

1854.

Fuller
v.
Richmond.

troyed, the loss must fall upon the purchaser, when, at the time of its destruction, the court would have compelled the specific execution of the agreement in his favor; because that right must be mutual, and the seller must have a right to say that as he could have compelled the specific performance of the agreement, the property was that of the purchaser at the time of the destruction, and he must bear the loss. It is true that the application of this doctrine may occasionally produce an anomalous state of things, as where the property is destroyed and the purchaser, as in such a case he would, is endeavouring to repudiate the contract. The seller under such circumstances, in order to throw the loss upon the purchaser, must shew that the article was of peculiar value to him, he denying it, and the fact perhaps depending upon personal reasons best known to himself; and yet it seems to me that the principal must apply. Thus in *Buxton v. Lister (a)*, where specific performance of an agreement relating to chattels was enforced, owing to the special circumstances of the case, if the property in question had been destroyed and the seller had been endeavouring to obtain payment of the stipulated price, he must have shewn, what, under the actual circumstances of the case the purchaser was endeavoring to shew, that the property possessed a peculiar value for the purchaser; although, of course, he would have denied it, and the proof of a matter perhaps personal to the purchaser would have been very difficult on the part of the seller. It seems to me that in the present case Mr. *Fuller* would have been entitled to a decree for the specific delivery of the logs, paying what remained due of the purchase money to *Kedmond*, so far as might have been necessary for the satisfaction of his claim, and the residue to *Richmond* and *Carl*; and that, consequently, this amount being deducted from the fund in court, the

Judgment.

(a) 3 Atk. 383.