Under the facts of the instant case, application of any rule of interpretation or statutory modification would result in a decision that the drawer cannot recover from the drawee the amount charged against the account of the drawer. Since the employee was the signing officer of the drawer, the Kentucky and Missouri rules are satisfied, as is the modified statute. And, since the act was committed within the apparent scope of the agent's authority, the agency analysis, as set forth by Professor Britton and the California court, is satisfied. Indeed, even the anomalous jurisdictions, such as Texas, would concur on these facts, since the acts of a corporation's executive officers, though a fraud on it, are binding on the corporation, as to third parties, if done within the scope of their apparent authority.

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Comment:

Although it would appear from the wording of the Bills of Exchange Act that only one problem need be resolved, that the payee be fictitious or non-existent, while the Negotiable Instruments Law has the further requirement that such fact be the intention of the person making the instrument so payable, this apparent difference disappears upon an application of the two statutes to a particular set of facts. In Canada, in order to ascertain whether a payee is fictitious, a determination must first be made of the intent of the party causing such person to be named as payee, for there is no other method to determine whether the payee was intended to have an interest in the instrument. In the United States, the existence of such intent is an express requirement of Section 9(3) of the Negotiable Instruments Law. It would appear that in both Canada and the United States upon proof of intention that the payee be fictitious, then the instrument is payable to bearer.

CONSTRUCTION WORK — NEGLIGENCE — LIABILITY OF CONTRACTORS — DUTY OF CONTRACTOR — PLAINTIFF AWARE OF DANGER.

The result of the recent House of Lords decision in *A. C. Billings & Sons Ltd. v. Riden*[1] is that contractors interfering with the access to a building must use reasonable care to ensure that persons lawfully[2] entering will not be injured because of the interference. The appellant contractors while reconstructing the

1. [1957] 3 All E.R.1; see the comments by R. E. Megarry, (1957) 73 Law Q.Rev. 294 and 433 and T. L. Montrose (1958) 21 Mod. L. Rev. 76.

2. The respondent was lawfully on the premises; the question of trespassers did not arise.

entrance to a house negligently left the front door inaccessible except by crossing the forecourt of the adjoining house close to a sunken area, which route the contractors advised the occupants of the house to use. The respondent, a seventy-one year old lady, visited the occupiers, entering by the indicated route; as she was leaving, after dark, she fell into the sunken area and was injured. Her action was dismissed on the ground that she, knowing of the sunken area, was fully aware of the danger. Judgment was based on the principle that a licensee can never complain of dangers which are obvious or known to him. An appeal was allowed, by a majority, on the ground that the duties of occupiers and contractors doing work on land are not identical; contractors are under a general duty imposed by law to use reasonable care not to injure other persons reasonably contemplated to be in the vicinity. This decision was unanimously affirmed by the House of Lords.

In so deciding the House of Lords applied *Clayard v. Dethick and Davis*[3] and *Mooney v. Lanarkshire County Council.*[4] *Malone v. Laskey*[5] was expressly overruled so far as it dealt with negligence. The rule laid down in the instant case is simply that contractors carrying on operations on the premises of another have a duty to ensure that persons lawfully on the premises should not be exposed to danger by their actions; the extent of the duty is to use reasonable care, and ordinarily notice of danger will not suffice.

Although the decision was unanimous, the speeches indicate some difference of opinion in the scope of duty, and contain conflicting dicta. Four judgments were given. Lord Reid, with whom Viscount Simonds concurred, said:

> . . . . I see no reason why the contractor who chooses to prevent safe access by visitors should be entitled to rely on any specialty in the law of licensor and licensee.
>
> In my opinion, the appellants were under a duty to all persons who might be expected lawfully to visit the house, and that duty was the ordinary duty to take such care as in all the circumstances of the case was reasonable to ensure that visitors were not exposed to danger by their actions.[6]

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3. (1848) 12 Q.B. 439; 116 E.R. 932.

4. [1954] S.L.T. 137.

5. [1907] 2 K.B. 141; that case decided that except where a contractual relationship exists, if a person carrying on operations on the premises of another negligently injuries a third person, no cause of action arises because there is no breach of duty on the part of the person sought to be made liable. This was expressly overruled by Viscount Simonds, Lord Reid and Lord Sommervell; Lord Cohen and Lord Keith of Avonholm said the principle was wrong.

6. [1957] 3 All E.R.1, at p. 5.

