

what he regards as the proper cost of the record. Burden of proof—see sec. 44. *Wilmer v. Baltimore*, 116 Md. 339. And see *Horpel v. Hawkins*, 115 Md. 157.

A delay of more than five months in transmitting the record is not a compliance with the last clause of this section. *Willis v. Jones*, 57 Md. 365.

For cases in which appeals were dismissed for a failure to comply with this section, the delay not being sufficiently accounted for, see *Duval v. Maryland Rys. Co.*, 114 Md. 298; *Warburton v. Robinson*, 113 Md. 25; *Estep v. Tuck*, 109 Md. 528; *Downes v. Friel*, 57 Md. 532; *Mince v. Tucker*, 37 Md. 363.

#### **Delay Explained.**

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 express company. *Bliss v. Bliss*, 133 Md. 68.

Where the appellant instructs the clerk as to what papers he wishes included in the transcript (which contains about 175 pages) five weeks before the time for the filing expires, and the transcript would have been filed in time if the clerk had not delayed for certain paper suitable for plats and to do other work, the appeal will not be dismissed, although the transcript is not filed within the three months. *Whittington v. Commissioners of Crisfield*, 121 Md. 395.

Where the delay in transmitting the record is equally attributable to the appellee and to the appellant, the appeal will not be dismissed. *Forrest Lake Cemetery v. Baker*, 113 Md. 531; *McGonigal v. Plummer*, 30 Md. 426. *Cf. Duvall v. Maryland Rys. Co.*, 114 Md. 298.

When the trial court has by granting extensions of the time for signing bills of exception, made it impossible to have the transcript prepared within the required time, the court of appeals has allowed such further time as seemed proper. *Duvall v. Maryland Rys. Co.*, 114 Md. 298.

#### **Generally.**

Record held to have been transmitted within the time allowed. *Cross v. Hecker*, 75 Md. 575; *B. & O. R. R. Co. v. Gilmore*, 125 Md. 618.

*Cf. sections 6 and 66, and notes.*

See secs. 44, 45, 90 and 91 and notes to secs. 43 and 44.

An. Code, sec. 34. 1904, sec. 34. 1888, sec. 32. Rule 11.

**38.** In making up the transcript of the record of equity proceedings to be transmitted to the court of appeals, it shall be the duty of the clerk of the court from which the appeal may be taken, to omit therefrom the formal heading and commencement of the record, stating only the titling of the cause and the time of the commencement of the proceedings; he shall also omit all subpoenas and other process for appearance of parties if parties have appeared; all orders and certificates of publication stating in lieu thereof the date of such order; the period of publication required, how published, and the time fixed for appearance of parties thereunder; all commissions to appoint guardians and orders to take testimony, and the formal returns thereto, stating in lieu thereof the fact and time of issuing such commissions, and passing such orders and the time of the return of such testimony; all entries of continuances; all injunction bonds, receivers' bonds, trustees, bonds, appeal bonds, and affidavits filed on appeal; all proceedings in the cause subsequent to the decree or order appealed from; and all merely collateral proceedings not in anywise involved in the matter of appeal, and which cannot be material to the hearing and decision of the case by the court of appeals; any party to the appeal, however, shall have the right to direct any particular part of the proceedings of the cause, that would otherwise be omitted, to be incorporated in the transcript, the clerk stating