

RATNAYAKE AND OTHERS
v.
KUMARIHAMY AND OTHERS

COURT OF APPEAL
WEERASURIYA, J., AND
DISSANAYAKE, J.
CA NO. 693/93 (F)
DC KURUNEGALA NO. 5548/P
JUNE 06, 22, 23, 2001 AND
JULY 12, 2001

Partition Law, No. 21 of 1977 – Identity of corpus – Extent far in excess of extent in the schedule to the plaint – Boundaries in deeds – Variance with boundaries in preliminary plan – Land not included in the inventory in the testamentary proceedings – Will it defeat the title of the deceased?

Per Weerasuriya, J.

"The system of land measure computed according to the extent of land required to sow with paddy or kurakkan vary due to the interaction of several factors. The amount of seed required could vary according to the varying degrees of the soil, the size and quality of the grain, and the peculiar qualities of the sower. In the circumstances it is difficult to correlate sowing extent accurately by reference to surface areas."

Held:

The non-inclusion of a land in a testamentary proceeding for the administration of an estate of a deceased, cannot in any manner, defeat the title of the deceased and his heirs.

APPEAL from the judgment of the District Court of Kurunegala.

Lakshman Perera for 1A, 4A & 5th defendant-appellants.

D. M. G. Dassanayake with *Hemantha Situge* for plaintiff-respondents.

Cur. adv. vult.

November 09, 2001

WEERASURIYA, J. (P/CA)

The plaintiff-respondent instituted this action to partition the land called Hapugaspitiyehena morefully described in the schedule to the 1
plaint and depicted in the preliminary plan bearing No. 426, dated 12. 12. 1975, drawn by W. C. S. M. Abeysekera, Licensed Surveyor (X). The deceased 1st and 4th defendants and the present 5th defendant-appellant in their joint statement of claim, prayed for dismissal of the action on the basis that lots 1 and 2 depicted in the preliminary plan (X) is the land called Rawanaellahena and lot 3 is a portion of the land called Hitinawatta.

Based on this claim, several points of contest were accepted for 10
adjudication at the trial.

The plaintiff-respondent asserted that Kiri Banda who was the original owner of this land acquired title by virtue of 3 deeds, namely:

- (1) deed bearing No. 24614 dated 10. 03. 1898 (P1),
- (2) deed bearing No. 6131 dated 10. 03. 1898 (P2), and
- (3) deed bearing No. 71 dated 12. 09. 1922 (P3).

She revealed that Kiri Banda had 7 children from three marriages, namely :

- (1) Tikiri Banda, Wijesundara Banda and Ran Banda from the first marriage, 20
- (2) Anulawathie and Punchi Kumarihamy from the second marriage, and
- (3) Dingiri Amma (1st defendant) and Punchi Banda (3rd defendant) from the third marriage.

The plaintiff-respondent produced marked P4, deed bearing No. 22273, dated 21. 09. 1951 by which Ranbanda transferred his rights to Wijesundara Banda. The plaintiff-respondent acquired rights from deed bearing No. 5671, dated 04. 01. 1971 from the said Wijesundara Banda. Tikiri Banda transferred his rights by deed of conveyance bearing No. 13721, dated 22. 10. 1942 to Sujatha 30 Kumarihamy (1st defendant).

Anulawathie Kumarihamy by deed of conveyance bearing No. 22050, dated 12. 07. 1951 (P6), transferred her rights to Punchi Banda, who, thereafter, transferred the same to Sujatha Kumarihamy by deed of transfer No. 22051, dated 12. 07. 1951 (P7). Sujatha Kumarihamy by deed of conveyance No. 958, dated 27. 06. 1934 (P8), purchased the rights of Punchi Kumarihamy.

