Whenever default is made in the payment of any sum of money secured by mortgage, and the last installment is due, the mortgagee is allowed to proceed by *scire facias*. The payment of the money borrowed of the bank was certainly secured by mortgage, and consequently the plaintiffs were authorized to proceed by *scire facias*. The court are at a loss to perceive any solid objection to this mode of recovering the money due the bank.

The judgment must therefore be reversed, with costs, and the cause remanded to the Gallatin circuit court for further proceedings. (1)

Judgment reversed.

Eddy, for plaintiff in error.

JOHN ADAMS, SEN'R., PETER PHILIPS and JACOB PHILIPS, Plaintiffs in Error, *v.* CHAUNCEY SMITH, Defendant in Error.

ERROR TO FRANKLIN.

A constable can not enter upon land and take in execution fruit trees standing and growing—they are part and parcel of the freehold.
It is not error to refuse a new trial.

Opinion of the Court by Justice LOCKWOOD. This was an action of trespass *quare clausum fregit*. The defendants plead not guilty, and Adams justified under an execution from a justice of the peace against the plaintiff, by virtue of which he seized and took the apple trees, &c., in the plaintiff's declaration mentioned.

To this plea plaintiff below demurred, and the court sustained the demurrer, and on trial of the issue of not guilty, the jury found a verdict for plaintiff below for 130 dollars, and judgment was given thereon. To reverse which, a writ of error has been brought to this court. The first error assigned is, that the circuit court erred in sustaining the demurrer. The only question presented by the demurrer is, whether on an execution from a justice of the peace, a constable can enter on land and sell fruit trees there standing and growing? This question is easy of solution. Fruit trees are part and parcel of the freehold, and can in no sense be considered as

(1) See note to *Cox* v *McFerron*, ante, p. 28.

goods and chattels. How far trees growing in a nursery might be considered goods and chattels, is not involved in the question decided by the demurrer, for the plea does not allege them to be nursery trees intended for sale. The demurrer was, therefore, correctly decided.

Anothor error assigned is, that the court erred in overruling the motion for a new trial. It has been frequently decided by this court, that overruling a motion for a new trial, can not be assigned for error. The judgment below must be affirmed with costs. (*a*) (1)

Judgment affirmed.

McRoberts and *Hubbard*, for plaintiffs in error.

Cowles, for defendant in error.

(*a*) Lord Kenyon, in the case of *Penton* v. *Robarts*, 2 East, 88, holds, that a nurseryman who is a tenant of land, may remove from the land his hot-houses and green-houses, with the trees growing, which he has erected.

As to what is personal, and what real property affixed to the soil, vide *Elwes* v. *Maw*, 3 East, 28.

A stone for grinding bark, affixed to a mill, called a bark mill, is not part of the freehold, but a personal chattel. 6 Johns. Rep., 5.

Wheat or corn growing is a chattel, and may be levied upon by execution. *Whipple* v. *Foot*, 2 Johns. Rep., 418.

(1) The question of what is realty and what is personalty, is, as will be seen by a brief review of some of the authorities, one about which there is much conflict of opinion. Browne on Statute of Frauds, page 239, says: "In certain cases, also, though they (crops, &c.,) are actually growing in land, they may never have any character of realty themselves; as for instance, if the title to them and the title to the land were originally and have remained distinct. A familiar case of this is found in nursery trees; the nursery man merely *using* the land for the purpose of nourishing his trees, the interest in the trees may be considered as separate from the realty, and they may well be denominated personal chattels, for the wrongful taking and conversion of which, the owner may maintain an action *de bonis asportatis*." In *Smith* v. *Surnam*, 9 Barn. & Cres., 561, the defendant had agreed to purchase of the plaintiff a quantity of timber, (most of which was then standing,) at a certain price per foot. The court held this not to be an interest in land within the meaning of the statute of frauds.

Sainsbury v. *Matthews*, 4 Mees. & Wels., 343, was a contract to sell the potatoes then growing on a certain tract of land at two shillings *per sack*, the plaintiff to have them at digging time and to dig them. Held not to be within the statute of frauds.

In *Smith* v. *Bryan*, 5 Maryland Rep., 141, the court say: "The principle to be gathered from a majority of the cases seems to be this, that where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee under a special license to enter for that purpose, it is still, in contemplation of the parties, evidently and substantially a sale of goods only."

In *Bishop* v. *Bishop*, 1 Kernan's (N. Y.) Rep., 123, it was held that poles, used necessarily in cultivating hops, which had been taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising, were a part of the real estate.

Gibbs, C. J., in *Lee* v. *Risdon*, 7 Taunton, 191, said, that trees in a nursery ground are a part of the freehold until severed.

In a late case in New York the question was very fully discussed. The facts of

JONATHAN CLARK, Plaintiff in Error, *v.* LEVI ROBERTS, Defendant in Error.

ERROR TO MONTGOMERY.

If the affidavit upon which an attachment is issued, does not comply with the requisitions of the statute, all the proceedings under it are void, and the attachment ought to be quashed.

THIS suit was originally brought by attachment, before a justice of the peace in Madison county, sued out by Roberts against Clark upon the following affidavit, viz.:

State of Illinois, Madison county:

Levi Roberts being duly sworn, saith, that Jonathan Clark

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that case were as follows: A sculptor placed in the grounds in front of his house, on a base three feet high, a statue of Washington, weighing, with its pedestal which was cut from the same block of stone, about three tons. The base rested on a permanent artificial mound, raised for that purpose. The statue was not fastened to the base, nor was the latter affixed to the foundation upon which it rested: *Held*, that the statue was a part of the realty. This decision was placed principally on the intention of the person erecting the statue. Parker, J., who delivered the opinion of the majority of the court, said: "If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was, that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands." *Snedeker* v. *Warring*, 2 Kernan's Rep., 170.

In *Palmer* v. *Forbes et al.*, 23 Ill., 301, which was a contest between execution creditors and mortgagees of the railroad, and in which the question arose as to what was realty, Caton, C. J., said, "We are of opinion that the rolling stock, rails, ties, chairs, spikes, and all other material brought upon the ground of the company incumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and incumbered by the mortgage as such; but fuel, oil, and the like, which are designed for consumption in the use, and which may be sold and carried away, and used as well for other purposes as in the operation of the road, and when taken away have no distinguishing marks to show that they were designed for railroad uses, can not, we think, with any propriety, be treated or considered as anything but personal property, and subject to, and governed by the law applicable to such property."

Brick, as soon as they are placed in a wall, become attached to the freehold, and if they are removed from the wall, unless for the purpose of being replaced by better material by the person who put them there, the proprietor of the soil is the owner of the brick. *Moore* v. *Cunningham*, 23 Ill., 328.

Hewn timbers intended for a granary, fence posts, &c., unattached to the soil, though on the land, are not appurtenances and do not pass by deed. *Cook* v. *Whiting*, 16 Ill., 480.

See also *Claflin* v. *Carpenter*, 4 Metcalf Rep., 580. *Safford* v. *Annis*, 7 Maine Rep., 168. *Cutler* v. *Pope*, 13 id., 377. *Bostwick* v. *Leach*, 3 Day, 476. *Green* v. *Armstrong*, 1 Denio, 550. *Westbrook* v. *Eager*, 1 Harr., (N. J.) 81.