ESTHER JARBOE, Appellant, *v.* SOLOMON JARBOE, Appellee.

MOTION TO DISMISS APPEAL.

Argued May 13, 1975. Decided June 26, 1975.

1. The sureties named in the appeal bond must be owners of the property pledged and their affidavit and the revenue certificate which must accompany the bond shall bear evidence to that fact.
2. When the foregoing documents accompanying the appeal bond do not precisely show that the sureties named are not the owners of the pledged property, the bond will be considered defective and the appeal subject to dismissal.
3. The affidavit of the named sureties and the revenue certificate required, must be filed simultaneously with the appeal bond.
4. The lower court loses jurisdiction over a matter with the service on appellee of the notice of completion of the appeal, after all the other requisites for completion of an appeal have been performed.
5. Exceptions to the sureties can be taken by the appellee only so long as the trial court still has jurisdiction over the matter, and cannot be taken after all the steps for completion of the appeal have been taken.

Appellee moved to dismiss the appeal, alleging primarily that the sureties were not the owners of the property pledged. Appellant mainly contended that appellee was guilty of laches in not having taken exceptions to the sureties in the lower court or applying to the Justice in chambers for the relief desired.

The Court sustained the contentions of the appellee, in that it found from the record of the case that the sureties were not the owners of the property pledged, as the law requires. It did not support the argument of laches on the part of appellee, since he did not know of the defects in the bond until after the service of the notice of completion of the appeal, when the lower court lost its jurisdiction over the matter. The motion was *granted* and the appeal was *dismissed.*

Clarence O. Tunning for appellant. *Daniel Draper* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

When this case, which emanated from the Third Judicial Circuit, Sinoe County, was called for hearing, we observed that the appellee had filed a motion to dismiss this appeal on the ground that the appeal bond was defective for the following reasons:

"1. that the sureties, David Wreh and Isaac Clarke, own no property;

"2. that lot No. 888 referred to in the appellant's revenue certificate is the property of J. E. Davies and Frances Wreh, who are not signatories to appellant's appeal bond;

"3. that lot No. 1218, also mentioned in the revenue certificate, is the property of D. J. Clarke of the City of Greenville, Sinoe County, who died leaving several lineal and collateral heirs, among whom is Isaac Clarke, one of the sureties; and

"4. that the appellee could not have moved for verification of the bond because he was not aware of the filing of appellant's bond until the service of appellant's notice of completion of appeal, when the lower court had lost jurisdiction."

Having stated the positions of the contending parties, let us now turn to the Civil Procedure Law relating to sureties of bonds.

"*1. Who may be sureties.* Unless the court orders otherwise, a surety on a bond shall be either two natural persons who fulfill the requirements of this section or an insurance company authorized to execute surety bonds within the Republic.

"*2. Lien on real property as security.* A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclu-

sive of all encumbrances. Such a bond shall create a lien on the real property when the party in whose favor the bond is given has it recorded in the docket for surety bond liens in the office of the clerk of the Circuit Court in the county where the property is located. Each bond shall be recorded therein by an entry showing the following:

"(a) The names of the sureties in alphabetical order;

"(b) The amount of the bond;

"(c) A description of the real property offered as security thereunder, sufficiently identified to clearly establish the lien of the bond;

"(d) The date of such recording;

"(e) The title of the action, proceeding, or estate.

"*3. Affidavit of sureties.* The bond shall be accompanied by an affidavit of the sureties containing the following:

"(a) A statement that one of them is the owner or that both combined are the owners of the real property offered as security;

"(b) A description of the property, sufficiently identified to establish the lien of the bond;

"(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and

"(d) A statement of the assessed value of each property offered.

"A duplicate original of the affidavit required by this section shall be filed in the office where the bond is recorded.

"*4. Certificate of Treasury Department official.* The bond shall also be accompanied by a certificate of a duly authorized official of the Department of the Treasury that the property is owned by the surety or sureties claiming title to it in the affidavit and that it is of the assessed value therein stated, but such a cer-

tificate shall not be a prerequisite to approval by the judge." Rev. Code 1:63.2.

Upon inspecting the appeal bond filed by the appellant, we found that the sureties named in the bond are David Wreh and Isaac W. Clarke, yet the revenue certificate states that the property offered for security, lots No. 888 and 1218, are owned by J. E. Davies and Frances Wreh, and D. J. Clarke, respectively, who are not sureties to the bond. However, the affidavit of sureties declares the named sureties to be owners. It is obvious that these documents do not state with any degree of certainty who are the actual owners of the property. The statute quoted above requires that the sureties named in the bond must be owners of the property offered as security and described in the bond; and all of the documents to be filed with the bond, the affidavit of sureties and a revenue certificate, must bear evidence to that fact and must be consistent. Where all of the documents that must accompany a bond do not show exactly that the sureties named in the bond are owners of the property offered for security, the bond will be considered as being defective, and the appeal will be dismissed on that ground.