On this chain of title, parties were entitled to undivided rights in the following manner :

Plaintiff	-	4/18	40
1st defedant	-	8/18	
2nd defendant	-	3/18	
3rd defendant	-	3/18	

1A defendant-appellant in his testimony claimed that his father Tikiri Banda Ratnayake acquired rights to this land from the following deeds :

- (1) Deed No. 6401 dated 12. 09. 1922 (1D2)
- (2) Deed No. 6286 dated 23. 08. 1922 (1D2)
- (3) Deed No. 6614 dated 16. 11. 1922 (1D4)
- (4) Deed No. 3674 dated 30. 05. 1927 (1D5)
- (5) Deed No. 30960 dated 08. 01. 1902 (1D6)

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At the hearing of this appeal, learned Counsel for the defendant-appellants contended that, plaintiff-respondent has failed to prove the identity of the corpus. He based this submission on the following grounds :

- (1) The extent of the land shown in the preliminary plan is 8A. 1R. 16P. far in excess of the extent described in the schedule to the plaint.
- (2) The boundaries given in the deeds are at variance with the boundaries shown in the preliminary plan. 60

The extent given in the deed by which the plaintiff-respondent got rights (P5) is 4 *lahas* of Kurakkan sowing extent. Learned Counsel for the defendant-appellants contended that the English equivalent to the customary Sinhala measure of sowing of one *laha* is one acre. However, it is to be noted that this system of land measure computed according to the extent of land required to sow with paddy or Kurakkan vary due to the interaction of several factors. The amount of seed required could vary according to the varying degree of fertility of the soil, the size and quality of the grain, and the peculiar qualities of the sower. In the circumstances, it is difficult to correlate sowing extent accurately by reference to surface areas. (vide Ceylon Law Recorder, vol. XXII, page XLVI).* 70

It is useful to examine the boundaries described in the deeds by which Kiri Banda purchased rights. Deeds P1 and P2 refer to a land called Hapugahapitiyehena while deed P3 refer to a land called Katugahapitiyehena.

P1

North Murutha tree and the rock belonging to
& Kosgahamulawatta.

East

South – Lunumidella tree and the boundary rock of the land
 owned by Punchi Banda Arachchirala.

West – Oya (stream).

P2

North – Rock of Ketakelagahamula and Muruthagaha standing on land belonging to the vendor.

East – Ditch of the land owned by the vendee.

South – Maha Kosgaha and Totilla stump standing on the land owned by the vendor.

West – Oya (stream).

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P3

North – Murutha tree and the rock of Ketakelagahamula.

East – Ditch.

South – Jak tree and Totilla tree.

West – Ela (stream).

It would be relevant to note that Kiri Banda acquired rights from the above deeds in the years 1895, 1898 and 1922, respectively.

The boundaries given in the deeds P1 – P3 are described in the schedule to the original plaint and the first schedule to the amended plaint.

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Ran Banda, a child of Kiri Banda by the first marriage, transferred by deed of conveyance marked P4, his rights to his brother Wijesundara Banda. This transfer effected in 1951 gives the boundaries as shown in the preliminary plan and the 2nd schedule to the amended plaint. They are as follows :

North – Katupitiyewatta owned by Mrs. Peiris.

East – Cart road Mallopitiya.

South – Rawanaellawatta.

West – Field of Sujatha Kumarihamy.

However, in deed 14. 12. 1971 (P5) by which Wijesundara Banda ¹¹⁰ conveyed rights to the plaintiff-respondent, the boundaries of Hapugaspiyehena were given as follows :

North – By Murutha tree Ketakelagahamulagala.

East – By ditch.

South – By Maha Kosgaha and Totilla tree, and

West – by Oya.

Therefore, it would be seen that in deed P5, this land has been described in the manner set out in the deed marked P3. It would be significant to note that boundaries relating to North and South in deeds P1 – P3 and P5 were given by reference to certain varieties ¹²⁰ of trees. In the absence of any names given to such lands on which such trees stood, the question may be posed whether it is justifiable for one to assert that boundaries are different, if the name of any land is inserted in the later deeds.

It would be relevant to note that Kiri Banda the original owner adverted to by the plaintiff-respondent was the grandfather of the substituted 1A defendant-appellant. The 1A defendant-appellant conceded that his father Tikiri Banda Ratnayake was a son of Kiri Banda, the original owner. In fact, he never sought to dispute the position that Kiri Banda was the original owner. It would be seen that, ¹³⁰ what the 1A defendant-appellant sought to place before the District Court, was some deeds by which his father acquired rights.

The plaintiff-respondent purchased rights from Wijesundara Banda by deed marked P5 in 1971 wherein the boundaries had been given in the manner described in the original plaint and the 1st schedule to the amended plaint.