Later he continued:

> . . . in my opinion their duty to visitors required them to mitigate the result of their interference in so far as in all the circumstances it was reasonable that they should do so . . . . But even if I am wrong in that I think that they were still at fault. They should have given warning against the use of this route instead of advising its use.[7]

From the last sentence, it might be concluded that a warning would exculpate the contractors; however, his Lordship in another passage said the result of the *Clayard* case, and others, was that in such circumstances there is no magic in giving a warning.[8]

Lord Cohen agreed with what Denning, L. J., had said in the Court of Appeal:

> . . . the claim is one for breach of a duty of care. In such a case I think the measure of liability is correctly stated by Denning, L. J., where he says [1956] 3 All E.R. at p. 362: "The (appellants) are liable, not because they created a dangerous state of things and they are under a duty to use reasonable care to prevent danger from it . . . (They might in some circumstances fulfill their duty of care to visitors by putting up a warning in clear terms 'Danger. Keep out'; for that might suffice to prevent damage to them. The occupants of the house might then have grounds of complaint for blocking their access, but the visitors would not.) If, however, contractors do provide an alternative route, on or off No. 25,[9] or adopt an alternative route, or point one out, as (the appellants) did here, or if it is an obvious deviation for a visitor to take, the contractors are under a duty to use reasonable care to prevent damage to visitors who take that route. A contractor who creates a dangerous state of things cannot escape the consequences by leading people into another danger.[10]

This passage clearly indicates the nature and scope of the duty in such a case; the *obiter dictum* as clearly indicates what, in the opinion of Lord Cohen, would be the scope if the injury occurred on adjoining premises.

Lord Keith of Avonholm expressly disagreed with the above passage from the judgment of Denning, L. J.[11] He said:

> . . . I agree that the appellants had a duty to protect members of the public . . . from harm as a result of their operations. The extent of that duty might depend on what a reasonable man might contemplate as likely to happen on the property . . . I emphasize the words 'on the property' . . .[12]

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7. *Ibid*, at p. 10.
8. *Ibid*, at p. 6.
9. The property on which the work was being done.
10. [1957] 3 All E.R.1, at p. 11.
11. *Ibid*, at p. 13; "So viewing the matter, I find myself unable to agree with a passage in the judgment of Denning, L. J."
12. *Ibid*, at p. 12.

His Lordship then expressly rejected the view that if injury occurred wholly on adjoining land the contractor would be liable for the following reason:

> If a person encourages a trespass and another person accepts the encouragement, both being aware of the position, and the actual trespasser is injured by some danger on the land trespassed on, known to both, there is no principle I know of which would attach liability to the instigator or encourager in a question with the trespasser.[13]

It would appear that Lord Keith directed his mind to joint-trespassers, which, it is submitted, does not seem to be applicable to the present case.

Commenting on the view expressed by Lord Keith, R. E. Megarry has suggested that whether injury occurred on or off the premises would be irrelevant as the relationship between the plaintiff and adjoining land owners could not affect the contractor's own duty of care; the contractor's liability would be based on the ground that they created a situation which forced the plaintiff to take a risk. To use his words:

> . . . the fact that the risk would entail a technical trespass on the land of a third person did not make it unforseeable because a reasonable person, in the plaintiff's position, might assume that a neighbour would not object to such a slight infringement.[14]

Regardless of what a person might assume of adjoining landowners, it is submitted that the plaintiff's relationship with an adjoining owner could have no effect on the contractor's liability if injury resulted from a breach of the contractor's own duty of care.[15] Lord Somervell of Harrow expressed this view when he said:

> . . . a person executing work on premises, as were the appellants in this case, is under a general duty to use reasonable care for the safety of those whom he knows or ought reasonably to know may be affected by or lawfully in the vicinity of his work.[16]

As was said above, the House of Lords in this case applied *Clayard v. Dethick and Davis*[17] and rejected the principle of *Malone v. Laskey*.[18] It is submitted that these cases could have

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13. *Ibid*, at p. 13; Lord Keith found liability as the fall began on the property where the work was being done.
14. (1957) 73 Law Q. Rev. 433.
15. If A is injured as a direct result of the negligence of B, that A was at the time a trespasser on the land of C is no defence to an action.
16. [1957] 3 All E.R.1, at p. 13.
17. (1848) 12 Q.B. 439; 116 E.R 932.
18. [1907] 2 K.B. 141.

been distinguished because there was a finding of nuisance in the *Clayards* case, but in *Malone v. Laskey* there was no nuisance. In the instant case, as in *Malone v. Laskey,* there was no nuisance, no noxious thing, and no invitor-invitee relationship, one of which was necessary according to *Malone v. Laskey* to ground liability. To find the contractors liable, it was, therefore, necessary to overrule *Malone v. Laskey.* It is not surprising that the House of Lords found liability; for although *Malone v. Laskey* was followed in *Ball v. London County Council*[19] and often referred to,[20] it was often criticized,[21] and in the recent case of *Mooney v. Lan ark County Council*[22] (applied in the instant case) the Scottish Court of Sessions expressly refused to follow *Ball v. London County Council* and found contractors liable on general principles of negligence.

