חזקת מרא קמא (The Power of Original Ownership) - What's the logic?

Of the many principles afforded by the Gemara about how to resolve property disputes, perhaps the most surprising is what's known as חזקת מרא קמא, presuming that the property still belongs to the person who originally owned it even if it is no longer physically there! What is the logic behind this principle? What can it teach us about presumptions about the reality? About ownership? About dealing with uncertainty?

1. בבא מציעא ק.

מַתְנִי׳ הַמַּחְלִיף פָּרָה בַּחֲמוֹר וְיָלְדָה, וְכֵן הַמּוֹכֵר שִׁפְחָתוֹ וְיָלְדָה, זֶה אוֹמֵר: עַד שֶׁלֹּא מָכַרְתִּי, וְזֶה אוֹמֵר: מִשֶּׁלָּקַחְתִּי – יַחְלוֹקוּ…

MISHNA: With regard to **one who exchanges a cow for a donkey,** such that by virtue of the cow owner's act of acquisition on the donkey, the donkey's erstwhile owner simultaneously acquires the cow, wherever it happens to be located, **and** afterward the cow is found to have **calved; and similarly,** with regard to **one who sells his** Canaanite **maidservant,** with the acquisition effected by the buyer giving him money, **and** afterward **she** is found to have **given birth** to a child, who will be a slave belonging to his mother's master, at times it is uncertain whether the offspring was born before or after the transaction. If **this** seller **says:** The birth occurred **before I sold** the cow or maidservant, and so the offspring belongs to me, **and that** buyer **says:** The birth occurred **after I purchased** the cow or maidservant, and so the offspring belongs to me, **they divide** the value of the offspring between them…

גְּמָ׳ אַמַּאי יַחְלוֹקוּ? וְלִיחְזֵי בִּרְשׁוּת דְּמַאן קָיְימָא, וְלֶהֱוֵי אִידַּךְ הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה! אָמַר רַב חִיָּיא בַּר אָבִין אָמַר שְׁמוּאֵל: בְּעוֹמֶדֶת בַּאֲגַם. שִׁפְחָה נָמֵי דְּקָיְימָא בְּסִימְטָא. וְנוֹקְמַהּ אַחֲזָקָה דְּמָרַהּ קַמָּא, וְלִיהֱוֵי אִידַּךְ הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה! הָא מַנִּי – סומְכוס הִיא, דְּאָמַר: מָמוֹן הַמּוּטָּל בְּסָפֵק חוֹלְקִין בְּלֹא שְׁבוּעָה.

GEMARA: The Gemara asks: In the first clause of the mishna, **why do** the two parties **divide** the value of the offspring between them? Instead, **let us see in whose domain** the offspring currently **is.** That person has presumptive ownership of the offspring, **and the other** person **will be** considered to be **the one who is exacting property from another,** and accordingly, the burden of **proof rests upon him.** Since he cannot prove his claim, he is not entitled to take the offspring.

The Gemara answers: **Rabbi Ḥiyya bar Avin says** that **Shmuel says:** The mishna is referring to a case **where** the calf **is standing in the marsh,** i.e., it is in the domain of neither the buyer nor the seller, and so neither one has presumptive ownership. And with regard to the **maidservant also,** this is a case **where** the child **is** found **in an alley** which does not belong to either the buyer or the seller.

The Gemara asks further: **But** even if the offspring is not in either party's domain, **establish** it to be **in the presumptive ownership of** its **original owner,** i.e., the seller, as he certainly owned the offspring when it was still a fetus. **And** so **the other** person **will be** considered to be **the one who is exacting property from another,** and accordingly, **the burden of proof rests upon him.** Since he cannot prove his claim, he is not entitled to take the offspring.

The Gemara answers: In accordance with **whose** opinion **is** the ruling of **this** mishna, that the parties divide the value of the offspring equally? It **is** in accordance with the opinion of **Sumakhos, who says:** When there is **property of uncertain ownership,** the parties **divide** it equally **without** the need to take **an oath.**

2. יבמות לא.-:

מִידֵּי דְּהָווֹ אַנְכְסֵי דְּבַר שָׁטְיָא. דְּבַר שָׁטְיָא זַבִּין נְכְסֵי. אֲתוֹ בֵּי תְּרֵי וְאָמְרִי: כְּשֶׁהוּא חָלִים זַבִּין, וְאָתוּ בֵּי תְּרֵי וַאֲמַרוּ: כְּשֶׁהוּא שׁוֹטֶה זַבִּין. וְאָמַר רַב אָשֵׁי: אוֹקֵי תְּרֵי לַהֲדֵי תְּרֵי,

The Gemara cites a proof for this: This is **just as it is in** the case **concerning the property of** a man named **Bar Shatya,** who was referred to by this name because he would have periods of psychosis (שטות). The case is as follows: **Bar Shatya sold property. Two** witnesses **came** forward **and said that he sold** it **when** he was **mentally cogent** and therefore the sale was valid. **And two** others **came** forward **and said that he sold** it **when** he was **experiencing psychosis,** and so the sale was void. **Rav Ashi said** with regard to this matter: **Place two** witnesses **against two** witnesses and let the testimonies cancel each other out. As there is no valid testimony to rely on,

וְאַרְעָא אוֹקְמַהּ בְּחֶזְקַת בַּר שָׁטְיָא!

let the land remain in the possession of Bar Shatya. Since no substantiated proof was brought forth, the land remains in the hands of its current possessor. As such, the same should be true with regard to cases of betrothal and divorce whose status is uncertain; the woman should remain in her former presumptive status.