Tikiri Banda (father of the 1A defendant-appellant and brother of Wijesundara Banda and Ran Banda) by deed marked 1D1, transferred his rights to Sujatha Kumarihamy (1st defendant) giving the boundaries as described in the deed P4 by which Ranbanda 140 transferred his rights to Wijesundara Banda. It is to be emphasized that these boundaries are identical to the boundaries shown in the preliminary plan X.

Anulawathie Kumarihamy, a child of Kiri Banda by the second marriage transferred her rights to Punchi Banda, another child of Kiri Banda by the 3rd marriage, by deed marked P6, who on the same day transferred those rights to 1st defendant, Sujatha Kumarihamy. Therefore, it must be noted that Sujatha Kumarihamy purchased rights to this land from Tikiri Banda, father of the 4th defendant-appellant. 150

Punchi Kumarihamy, the other child by the second marriage of Kiri Banda transferred her rights as well to the deceased 1st defendant, Sujatha Kumarihamy. It is to be highlighted that in deeds marked 1D1, P6, P7 and P8 by which Sujatha Kumarihamy claimed title, land has been described in the same manner as shown in the preliminary plan (X) and the 2nd schedule to the amended plaint.

Learned Counsel for the defendant-appellants contended that the land sought to be partitioned was not included in the inventory in the testamentary proceedings of Kiri Banda. The non-inclusion of a land in testamentary proceedings for the administration of an estate of a 160 deceased cannot in any manner defeat the title of the deceased and his heirs. Therefore, non-inclusion of this land in the inventory cannot

wipe out any rights of Kiri Banda or his heirs. Anulawathie and Punchi Kumarihamy had transferred their undivided rights on the basis of paternal inheritance and therefore they cannot disclaim any rights from Kiri Banda to this land.

Tikiri Banda had purchased rights to the land called Rawanaellawatta. In deed 1D1 by which Tikiri Banda transferred his rights of Hapughapitiyehena to Sujatha Kumarihamy (1st defendant) Rawanaellawatta has been described as the Southern boundary of ¹⁷⁰ Hapugahapitiyehena. Despite a reference in the deed of lease 1D13 that Rawanaellawatta was also being called as Hapugahapitiyehena yet the Southern boundary is different.

The 1A defendant-appellant sought to identify lots 1 and 2 in the preliminary plan as Rawanaellawatta depicted as lot A in plan 1118, containing an extent of 7 acres 2 roods and 21 perches. It is surprising that 1A defendant-appellant has never sought to superimpose the said plan on the preliminary plan (X) to identify the land called Rawanaellawatta.

For the foregoing reasons, it seems to me that there was sufficient ¹⁸⁰ material to identify the corpus in this partition action.

The land described in the title deed of the plaintiff-respondent (P5) has been sufficiently identified as the land shown in the preliminary plan. In the absence of a previous survey showing the precise extent, the old land measures in terms of sowing extent cannot be accurately correlated to surface areas.

Therefore, I proceed to dismiss this appeal with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.

ANNEXURE 1**ANCIENT MEASURES OF CAPACITY AND SURFACE**

(We reproduce below an extract from a paper read before the Engineering Association of Ceylon by D. B. Ellepola, Esq., B.Sc. (London), F.R.G.S., Superintendent of Surveys, Ceylon Survey Department, presently Controller of the Internal Purchase Scheme. In his paper he deals with Ancient Lineal Measures, Ancient Measures of Weight, Ancient Measures of Capacity, Ancient Measures of Distances, and Ancient Surface Measures.)

"The following is a Table of Measures in common use in Ceylon :

4 Hunduwas (or Patas)	=	1 Neliya
4 Neliyas	=	1 Laha
4 Lahas	=	1 Timba
10 Lahas	=	1 Pela
4 Pelas	=	1 Amunam

The measures actually in use were only the "Neliya" and the "Laha", the others being merely terms used for deriving the larger measures. The "Laha" was the largest dry measure and the "Neliya", the largest liquid measure, this latter measure being used as both a grain and a liquid measure. For grain the "Neliya" was sometimes made of rattan, but for oil it was always made of bamboo, being equal in capacity to the space contained between two consecutive joints of a bamboo, whence it derives its name "Neliya".

The Neliya measure appears to have been in existence even in ancient India, for according to General Cunningham's Archaeological Report for 1871-72 p. XI "the old measures are usually made of joints of bamboo or of iron, and more rarely of hard wood. The commonest name for one of the smallest measures is the Nell".

