Issue Preclusion: Common law doctrine; subtle with many exceptions. Be open to the fact that you have to be creative because it is fact specific.

1. If in an earlier case an issue was actually litigated and decided (fairly and fully) and essential to the determination of earlier result prohibits the re-litigation of an issue by someone who was a party (or in privity with a party) in the earlier litigation
2. Same Issue: Although arguments may be different, issue preclusion still applies (Ex. The issue of D’s negligence in one case decided against P will not be relitigated in a subsequent case by P against D even if you have a different argument about why D was negligent).
3. Has to be actually litigated and decided
4. Trial-yes
5. Direct verdict-yes
6. Summary judgment-yes
7. Default judgment-No
8. Consent Judgment- Settlement between P and D; Courts generally say no; whether it has preclusive effects is determined by the parties
9. Admissions-No
10. Essential to the judgment

Example:

P sues D for negligence;

Jury finds D negligent but also finds P contributorily negligent;

Judgment for D;

Finding of D’s negligence was not essential.

Why the essentiality requirement? (1) D may not have been properly motivated to fully litigate a nonessential issue. (2) The finder of fact may not have taken this issue seriously. (3) The D can’t appeal the finding of his negligence because he won!

1. Last in Time Rule: (See slide for hypo)

* A suit brought up an issue. Same issue re-litigated by same parties in another suit and decided differently. Which case has issue preclusive effect?
* Last judgment is the one that has issue preclusive effect because it incentivizes parties to bring up issue preclusion.
* What if party did bring up issue preclusion, but it was wrongly rejected?
  + A finding that 1st case did not have issue preclusive effect itself has issue preclusive effect; even if it is wrongly decided and an unconstitutional determination. It had issue preclusive effect🡪 should have been appealed. (In the interest of finality).

1. Hypo: P brings a quasi in rem action against D in NY state court, where D has $100 of assets. P’s action is for 100K due to D’s negligence. D makes a limited appearance and there is a judgment for P (D WAS NEGLIGENT). P then brings an in personam action concerning D’s negligence in CA State Court. Is D issue precluded to re-litigate his negligence?

* The nature of limited appearances is that one can litigate and limiting to the value of the property. There should not be issue preclusive effect (Issue preclusion is determined by FIRST jurisdiction—Full Faith and Credit—the law of first jurisdiction determines preclusive effect). MSG: Some jurisdictions argue that limited appearances do not have issue preclusive effect. Argument for the other side? Perfect overlap of issue/parties etc. Inefficient to relitigate. If you believe in limited appearance it can’t have preclusive effect.

1. Exceptions to Issue Preclusion at Common Law:

Restatement 2d of Judgments

1. Ex. D’s acquitted of battery in connection with resisting arrest; govt sues D civilly for battery to officer; is govt issue precluded?

* No; 1st Suit: Beyond a reasonable doubt; 2nd Suit: Preponderance of evidence.

1. Different standards of proof can mean no issue preclusion.
2. Ex. D is convicted of battery in connection w| resisting arrest. Govt sues D civilly for battery for damages to officer. Is D issue precluded?

* Criminal conviction can have issue preclusive effect in a subsequent law suit. An acquittal cannot be issue preclusive because the acquittal was on a basis on a harder standard.[ (4) of Restatement. ]

1. See slides for Illinois hypo. Because burden has shifted🡪 No issue preclusion
2. See slides for hypo on property damage in small claims court etc. 🡪 Is D issue precluded? No—large procedural different between the proceedings. [(3) of Restatement & (1) of Restatement].
3. Hypo:

P sues D for negligence

P was also negligent.

Held P is barred due to contributory negligence (comparative fault rejected)

P and D get into another accident

P sues D for negligence

P was also negligent

Is p precluded to re-litigated whether P is barred by contributory negligence or comparative fault applies? New facts, new accident🡪 Pure issues of law do not have issue preclusive effect. [(2) of Restatement: Issue of law and no factual overlap—pure issue of law]. \*P could have invoked *stare decisis* (precedent) but it is not as strict as issue preclusion. [(5) of Restatment: lack of adequate anticipation]

Why? Inequity for the defendant. Although efficient to preclude re-litigation of issues, it is not as expensive to relitigate pure issues of law as opposed to issues of fact.

1. Hypo: African-Americans as a class sue to have a park desegregated. It is before Brown and they lose. After Brown, they sue to have the park desegregated again. Issue precluded?

Not a pure question of law but, large effects on third parties and there has been a change in legal context, want for uniformity. Issue preclusion overridden. [(5) of Rest.: clear and convincing need for a new determination…etc. ]

1. See slides for hypo on Business A & B and widgets. 🡪 large inequity; not a pure issue of law; [(2) of Rest.: issue is one of law . . . (b) new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable application of laws . . . ]

***U.S. v. Moser:***

Facts. Moser was in the Naval Academy during the Civil War. He sued the government for pay he was supposed to receive under a statute that contended per retirement the retiree should get 3/4 sea pay of the next rank. The U.S. contended that serving at the Naval Academy did not count as time served during the Civil War under the statute.

Determined that he served in Civil War. In Fourth suit by Moser, SCOTUS determines that there is issue preclusion. Is this a pure question of law? No. Mixed question of law and fact? Yes. Tied to a particular set of concrete facts.

* Mixed questions of law and fact do have issue preclusive effect because most issue determined are mixed.
* (2) of Rest.: Why isn’t this like the widget example? In another suit Jasper loses on same issue. He gets a lower pension. There is inequitable administrative of law.
* But inequity does not have the same economic consequences as in widget example. Also Moser has relied on the pension🡪 protects his reliance interest.
* For the exam, think creatively for issue preclusion! Things are subtle.

**Privity: A determination of a final issue is binding upon those in privity with a party in earlier litigation (conclusory term).**

1. Guardian/Ward: a guardian loses a suit on behalf of ward that will be binding on ward.
2. Trustee/Beneficiary
3. Executor/Decedent

**Example:** P sues D to determine whether P has an easement to D’s property. P wins. D sells the property to X. X finds P on his property and sues P in ejectment. P defends on the ground of the easement. Is X precluded? Yes, when D sold the property he sold right of easement with it. He is a successor in interest.

**Example:** P sues close corp. majority shareholder controls litigation. Corp loses. In litigation between P and majority stockholder, shareholder can be issue precluded. Shareholder controlled the litigation and there is a strong overlap of interest between majority shareholder and corp.

**Example**: P as guardian of X sues D for negligence in an accident in which P, X and D was involved. X loses (D not negligent) P then sues D in individual capacity for negligence; Issue precluded? Even assuming it is the same issue, P is not issue precluded because when suing on behalf of child she has to look at the best interest of the child and not her own and she will give evidence or fail to do so to best represent interest of her child. She should have another bite at the apple to represent her own interest.

* Husbands and wives are not in privity. Privity when there is duty to another person.

**Example:** P sues D for dam. Dam will flood X property. P wins. X is aware of litigation but does not intervene. X then sues D to have dam removed. Is X issue precluded? No privity; D doesn’t have an obligation to represent X’s interest. No privity but, a “cutting edge exception” to rule that you can’t be bound unless you are a party or in privity with a party in earlier litigation.

**Mutuality**

Used to be the case that if you were invoking issue preclusion, you had to have been a praty or in privity with a party in the earlier suit. You would have been bound if the case had gone otherwise. No longer the rule in most jurisdictions that there is a mutuality requirement.

The person who is bound has to be a party or in privity with a party to be bound. What about the person taking advantage of issue preclusion, do they have to have been a party? Old doctrine: Yes. Now: Moving toward non-mutual issue preclusion .