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Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461	7.166, 7.167
Adam v Ward [1917] AC 309	9.253
Adams v Cape Industries Plc [1990] Ch 433.....	7.038
Adams v Lindsell (1818) 1 B & Ald 681, 106 ER 250	2.053, 2.054, 5.050
Adamson v Jarvis (1827) 4 Bing 66, 130 ER 693	6.070
Advent Systems Ltd v Unisys Corp 925 F 2d 670 (3rd Cir 1991)	3.012
Aktieselskabet Dansk Skibsfinansiering v Brothers (2000) 3 HKCFAR 70.....	2.261, 2.262
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All Link International Ltd v Ha Kai Cheong [2005] 3 HKLRD 65.....	8.048, 9.044
Allcard v Skinner (1887) LR 36 Ch D 145.....	2.286
Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656.....	7.099
Allen v Hyatt (1914) 30 TLR 444.....	7.179
Allianz Insurance Co Egypt v Aigaion Insurance Co SA [2009] 2 All ER (Comm) 745	2.038
Alidem Mae G v Kwong Si Lin (HCLA 4/2004, [2004] HKEC 693).....	10.214
Allied Success Creation Ltd v Cheung Hon Kuen [2015] 3 HKC 202	6.113
Aldridge v Johnson (1857) 7 El & Bl 885, 119 ER 1476	3.024
Aluminum Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676	3.147, 3.159
Always Win Ltd v Autofit Ltd [1995] 2 HKC 48	2.205, 2.222, 2.223
Amco Enterprises Pty Ltd v Wade [1968] Qd R 445.....	3.014
Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (1973) 133 CLR 288	2.357
Anchor Line (Henderson Bros) Ltd, Re [1937] Ch 1	3.136
Andrew Bros (Bournemouth) Ltd v Singer & Co Ltd [1934] 1 KB 17.....	2.210
Angel v Jay [1911] 1 KB 666	2.143
Antwerp Diamond Bank NV v Paymaster [2010] 5 HKLRD 509	4.126
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Archer v Hong Kong Channel Ltd (HCLA 12/1996, [1996] HKLY 730)	10.290
Arcos Ltd v EA Ronaasen & Son [1933] AC 470	3.068, 3.069
Armagas Ltd v Mundogas SA [1986] 2 All ER 385	6.113
Arthur JS Hall & Co v Simons [2002] 1 AC 615	9.027
Ashington Piggeries Ltd v Christopher Hill Ltd [1972] AC 441	3.069, 3.091
Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd [1973] 1 WLR 828	2.333, 2.334
Asia Property Agency Co Ltd v Cheung Wun Yee Jamie (HCA 298/2013, [2016] HKEC 794)	6.074, 6.082
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