Neliya measures may be seen in every village, even today, and are actually in use. It may readily be imagined how varying this measure can be, depending

as it must, on the size of the bamboo, and the length of the joint. Referring to this Pridham says as follows : "This measure varied and no two were to be found actually alike. When these measures prevailed, standard gauges were deposited for reference in every Kachcheri, as a protection against fraud through defective weights, a precaution absolutely requisite, where the natives would frequently place the measures in boiling water, then dry them in the sun, and complete the roguery, by coating the interior surface with a thick layer of transparent dammer of pine resin".

The 'Laha' was also a measure of varying size. Within the same district and sometimes in the same Chief Headman's division, in different parts, a different size of Laha was in use. In the North-Western Province alone, in different parts, these are in use even today, four sizes of "Lahas" containing in capacity, 4, 5, 6 and 7 "Neliyas", respectively. The largest size of "Laha" according to my investigations is one in use in the Inamaluwa Korale of Matale North, and contains twelve "Nelis".

The various sizes of "Lahas" have in certain parts of the country different names. The "Punchi Laha" and "Loku Laha" are terms commonly used, and according to Pridham one and a half "Punchi Lahas" make a "Loku Laha." Mr. M. S. Crawford, late of the Ceylon Civil Service, in his Grain Tax Settlement Report of Matale South refers to a 'Kalawita Laha'. This is a 'five Neli Laha' and is so called as it was the 'Laha' used in the threshing floors.

I should like to make mention here of two other measures, the names of which are of some interest. One is the "Bandara Neliya" and according to Knox, this signifies the king's 'Neliya'. This contained four 'patas,' a 'pata' of grain being as much as a man can hold heaped up in his whole hand palm and fingers and all. The other measure is the "Humba Neliya," which according to my information is a measure in use in the Dambulla Vihare and said to hold three "Neliyas" of grain. It is said that the original "Humba Neliya" which the Vihare used, was of the capacity of six "Neliyas" of grain.

The "Laha" is a large mouthed measure, rather in the shape of a small sized washing basin and generally made of "Gansuriya" or "Demata" wood. Mr. R. W. Ivers in his "Manuel of the North-Central Province," states that in all agreements regarding grain, it is always stated how many "Seers" or "Neliyas" the 'Laha' is

to hold when the measurement takes place – a very necessary stipulation in view of the varying sizes of Lahas in general use.

These measures have been related to the English standard measures which, according to the Ceylon Blue Book, are as follows :

1 Amunam	=	4 Pelas
	=	40 Lahas
	=	8 Parahs
	=	5 Bushels or 160 Quarts or Seers or Neliyas.

The 'Parah' which is a Dutch measure, being adopted by Regn. No. 31 of 1816 as the standard measure, was defined as perfect cube of internal side measuring 11.57 inches. The Parah was again divided into 24 'Seers', a 'Seer' being a cylinder of equal depth and diameter measuring 4.35 inches.

MISCELLANY

The sub-divisions and multiples of the 'Parah' as follows :

4 Cut Chundus	=	1 Cut Measure
4 4/5 Cut measures	=	1 Kuruni
2 1/2 Kurunis	=	1 Marsal
2 Marsals	=	1 Parah
8 Parahs	=	1 Amunam
9 3/8 Amunams	=	1 Last

The Cut Measure was legalised by the same Regulation, declaring that "the legal contents of the measure in all transactions should be those remaining in the measure level with the rim or edge, after the same had been struck or cut by a straight rod or 'strike' mounted with iron, resting upon the edges".

The above table of measures in "Neliyas," "Lahas" and "Pelas," in varying forms are still used in all villages of the Kandyan Provinces.

In the low-country too, it is noteworthy, that in spite of the long periods of Portugese and Dutch rule, the systems of measurement, as quoted above still

prevail. Apart from the introduction of measures of capacity such as the "Parah" and "Marsal," which appear to be the equivalent of the Tamil terms ("Parah" and "Marakkal"), the Portuguese and Dutch appear to have left the local measures uninterfered.

