A contract is formed between two or more parties. In order for a contract to be legally binding there must be offer and acceptance. This simple basis for a contract is not as clear cut as it first appears. In certain circumstances it is often necessary for the two parties to the contract to communicate via post or by other indirect means. This practise gives rise to the problem of whether an acceptance is given when it is posted or when it is received. There is also the issue of whether or not the person posting the acceptance wilfully intended there to be a delay in delivery. The use of electronic mail further ads to the complication as the courts must decide whether or not electronic mail can be classified as instantaneous communication.

Firstly, let us examine the postal rule in order to analyse its possible applications to communication by electronic means. As already stated, the two elements of a simple contract are the offer and the acceptance. The acceptance will only have effect when it is given to the offeror in response to his offer. Lord Herschell defines the postal rule as:

"*Where the circumstances are such that it must have been within the contemplation of the parties that ... the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted* ."[1]

The postal rule is an exception to the general rule of offer and acceptance as normally there is immediate effect when both offer and acceptance are made via direct communication (i.e. telephone or face to face). The postal rule is in place to deal with a problem caused by the circumstance of postal or 'long distance' contractual agreements.

[1] Lord Herschell

The case of Entores Ltd v Miles Far East Corporation[2] is an important case when considering the postal rule and its application. The dictum of Denning L.J suggests two important facts; firstly, a contract made by post is complete as soon as the letter of acceptance is put in the post box. Secondly, the communication of acceptance by means which are "virtually instantaneous" is distinguishable and must "stand on a different footing"[3]. Several examples of circumstances are given by Lord Justice Denning in his ruling. He gives the telex example in which it is clear that if the acceptance is not communicated due to intervening circumstances then it is the duty of the party accepting the offer to ensure that there is acceptance is properly received. Only if A believes his acceptance has been received and it has not, due to a problem at the offeror's end is the offeror bound. It is his own fault and he will be estopped from claiming he did not receive the message.

One important point to consider when discussing email communication is the fact that it is often the case that emails are not received instantaneously. It can sometimes be the case that a message sent via email can take hours and sometimes a full day to reach the recipient. This raises the issue of whether or not we classify email as instantaneous communication and thus distinguish it from the postal rule. Lord If we were to apply Denning L.J rationale, we can classify email as instantaneous communication and we must make that important distinction between mail and electronic mail.

[2] Court of Appeal [1955] 2 Q.B. 327
[3] Smith & Thomas , A Case Book on Contract 11th Edition

The next important case to discuss is that of Brinkibon Ltd. V Stahag Stahl, etc.[4]. This case involves the use of telex and the ruling refers to and follows that of Entores Ltd v Miles Far East Corporation[5]. Although the ruling follows the earlier decision the House of Lords do look more carefully at the issue of time sensitivity and the place in which a contract is actually made. The ruling in this case is that a contract is formed at the place where acceptance is received, thus there can be issues with jurisdiction. The main importance of this case is that it is a later case which takes into account the fact that technology and communications were developing rapidly. Lord Wilberforce makes an excellent point in his dictum:

"The message may not reach, or be intended to reach, the designated recipient immediately: Messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time ……. No universal rule can cover all such cases."

D. Stott write in his article entitled "Should the postal acceptance rule be applied to email?" argues an interesting point when he says

"Despite operating instantaneously, it does not go directly to its destination. This is unlike other instantaneous forms of communication such as fax or telex ."[6]

This is an important distinction and one which must be taken into account. Unlike telex, emails do sometimes have a delay and there is some risk that the email might not arrive. These attributes make email more like standard post only with a shorter

[4] House of Lords [1983] 2 A.C 34
[5] Ibid footnote 1
[6] D. Stott "Should the Postal Acceptance Rule be applied to email?"

delay. If this is the case then the postal rule should apply to electronic mail. The cases that are given as evidence that the postal rule does not apply to email rely upon the definition of email being 'virtually instantaneous communication' when in fact it can be argued that it is not. There are occasions when the server may not deliver the email for up to 24 hours after its being sent. However, the point is also made that in many ways email is a completely different method of communication from mail and it cannot be said that there is always a consistent delay that would cause either the offeror or offeree to bear a risk during the transit time of the acceptance.

D. Capp makes an interesting point in his article entitled "You've got mail!" His conclusion is that *"given the advances in communications systems since the postal rule was created, concluding that the postal rule does not apply would seem sensible*."[7] The article also covers the point that the postal rule could have been removed all together under a recent EC directive, namely the Electronic Commerce Regulations 2002[8], regulation 11(2)(b) states that communications are "deemed to be received when the parties to whom they are addressed are able to access them". This is similar to the American law[9] under which the contract is not formed until acceptance is actually received.

Another important case is that of *Household Fire Insurance Co. v Grant*[10], it establishes the Post Office as an agent of both parties. Thesiger L.J in his judgement refers to Adams v Lindsell[11] as a point of authority in the common law for this matter. He then goes on to draw upon the arguments put forward earlier in the cases of

[7] D. Capp "You've got mail" NLJ 153.7084(906)
[8] (SI 2002/2013)
[9] Specifically the Uniform Computer Information Transaction Act 2000
[10] Court of Appeal (1879) 4 Ex. D 216
[11] (1818) 1 B. & A, 681

Dunlop v Higgins[12] that posting a letter is sufficient to constitute a binding contract. An interesting point was made by Bramwell L.J in his dictum that if a man pays his tailor by cheque in the post if the letter does not reach him has he been paid? The conclusion that he reaches is a valid one a *"communication to effect a man must be a communication, that is, it must reach him."*[13] Whilst this obiter is not common law the point it makes is important, can it really be reasonable for a party to be bound to a contract if the acceptance never reaches him.

In conclusion, it can be seen that the simple exchange of offer and acceptance is clearly made more complex by the use of different ways of communicating both offer and acceptance. It was once a simple matter of two or more parties coming together and communicating their intent to be bound to a contract by one making an offer and the other accepting it. Under these basic circumstances a binding contract is clearly formed. Over the last century, this process has seen many changes with the development of communications technology from telegram to mail, telex and now email.

I submit that this has made it far more difficult to ascertain exactly when a binding contract has been formed. It has been left to the courts to decide at what point the two parties are bound in contract and they have found no universal rule to govern where exactly that point falls. The use of electronic mail to communicate offer and acceptance has given rise to further issues, does the postal rule apply to this new form of communication?, When is the contract formed when the send button is clicked or when it arrives in the inbox of the recipient?, Are email instantaneous communication?

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[12] 1 H.L.C 381
[13] Bramwell L.J in *Household Fire Insurance Co. v Grant* 1 H.L.C 381

The answers to these questions must lie in the common law which at the moment is struggling to keep up with the advancement in technology and the changing circumstances created by the ever growing e-commerce industry. I would suggest that if the technology that makes email possible reaches a point where every email is transmitted to its recipient within mere seconds and there are no errors in the system then the courts must make a distinction between email and post but the circumstances as they are show that email is not as reliable as many believe and there is a substantial risk of delay or the loss of a message and while that is the case the postal rule must still apply. The fact that the question marks over email and its effect on the formation of contracts has been raised alone is evidence that it has made ascertaining the point of a contracts commencement more difficult to identify.

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