3. קונטרוס הספקות א:ה

וראוי להתבונן חזקת מ"ק בממונא מנלן דאזלינן בתרה בשלמא חזקת ממון מהסברא שמיע להו כדאמרי' בריש הפרה סברא הוא וכו'. אבל חזקת מ"ק שאין שום אחד מוחזק בו שיד שניהן שוה בו מנלן דלוקמה בחזקת מ"ק ועל אידך שדינן לאתויי ראי',

And it is worth examining whence status quo ante in monetary matters comes from. For holding possessions (as a way of establishing ownership) is logical. But assuming the ownership of the original owner in a situation in which neither claimant is physically in possession and the two claimants' hold on it is equal, where do we get the idea that we should establish ownership based on the original owner and make the other claimant bring evidence to argue the contrary?

ואפשר לומר דחזקת מ"ק בממון מכח חזקה קמייתא דאיסורא הוא דאתיא. וכמו דבכל ס' איסורא מעמידן הדבר בחזקת מה שהי' מתחילה קודם שנולד הספק בין להתירא בין לאיסורא כדיליף בפ"ק דחולין…וחזקת מ"ק מעין חזקת ממון ממש הוא דכמו דבחזקת ממון הסברא נותנת שאין להוציא הימנו בלי ראי'. ה"נ אין להוציא מחזקת מ"ק בלי ראי, דכל שידוע שהיתה שלו מתחילה אך שהוא עומד ברה"ר או באגם בי גזא דבעלים איתא. וחשבינן לי' כאלו עדיין הוא מוחזק דדל ספקא מהכא תשאר ביד הבעלים הראשונים:

And it is possible to say that the notion of original ownership establishing ownership in contested cases comes from the maintenance of presumed status in the realm of laws related to *issura* (=what's forbidden or permitted - e.g., marital status, kashrut, etc.). And just as in cases of uncertainty regarding issur, we maintain that the item/person retains the presumptions that were true of it/her/him before the uncertainty arose - whether this leads to permission or prohibition…[Alternatively] presuming the ownership of the original owner might be similar to the ownership that is established by physically having an item on one's property/in hand, that similar to that situation, it makes sense that a person trying to remove the item from that person's possession should have to bring evidence. Once we know that something belonged to a person originally, even if it is now in the public thoroughfare or the marsh, it's still considered to be within the property of the original owner. And we consider it as though that original owner is still "holding" it…

4. מהרש"א חידושי הלכות ב"מ ק.

ולא אמרו חזקת מרא קמא אלא כי הכא שאין א' מהם מוחזק כגון בעומדת באגם ובסימטא דאמרי' הכא לרבנן דאית להו בעלמא דחזקת ממון מהני אית לן למימר דה"נ מהני חזקת מרא קמא להעמיד הממון בחזקתו והוה ליה כאילו הוא מוחזק ממש בממון

And they only invoked the ownership of the original owner in a situation like this one, where neither of the two claimants is holding the item (physically or on their property), as in the case of standing in a marsh or a side street. For here we say that for rabanan who generally hold that holding an item (physically or on one's property) establishes ownership, likewise original ownership establishes that the item is still in the original owner's possession. And it's as though the original owner is literally holding it.

5. כתובות עו.

אָמַר רַב יְהוּדָה אָמַר שְׁמוּאֵל: הַמַּחֲלִיף פָּרָה בַּחֲמוֹר, וּמָשַׁךְ בַּעַל הַחֲמוֹר אֶת הַפָּרָה, וְלֹא הִסְפִּיק בַּעַל הַפָּרָה לִמְשׁוֹךְ אֶת הַחֲמוֹר עַד שֶׁמֵּת הַחֲמוֹר — עַל בַּעַל הַחֲמוֹר לְהָבִיא רְאָיָה שֶׁהָיָה חֲמוֹרוֹ קַיָּים בִּשְׁעַת מְשִׁיכַת פָּרָה.

§ Rav Yehuda said that Shmuel said: With regard to one who exchanges a cow for a donkey, where the two animals involved in this transaction are not in the same location, one of the parties acquires one of the animals by means of pulling it, which transfers the other animal to the other party through acquisition by means of the exchange. And in this case the owner of the donkey pulled the cow, but before the owner of the cow could pull the donkey in turn, the donkey died. The owner of the cow claimed that the donkey died before the other one pulled the cow, which means the exchange transaction never took effect. In that case, the owner of the donkey must bring proof that his donkey was alive at the time when the cow was pulled. If he is unable to bring proof to this effect, the owner of the cow retains his animal.

6. תוספות על בעל החמור להביא ראיה -

אע"פ שהוא מוחזק וחזקת הגוף נמי מסייע ליה והוה לן לאוקמי החמור בחזקת שהיה קיים אלא טעמא דשמואל דמוקמינן לפרה בחזקת מרה קמא

And even though the person who bought the cow is physically holding it on his property, and also the donkey has a presumptive physical status of being alive, nonetheless it seems that Shmuel holds that we establish the cow as being in the possession of its original owner.