the court of appeals that such delay was occasioned by the neglect, omission or inability of the clerk or appellee; but such neglect, omission or inability shall not be presumed, but must be shown by the appellant.

Fault of the clerk.

The burden of proof is on the appellant to show the cause of the delay. Willis *v.* Jones, 57 Md. 366.

The last clause of this section applied. The proof that the clerk was at fault must be under oath, and is generally in the form of affidavits; a certificate from the clerk "that the delay has been in no way attributable to the defendant," is not admissable. Northern Central Ry. Co. *v.* Rutledge, 48 Md. 263. See also, Hannon *v.* State, 9 Gill, 442.

The last clause of this section, applied. The clerk may properly decline to transmit the record until he is paid for it, and he need not notify the appellant when the record is ready for transmission. Parsons *v.* Padgett, 65 Md. 356.

Though a clerk may decline to transmit a record until it is paid for, he has no right to decline to make the record up until he is paid, and when the transcript is delayed on the latter account, the appeal will not be dismissed. Walter *v.* Second National Bank, 56 Md. 139. See also, O'Hern *v.* Browning, 33 Md. 474.

Where the appellant takes papers from the clerk's office and does not return them so as to enable the clerk to transmit them in time, the appeal will be dismissed. Sample *v.* Motter, 5 Md. 370.

For cases in which the appeal was dismissed, there being a failure of proof that the delay was occasioned by the clerk, see Duvall *v.* Maryland Rys. Co., 114 Md. 298; Warburton *v.* Robinson, 113 Md. 25; Estep *v.* Tuck, 109 Md. 530; Steiner *v.* Harding, 88 Md. 343; Mason *v.* Gauer, 62 Md. 263; Downes *v.* Friel, 57 Md. 532; Ewell *v.* Taylor, 45 Md. 573; Mince *v.* Tucker, 37 Md. 362. *Cf.* Miller *v.* Gehr, 91 Md. 714; B. & O. R. R. Co. *v.* State, 62 Md. 481; Biddison *v.* Mosely, 57 Md. 92; Bowie *v.* Neal, 41 Md. 130; Lewin *v.* Simpson, 38 Md. 480; Andrews *v.* Poe, 30 Md. 485.

Generally.

In a case where the delay in the transmission of the record was due to a controversy over an appeal bond, the appeal was entertained. Nutwell *v.* Nutwell, 47 Md. 46. (This case was decided prior to the Act. of 1888, Ch. 34).

The appeal will not be dismissed if the delay is not the appellant's fault. Hooper *v.* Baltimore, etc., Turnpike Co., 34 Md. 521; Wilson *v.* Merriman, 48 Md. 334.

This section applies to appeals in insolvency cases Glenn *v.* Chesapeake Bank, 3 Md. 475. And see State *v.* Mister, 5 Md. 16.

For cases apparently now inapplicable to this section by reason of changes in the law, see Marsh *v.* Hand, 35 Md. 126; Bowie *v.* Maryland Agricultural College, 27 Md. 276; Dugan *v.* Hollins, 11 Md. 41. See also, section 41.

See sections 6 and 33.

1904, art. 5, sec. 41. 1888, art. 5, sec. 39. 1864, ch. 322.

41. If the clerk shall have prepared the record as required by law, and the appellant or plaintiff in error shall have neglected or omitted to pay for such record, or by any other neglect or omission on the part of the appellant or plaintiff in error, the said record shall not be sent to the court of appeals within time, the court from which the appeal was taken may, on motion, strike out the entry of such appeal and proceed to execution, or other proceedings, as if such appeal had never been entered, and thereafter no other appeal or writ of error shall be allowed.

If the trial court has struck out the appeal and on appeal from such action, it appears that the delay was not the appellant's fault, the case will be reinstated and the appeal allowed. O'Hern *v.* Browning, 33 Md. 474.