

Fault of 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 admissible. *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.

Where it appears from the affidavit of the clerk that the transcript was not turned over to the express company for transmission to the court of appeals until twelve days after it was paid for, the appeal will not be dismissed, although the record does not arrive in time; delay of the express company. *Bliss v. Bliss*, 133 Md. 68.

Where the delay in transmitting the record is due to efforts of counsel to settle the controversy, or where delay is equally attributable to appellant and appellee, the appeal will not be dismissed. *Mitchell v. Slye*, 137 Md. 95.

A motion to dismiss an appeal overruled because it was shown that the failure to transmit the record in due time was due in part to the absence of the appellee's counsel from the city. *State v. B. & O. R. R. Co.*, 117 Md. 288.

Appeal dismissed under sec. 66. The burden is on the appellant to bring the case within this section. The appellant must not only give directions to enter an appeal and transmit the record, but must pay the costs so that the record may be transmitted in time. The clerk may not, however, withhold the making up of the transcript until the costs are paid. *Miller v. Mencken*, 124 Md. 675.

Appellee held not responsible for delay in transmitting record; appeal dismissed under sec. 6. *Horsev. Woodward*, 124 Md. 362.

There being no proof to bring the case under this section, an appeal was dismissed under sec. 6. *Horseman v. Furbush*, 124 Md. 582.

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 sec. 41.

This section referred to in construing sec. 6—see notes thereto.

See secs. 6 and 37, and notes thereto.

An. Code, sec. 41. 1904, sec. 41. 1888, sec. 39. 1864, ch. 322.

45. 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 ap-