good, unless it be for the benefit of one of the parties to the submission, and the *onus* of shewing that is thrown on the party seeking to enforce the award; but if the stranger be the authorized agent of the party, the award is good, and see Hare v. Fleay, 11 C. B. 472. Where all matters in difference are referred, one party cannot, after an award made in favour of the other, set off a claim which he has neglected to bring before the arbitrator, Smith v. Johnson, 15 East, 213, nor can he afterwards sue upon a claim fairly within the reference, which he has omitted to bring before the arbitrators as a matter of difference, for where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case, Dunn v. Murray, 9 B. & C. 780. And so where arbitrators omitted to give damages upon a protested bill of exchange—giving only the prin-
628 cipal and *interest—it was held that the damages could not be recovered in a subsequent action, Kenner v. Kennedy, 4 H. & J. 240. It is held, however, that the original contract between parties submitting to arbitration is not destroyed except so far as the award pursues and conforms to the submission, and hence the award is not evidence upon a count on that contract; and it seems that if part only of a disputed matter of contract is submitted and awarded on, the party may comply with the award, without complying with all the terms of the original contract, Walsh v. Gilmor, 3 H. & J. 383. But in general, in this country, it is held that the contract is merged by a good award, whether the submission be by bond or by parol; but a distinction is taken between a submission of matters in controversy between the parties to arbitrators who are to decide them, and a reference of collateral, incidental matter of calculation or appraisement, or the submission of a particular question, constituting only a link, so to speak, in the controversy, and not of itself sufficient to determine it, when the reference and ascertainment of such a matter do not merge the original contract, and are admissible under it as an admission of the party, Randall v. Glenn, 2 Gill, 430; which was a case of a mortgage to secure such sum, &c., and containing a reference to A. and B. to ascertain the amount of advances to be secured, upon which an award was made ascertaining the sum. General releases to be executed by the parties to each other are sometimes awarded, and an award of mutual releases in general terms is sufficient, Toby v. Lovibond, 5 C. B. 770. The advantage of such an award is, that it is some evidence that the arbitrator has decided on all matters of difference between the parties, see Wharton v. King, 2 B. & Ad. 518; but where judgment is entered upon the award, as generally with us, it is unusual and unnecessary. An award of mutual releases to the time of award made, it seems, is bad, as exceeding the submission, but an award of mutual releases *generally* relates only to the time of submission, Marks v. Marriott, 1 Ld. Raym. 114. With regard to the costs of the arbitration, the better opinion would appear to be that in strictness the arbitrator cannot determine the amount of his own fee, unless such power is reserved to him in the submission, Garritee v. Carter, 16 Md. 309; nor take it out of a fund in his hands as receiver, Roberts v. Eberhardt, 3 C. B. N. S. 482; but the practice is generally for him to fix it, and he may detain, and the practice is for him to detain, the award, till it is paid him, which is, in general, to be done by the party taking up the