It must be considered satisfactory that *Malone v. Laskey* has been finally overruled. There seems to be no valid reason why contractors should be immune from liability simply because they cannot be brought within a certain category. This view is by no means novel. In *Donaghue v. Stevenson* Lord Atkin, speaking of *Blacker v. Lake and Elliott*[23] in which the rule in *Malone v. Laskey* was applied, said:

> The judgments in the case err by seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed by those who will be immediately injured by lack of care.[24]

Although the rule in *Malone v. Laskey* has been applied by Canadian courts[25] and the instant case is not binding here, it is difficult to imagine why it should not be followed. The questoin

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19. [1949] 2 K.B. 159.
20. See *Blacker v. Lake and Elliott* (1912) 106 L.T. 533; *White v. Steadman* (1913) 109 L.T. 249; *Cunard v. Antifyre Ltd.* [1933] 1 K.B. 551; *Otto v. Bolton and Norris* [1936] 1 All E.R. 960; *Metropolitan Properties Ltd. v. Jones* [1939] 2 All E.R. 202; *David v. Foots* [1940] 1 K.B. 116.
21. Goodhart, 65 Law Q. Rev. 518; Salmond on Torts, 11th Ed., p. 602; Charlesworth on Negligence, p. 190; and Clerk & Lindsell on Torts, 10th Ed., p. 661 express the opinion that *Malone v. Laskey* was wrongly decided on the issue of negligence. Street on Tort at p. 181, says: ". . . the weight of opinion and the conflict in *Ball v. London County Council* and *Haseldine v. Daw* leads to the conclusion that *Ball v. London County Council* was wrongly decided, *a fortiori Malone v. Laskey* must be wrong."
22. [1954] S.L.T. 137.
23. [1912] 106 L.T. 533.
24. [1932] A.C. 562, at p. 594.
25. *Gregson v. Henderson Holler Bearing Co.* (1910) 20 O.L.R. 584; *Bilton v. Mackenzie* (1914) 31 O.L.R. 585; *Dozois v Pure Spring Co.* [1935] S.C.R. 319; *Hammond v. Davidson* [1940] 2 D.L.R. 249.

whether the duty of care would extend to injuries on adjoining land and to trespassers on the premises where the work was being done did not have to be answered, but it is submitted that, for the reasons adduced, there should be no difference in a contractor's liability in such cases.

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WIFE'S REFUSAL TO BAR DOWER IN HUSBAND'S CONTRACT OF SALE — PURCHASER INSISTING ON A CLEAR TITLE — PURCHASER'S RIGHT TO ELECT SPECIFIC PERFORMANCE — POWER OF COURT TO ORDER PORTION OF PRICE PAID INTO COURT TO SECURE DOWER — NO ABATEMENT OF PRICE TO PURCHASER.

The effect of a wife's refusal to bar her dower in land that her husband has contracted to sell has been reviewed recently in the Ontario Court of Appeal in *Freedman v. Mason*.[1] Here Louis Freedman signed an offer to purchase certain lands of Mason listed with real estate brokers. When the brokers presented the offer to Mason, he accepted and signed it, but his wife did not sign. Later on discussing the contract with his solicitors, Mason saw that it was not as advantageous as he had at first thought, and he decided not to carry it out. He was also informed that his wife was not obliged to sign the deed and to bar her dower. Mason informed Freedman that unless a more satisfactory agreement could be reached, his wife would refuse to bar her dower. Negotiations proved futile. Before the closing date of the transaction, Louis Freedman assigned the offer to purchase to the appellant, Sydney Freeman. The appellant's solicitors tendered the amount due under the contract. Mason's solicitor tendered a deed signed by Mason only and demanded the full purchase price. The appellant refused to accept the deed or a return of the deposit, but demanded a deed with bar of dower executed.

The appellant brought an action for specific performance or damages. He later added an alternative claim praying for specific performance with an abatement of the purchase price for the inchoate right of dower. At the trial a further alternative claim was added — an order declaring that the appellant was entitled to a conveyance by Mason and to have a sum set aside from the purchase price to provide for the wife's claim to dower if she should survive her husband and that during the joint lives of Mason and his wife, the interest on the money so set aside should be paid to Mason. The Court held that the appellant was entitled to the last alternative.

1. (1957) 9 D.L.R. (2d) 262.