The appellant, in an effort to counter the argument with respect to nonownership of the properties by the sureties, filed another revenue certificate showing that David Wreh, one of the sureties, is the owner of lot No. 889 in Greenville, Sinoe. We cannot accept this certificate because there is no affidavit of sureties filed with it; and it cannot relate back to the previous affidavit of sureties because that affidavit states that David Wreh is owner of lot No. 888 and not lot No. 889. More important is the fact that this new revenue certificate is dated April 23, 1975, and the appeal bond was filed on September 11, 1973. The statute is clear that the bond must be accompanied by the revenue certificate, and we interpret this to mean that the affidavit of sureties and the revenue certificate must be filed simultaneously with the bond.

The appellant alleged that lot No. 1218 is owned by Isaac W. Clarke because he is the only legal heir of D. J. Clarke, the recorded owner of the property. This allegation, unsupported by any evidence, does not quiet the doubt raised by the appellee. The revenue certificate carries the name of D. J. Clarke as owner of lot No. 1218. This Court accepts only what appears in the affidavit of the sureties and the revenue certificate as evidence that the sureties are owners of the property described therein, and each of these documents must be consistent with the other.

The appellant contended that the appellee is guilty of laches because he did not take exception to the sureties in accordance with our Civil Procedure Law.

"Exception to surety; allowance where no exception taken.

"*1. Exceptions.* A party may except to the sufficiency of a surety by written notice of exceptions served upon the adverse party within three days after receipt of the notice of filing of the bond. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs.

"*2. Allowance where no exception taken.* Where no exception to sureties is taken within three days or where exceptions taken are set aside, the bond is allowed." Rev. Code 1:63.5.

"Justification of surety.

"*1. Motion to justify.* Within three days after service of notice of exception, the surety excepted to or the person on whose behalf the bond was given shall move to justify, upon notice to the adverse party. The surety shall be present upon the hearing of such motion to be examined under oath. If the court finds the surety sufficient, it shall make an appropriate endorsement on the bond.

"*2. Failure to justify.* If a motion to justify is not

made within three days after the notice of exception is served, or if the judge finds a surety insufficient, he shall require another surety or sureties in place of any who have not justified. Any surety who has not justified shall remain liable until another surety signs the bond and the bond is allowed." Rev. Code 1:63.6.

We have reviewed the record certified to us and see that the appeal bond and the notice of completion of appeal were filed on the same day, and the notice was served on the appellee two days later. This Court has consistently held that it is the service of the notice of completion of appeal which alone gives the appellate court jurisdiction over the matter. *Witherspoon* v. *Clarke,* 14 LLR 194 (1960). We take this to mean that after all the prescribed requisites for completion of an appeal have been performed, the lower court loses jurisdiction with the service on the appellee of the notice of completion of appeal. Since the appellee did not know of the defects in the bond until after service of the notice of completion of appeal, after the trial court had lost jurisdiction over the matter, we wonder how the lower court could have assumed jurisdiction to consider any exceptions taken to the sureties. It is our opinion that the law with respect to exceptions to a surety can be employed only so long as the trial court still has jurisdiction over the matter, and not after all of the steps for completion of an appeal have been taken.

The appellant, relying on *Jos. Hassen & Soehne, Ltd.* v. *Tuning,* 17 LLR 298 (1966), argued that if appellee felt that the sureties were insufficient, he should have applied to the Justice presiding in chambers for the necessary relief. We find this argument untenable because we cannot imagine what relief the Justice in chambers could have given when the lower court had lost jurisdiction and the matter was pending on appeal before the bench en banc. The case cited by appellant is not analogous because in that case the lower court had not lost jurisdiction

over the matter. It was the trial judge who had lost jurisdiction over the circuit immediately after approving the appeal bond, and this Court has held that since a circuit judge is not authorized to perform any judicial act within the circuit after the expiration of his term time, a party who desires the performance of an act indispensable to an appeal must apply for relief to the Supreme Court or to the Justice presiding in chambers, after which any judge may be ordered to perform the act. This holding presupposes that the final jurisdictional step of service of the notice of completion of appeal has not been taken. The situation in the instant case is different in that the lower court had lost jurisdiction over the matter. Therefore, we do not find appellee guilty of laches for failure to except to the sureties or to apply to the Justice in chambers for relief.

The appellant contended that the appellee was negligent in not superintending his interest or cause but, to the contrary, we found that she was the one who failed to superintend her appeal. The defects complained of could have been discovered easily had appellant taken time to read the documents she was filing. It is the responsibility of the appellant to insure that the statutory prerequisites for completion of an appeal are properly executed within the prescribed period of time. *Yengbe* v. *Porte,* 15 LLR 537 (1964); and where the sureties subscribing to an appeal bond are not statutorily qualified, the bond is materially defective and the appeal will be dismissed. *Sauid* v. *Gebara,* 15 LLR 598 (1964).

In view of the foregoing, the motion to dismiss is granted with costs against the appellant; and the Clerk of this Court is hereby ordered to send a mandate to the court below ordering it to proceed to resume jurisdiction and enforce its judgment. And it is so ordered.

Motion to dismiss appeal granted; appeal dismissed.