be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness, irrespective of whether parties other than the one taking the deposition were present or represented at the taking of the deposition or had due notice thereof.[4]

4. All or any part of a deposition may be used, either as substantive or original evidence or for the purpose of contradicting or impeaching the testimony of the deponent as a witness, but Rule 26(d)(4) provides:

> "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."[5]

5. Depositions may be used upon the hearing of a motion or an interlocutory proceeding, if appropriate, as well as at the trial. In this respect it should be noted that Rule 56(c) expressly provides for the use of depositions in the proceedings under a motion for summary judgment; and Rule 43(e) provides:

> "When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or *depositions*."

Should depositions taken in prior actions be admissible where the issues are substantially the same—but the parties are different?[6] The guidelines under which the deposition would be so admissible—as-

where party had opportunity to examine witness).

[4] *Cf.* Lebeck v. William A. Jarvis, Inc. (CA3d, 1957) 250 F2d 285, reversing in part (ED Pa 1956) 145 F Supp 706, 23 FR Serv 26d.41, Case 1.

[5] See ¶26.31, *infra*.

[6] In Rivera v. American Export Lines, Inc. (SD NY 1952) 17 FR Serv 26d.62, Case 1, 13 FRD 27, Judge Leibell in a sound decision permitted the use of depositions taken in a prior action brought by the now co-defendant A against the now co-defendant B. The depositions were admissible in the subsequent suit on behalf of A and the plaintiff, X. Judge Leibell's ruling was approved by the court of appeals in Hellenic Lines, Ltd. v. The Exmouth (CA2d, 1958) 253 F2d 473, 478.

Accord: Insul-Wool Insulation Corp. v. Home Insulation, Inc. (CA 10th, 1949) 176 F2d 502, 13 FR Serv 26d.62, Case 1.

See also ¶26.33, *infra*.

suming relevancy and materiality—were summarized by Judge Dawson in *Hertz v. Graham.*[7]

> "Where depositions and testimony from a prior trial are sought to be used at a subsequent trial *and the issues are substantially the same,* and the interest of the objecting party in the prior action was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end." (emphasis added).

The court, of course, should be careful to eliminate inapplicable or prejudicial material from the prior depositions.

[7] (SD NY 1958) 1 FR Serv2d 26d.62, Case 2, 23 FRD 17. Judge Dawson's pre-trial ruling was not disturbed on review (CA2d, 1961) 292 F2d 443, 447, 4 FR Serv2d 26d.44, Case 1. And see ¶26.30, *infra;* Scotti v. National Airlines, Inc. (SD NY 1954) 19 FR Serv 26d.62, Case 1, 15 FRD 502 (plaintiff in action arising out of an airplane crash may introduce depositions taken in other actions arising out of same occurrence, even though an additional defendant was present in the other actions).

Contra: Wolf v. United Air Lines, Inc. (MD Pa 1951) 16 FR Serv 26d.62, Case 1, 12 FRD 1.

Cf. First National Bank in Greenwich v. National Airlines, Inc. (SD NY 1958) 1 FR Serv2d 26d.62, Case 1, 22 FRD 46, where, as distinguished from the prior action, different parties and an additional issue were present. Judge Herlands endorsed the approach adopted in Rivera v. American Export Lines, Inc., *supra,* but found that if the depositions in the prior action were admitted, this would "create more problems than it would solve".

See also Batelli v. Kagan and Gaines Co., Inc. (CA9th, 1956) 236 F2d 167, 23 FR Serv 26d.62, Case 1 (admissibility of deposition on prior action does not ". . . require a dismissal of the prior action.").

Cf. Tobacco & Allied Stocks, Inc. v. Transamerica Corp. (D Del 1954) 20 FR Serv 26d.62, Case 1, 16 FRD 545; Moultrie National Bank v. Travelers Indemnity Co. (CA5th, 1960) 275 F2d 903 (prior case involving substantially same parties and same issues, deposition admitted).

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