

I would add that I have not overlooked the plaintiffs' contention that the statement made by the defendant after the dismissal of the principal "that he would pay anything that he was liable for, and that if the plaintiffs would make up the books he would pay all that the treasurer had received and not accounted for after the execution of the bond," prevented the defendant from setting up the defence of misrepresentation; but I do not think it can have that effect. The statement and promise being made after the dismissal, the plaintiffs were not in any manner prejudiced or induced thereby to alter their position, and the promise was made in ignorance of his equitable rights. The withdrawal of the letter of the defendant of the 10th December, 1879, asking to have the bond cancelled, was equally inoperative to deprive the defendant of his equitable defence.

As far as appears from the evidence the defendant was then quite as much in ignorance of any default of the principal as he had been when the bond was executed. The writing and withdrawal of the letter, therefore, could have no other effect than to leave the parties with their legal and equitable rights as they were at that time. No doubt a surety may by his conduct waive his right to set up his equitable defence, but he must do so with full knowledge of his rights, or in such a manner as to alter or prejudice the position of the creditor. The verbal promise to pay in this case was void under the Statute of Frauds, and there being no change in the position of the plaintiffs by reason thereof, there was nothing on which a Court of Equity could set aside the statute, or from which the promise could be treated as evidence of a knowledge by the defendant of the true position of the principal's accounts when the bond was entered into. The doctrine of appropriation of payments to the earlier items of claim, is also inapplicable to the circumstances of this case.

On the general principles of law relating to the effect of untrue representations, in matters of contract, on which a party acts, I would also refer to the language of the