The Dry Measures in the Tamil District vary in the Northern and Eastern Provinces. According to the Ceylon Manual, the Tamil measures of capacity and their relation to the English Bushel, as given in the Ceylon Blue Book are as follows :

Northern Province

Jaffna 32 Quarts (or Seers) = 1 Bushel
(Note. – According to Mudaliyar C. Rasanayagam the system of measure prevailing in Jaffna from pre British times is as follows :

	12 Measures	=	1 Lacham
	2 Lachams	=	1 Parah
<i>Vauniya and</i>	16 Seers	=	1 Marakkal
<i>Mannar</i>	2 Marakkals	=	1 Bushel
<i>Mullaitivu</i>	12 Quarts (or Seers)	=	1 Marakkal
	2 Marakkals	=	1 Bushel

Eastern Province

<i>Batticaloa</i>	8 Cut Measures, Seers, or 7 heaped Measures	=	1 Marakkal
	4 Marakkals	=	1 Bushel
	7 1/2 Bushels	=	1 Avanam
<i>Trincomalie</i>	12 Quarts	=	1 Marakkal
	2 1/2 Marakkals	=	1 Bushel
	10 Bushels	=	1 Avanam

<i>Tampalakaman</i>	2 1/2 Quarts (or Seers)	=	1 Nali
	15 Nalis	=	1 Peddi
	8 Peddis	=	1 Avanam
	1 Avanam	=	10 Bushels
<i>Kodiyappuram</i>	3 Measures (or Seers)	=	1 Nali
	15 nalis	=	1 Peddi
	8 Peddis or 64 Marakkals	=	1 Avanam
	1 Avanam	=	12 Bushels
<i>Kadukkulam</i> (Tamil Village)			
	5 Measures	=	1 Nali
	2 Nalis	=	1 Marakkal
	24 Marakkals	=	1 Avanam
	1 Avanam	=	9 Bushels
<i>Kadukkulam</i> (Sinhalese Villages)			
	6 Measures	=	1 Marakkal
	10 Marakkals	=	1 Pela of Peddi
	4 Pelas or Peddis	=	1 Avanam

I have made the above references in detail to the ancient measures of weight and capacity or dry measure, before discussing the Ancient Surface Measures of Ceylon for the reason that surface areas were measured not by lineal or squared measure, but by a measure of the quantity of seed required to sow the land i.e., "sowing extents." is in terms of grain capacity for sowing or "sowing extents". The scale of measures is as given below and starts from a "Mita" or "fistful" a very appropriate measure as a sower sows in "fistfuls". The common local expression used to describe a man of straw, as a man not possessed of even "a Mita of land" has its origin here.

The following table is according to Modder in the Royal Asiatic Society's Journal :

4 Mitas	=	1 Atalossa, i.e., handful with the fingers slightly bent inwards
8 Mitas	=	1 Pata – a handful with the fingers stretched out

2 Patas	=	1 Manawa or Dota or two handfals
2 Manawas	=	1 Neliya, Seruwa of Seer
4 Neliyas	=	1 Kuruni or Laha
4 Lahas	=	1 Timba
7 Lahas	=	1 Bushel
5 Kurunis	=	1 Bera
2 Beras	=	1 Pela
4 Pelas	=	1 Amunam
6 Bushels (5 3/4)		
acc.	=	1 Amunam

The seed sown is also always stated – the commonest being Kurakkan and Paddy – high land generally being sown in Kurakkan and low land in paddy. Thus it is, that we often have expressions such as "Ihalagederawatta of 2 pelas Kurakkan sowing extent" and "Ihalagedera Kumbura of 1 amunam paddy sowing extent." In areas such as Kegalle District or the Central Province where sometimes Elwi, a kind of paddy, is sown on high land too the expression of high land areas in paddy sowing extents, is often encountered.

It will be obvious how difficult it is to correlate sowing extents accurately with surface areas, as there are so many variable factors, depending on the size and quality of grain, the peculiarities of the sower, the fertility of the soil, etc., which make any assessment of surface areas by sowing extents very doubtful of comparison. In fertile lands the seed would be sown much less thickly than in poor soil. An inexperienced sower would scatter the seed unevenly. No rigid correlation of surface areas by sowing extents is possible and the amunam sowing extent consequently varies in different parts of the Island.

