagine the attorney in "time trouble." Too much to do and too little time in which to do it. A hostile witness is spewing hearsay like Mount St. Helens. Dare one waste precious seconds on an objection, however well founded? Dare one use time to ask the judge for an extension of time? Mauet take note: Even the most experienced litigator may be caught in a classic "zugzwang."³¹

But these are all details to be addressed. The critical breakthrough has been made. There is no turning back. We have come one giant step nearer to Christopher Columbus Langdell's vision of law as science.³² We have broken the sound barrier, arrived at the new frontier.

But let us not be too smug. There is one major field yet to conquer that has thus far eluded us—the application of chess clocks to the billing of clients.

guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

31. This is roughly the chess equivalent of the law school concept of being caught between Scylla and Charybdis.
32. "If law be not a science, a university will best consult its own dignity in declining to teach it." Christopher Columbus Langdell, Address to the Harvard Law School Association, 1886, *reprinted in* Arthur E. Sutherland, *The Law at Harvard 175* (Cambridge, Mass., 1967).