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MECHANIC'S LIENS—WAIVER—REVIVAL AFTER WAIVER—An action to foreclose mechanic's lien. The building contract provided that, "the contractor agrees to waive and does hereby waive and relinquish all right to a lien upon the real estate herein above described and the building to be erected thereon * * *; and the contractor expressly agrees that no lien shall attach to the real estate, building, structure or any other improvement of the owner, either on behalf of the contractor herein, or in behalf of the subcontractors, mechanics, etc., and the said contractor does hereby expressly waive all rights to any such lien under the laws of the State of Indiana for and on behalf of themselves and all materials * * * for the erection, construction and completion of said building." The contract was breached by the owner by its refusal to make certain installment payments to the contractor as required by the contract. The trial court stated as conclusion of law that the covenant of the contractor "against mechanic's lien on the property of the owner was dependent upon the covenant of the owner to perform its part of the contract as the work progressed and by reason of the owner's breach of contract" the contractor was "released from the covenant against mechanic's liens contained

in said contract." The judgment of the trial court was reversed by the appellate court which held that the lien that was waived by the contractor was not revived by the owner's refusal to make instalment payments due under the contract. *Hammond Hotel & Improvement Co. v. Williams et al.*, 176 N. E. 154. A petition for rehearing was filed. *Held*, petition for rehearing denied. 178 N. E. 177, Appellate Court of Indiana Oct. 30, 1931.

That a contractor may, by express agreement, waive the right of himself and those claiming under him to the mechanic's lien given by the statute is well settled. *Kokomo, Frankfort & Western Traction Co. v. Kokomo Trust Co.* (1923) 193 Ind. 219, 137 N. E. 763; *Baldwin Locomotive Works v. Hines* (1919), 189 Ind. 189, 125 N. E. 400, 127 N. E. 275; *Hoosier Brick Co. v. Floyd County Bank* (1917) 64 Ind. App. 445, 116 N. E. 87; *Masson v. Indiana Lighting Fixture Co.* (1913) 53 Ind. App. 376, 100 N. E. 875. (For cases from other jurisdictions see note, 1 Ann. Cas. 954.) But it is essential that the intention to waive the lien should clearly appear. *Masson v. Indiana Lighting Fixture Co. supra*.

The case of *Kertscher v. Green* (1912) 205 N. Y. 522, 99 N. E. 146, Ann. Cas. 1913E, 561, and *Greenfield v. Brady* (1912) 204 N. Y. 659, 97 N. E. 1105, seem to be the only cases which might be urged against the rule of the principal case. The *Greenfield* case was decided and affirmed without opinion. And upon the authority of that case the New York Court of Appeals, in the *Kertscher* case, said, "Assuming that the contract between the parties is to be construed as contended by the defendant's (that all liens were waived including the contractor's) their breach of the contract by their default in making that payment relieved the plaintiff from the obligation upon its part, and it became entitled to file a lien for its work and materials." This statement was, however, unnecessary to the decision and the case could easily have been left to stand upon the second ground given by the court that the stipulation for the waiver of the lien, properly construed, did not apply to a lien by the contractor himself but only to liens by third parties. And ten years later, (1922) the New York Court of Appeals in the case of *Cummings v. Broadway—94th St. Realty Co.*, distinguished the *Greenfield* case upon its facts and said that the doctrine of the *Kertscher* case should not be extended holding, in substance, that the statement made in that case to the effect that the failure of the owner to pay the amount due upon the contract revived the right to the lien once waived was unnecessary and erroneous. In this manner the New York Courts were brought into harmony with the courts of other jurisdictions upon this point. *Pittsburgh Plate Glass Co. v. Art Centre Apts.* (1931) 253 Mich. 501, 235 N. W. 234; *Blakely v. Moshier*, (1892) 94 Mich. 299, 54 N. W. 54; *Au Sable River Broom Co. v. Sanborn*, (1877) 36 Mich. 358; *Center Creek Mining Co. v. Coyne*, (1912) 164 Mo. App. 492, 147 S. W. 148; *Whitmer v. Arthur*, 23 Ohio N. P. (N. S.) 481; *Collinsville Mfg. Co. v. Street*, (1917) (Tex. Civ. App.) 196 S. W. 284.