The system of surface measures in sowing extents does not appear to have been altered at all by the portuguese or the Dutch during the periods of their occupations. The Portuguese "Forals" and the Dutch "Thombos" particularly the latter, give reference to the areas of the land in terms of sowing extents, i.e., Amunams and Kurunis. The Portuguese "Forals" and Dutch "Thombos" were registers prepared mainly for the purpose of taxation and therefore they concerned themselves with only the produce of the land, and left apart the question of surface areas, these latter being merely recorded in the then established systems of sowing extents of Kurunis and Amunams. Such Dutch Thombos as are accompanied by plans, make reference to the extent in Dutch measures, together with a statement of the generally accepted sowing extent of the land.

In the Tamil Districts of Ceylon too, i.e., the Northern and Eastern Provinces, the system of land measurement would seem to have been in sowing extents, and this system still prevails except in Jaffna, where in addition to the sowing measures a surface measure termed the "Kuli" appears to have been in use from Ancient times. This measure the "Kuli" is the extent of land contained within a square, of side equal to a "Kole" or pole, in length approximately equal to 12 ft.

Appendix A is a table shewing the usual assessment of sowing extents in acres which is followed generally, but is not rigidly adhered to and is always considered variable, depending on local information regarding the fertility of the soil, the violence of the wind, the water supply and various other factors which have to be taken into consideration on account of local conditions.

This practice of the measurement of surface areas in sowing extents is not by any means peculiar to Ceylon and appears to be of Indian origin. I find the following quoted by Mr. E. Thomas, as taken from "The Report on Kuman" by G. W. Trail. "The mode of calculation of the measurement of land in use throughout the hills is by the estimated quantity of grain which the land will require to sow it . . . The most common denomination is the "Bisi" which has now been adopted as a general standard. The regular bisi ought, as its name implies, to contain land requiring 20 Nails (nail=a joint of bamboo) of seed. Its actual extent varies according to the quality of the soil, as the grain is sown much wider in poor lands near the summit than in rich lands at the base of mountains."

ANNEXURE 2

"SINHALESE LAND MEASURES

Ceylon being primarily an agricultural country Land Measures used to be computed according to the extent of land required to sow either paddy or kurakkan. The amount of seed required varied according to the varying degrees of fertility in different parts of the Island, as fertile soil does not require as much seed as poor soil. For instance, an amunam in a fertile area will sometimes be twice as many square feet as an amunam in an unfertile area. In spite of these variations these measures continue to be used by the villagers even at present and very

frequently in our Courts when a land is defined by these measures the question is raised as to their equivalents in English measurement. Generally it is agreed between the contesting parties or evidence is led as to the equivalent in English measurement of a bushel of paddy or kurakkan sowing in the area in question and the table is worked out on this basis.

In surface measure the smallest is *mita* or *ahura* in much seed as can be held in the closed hand.

4 mitas	=	1 atalossa (a handful with the fingers slightly bent inwards)
8 mitas	=	1 pata (a handful with the fingers stretched out)
2 patas	=	1 manawa or dhota or two handfuls
2 manawas	=	1 neliya, seruwa or seer
4 neli	=	1 kuruniya or laha
4 lahas	=	1 timba
7 lahas	=	1 bushel
5 kuruni	=	1 bera or parrah
2 beras	=	1 pela
10 lahas	=	1 pela
5 pecks	=	1 pela
4 pelas	=	1 amuna
6 bushels (5 1/2 more correctly)	=	1 amuna

6 pelas = 1 yel amuna

12 amunu = 1 yala

The equivalents of these terms in English standard measurements are as follows :

1 amunam's sowing extent = 2 1/2 acres (2 a. 2 r. 37 1/2 p. exactly)

1 pela's do. = 2 roods 20 perches (2r. 19 5/8 p.)

1 laha or kuruni's do = 10 perches

1 parrah's do. = 1 rood 10 perches

1 bushel's do. = 2 roods

1 peck's do. = 20 perches

1 quart's or seer's do. = 2 1/2 perches

The above table giving the English equivalents refers to paddy sowing, In the case of kurakkan sowing 1 laha is equivalent to 1 acre and 1 pela is therefore equivalent to 10 acres. Generally high land is measured in 'kurakkan' and low lands (fields) in paddy."

(With acknowledgment to the New Illustrated Dictionary, C. A. C. Times Green Book and Ferguson's Directory).

S. R. W.