The Nature of Ownership in Jewish Law

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Introduction

Halachah has two broad categories of property: land, and *metaltelin* (movable property). These two categories are necessary because many laws, such as how to perform an acquisition or how to settle a property dispute, differ based on the property type.

Many of these distinctions simply reflect physical differences between stationary property (land) and movable property (*metaltelin*). For example, because land has a definitive location, you can unambiguously refer to it in writing. However, you cannot unambiguously refer to *metaltelin* in writing (e.g., a "water bottle" can refer to any water bottle, and it has no unique location by which it can be specified).[1] Therefore, a contract can transfer ownership of land but not *metaltelin*.[2]

However, Rambam distinguishes between land and *metaltelin* in ways that do not have any obvious physical explanations. Thus, we will explore whether Rambam believes that the nature of *ownership* itself differs between land and *metaltelin*.

Method of Acquisition

Halachah provides numerous mechanisms to perform a transaction (*kinyan*). At the outset, we might expect that land and *metaltelin* accomplish a transaction in a similar way. We expect that:

1) By default, any *kinyan* (method of transaction) that works for one property type should work for the other. Indeed, purchasing (*kinyan kesef*)[3] and trading (e.g., *chalifin*, *sudar*) work for both land and *metaltelin*.

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1 חידושי הריטב"א מסכת בבא בתרא דף עו עמוד א:
דהא מטלטלי לאו בני שטרא נינהו לפי שאי אפשר לסיימם כמו קרקע במצריו או עבד בשמו.

2 There are some *mitaltelin* that can be unambiguously named (e.g., the Hope Diamond, the Rosetta Stone). *Kovetz Shiurim* (*Bava Kamma* 84) posits that if *mitaltelin can* be unambiguously specified, then a contract might be effective.

3 We rule like Rav Yochanan (*Bava Metzia* 47b), that on a Biblical level, *kesef* works for *mitaltelin*, but there is a rabbinic rule to use alternative methods. Reish Lakish disagrees with Rav Yochanan and rules that *kinyan kesef* does not work for

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2) Wherever halachah restricts a *kinyan* to a single property type (i.e., land or *metaltelin*), there is a logical explanation.[4] For example, we cannot transfer *metaltelin* through a contract since we cannot specify

mitaltelin. For Reish Lakish, *kinyan kesef* is an instance where a *kinyan* for one property type *does not* work for the other. However, this article will focus on the opinion of Rav Yochanan.

4 One might question this assumption as follows: I seem to be assuming that *kinyanim* can be derived from *sevarah* (reasoning); I assume that if a certain type of *kinyan can* logically exist, then it *should* exist. However, the *kinyanim* are generally inferred from either Biblical sources (see *Kiddushin* 26a) or a *Halachah LeMoshe MiSinai (*see Rava's statement in *Kiddushin* 9a). So why would one assume that if a certain type of *kinyan* exists for one property type, it should exist for another? Perhaps there is no source (Biblical or traditional) for the other property type.
The first answer is that *kinyanim* can be derived from *sevarah* in addition to Biblical sources and tradition. If a *sevarah does* exist for one type of *kinyan*, there is no reason to reject it. For example, Ritva in *Bava Metzia* 47b explains that Rav Yochanan uses *sevarah* to determine *kinyan kesef* works for *mitaltelin*, not a Biblical source or tradition.
Therefore, we should assume that if halachah restricts a *kinyan* to a single property type (i.e. land or *mitaltelin*), there is an explanation, even if the method is initially derived from Biblical sources or tradition. For example, even though we use a Biblical source (Jeremiah 32:44) to learn that contracts can acquire land (*Kiddushin* 26a), Ritva and Ran still ask why contracts cannot be used to acquire *mitaltelin*. They answer that *mitaltelin* cannot be specified in writing; they do not simply say that it lacks any *pasuk*/tradition.
However, some Rishonim, like Rashba, are less comfortable using *sevarah* to derive *kinyanim*. For example, when Rashba asks why contracts cannot be used to acquire *mitaltelin*, Rashba initially bring up the explanations of Ritva and Ran—*mitaltelin* cannot be specified in writing—but rejects this answer and says that the real answer is that we simply do not have a Biblical source from which to learn it (*Rashba Bava Basra* 76a ד"ה "שטר בספינה").
But even for Rishonim that do not think *kinyanim* can be derived from *sevarah*, we can give a second answer. Even when laws are initially derived from Biblical sources or tradition, we might still expect the resulting system to have an understandable logic. In other works, *sevarah* can still be used to analyze the laws post-facto, even if *sevarah* cannot be used to derive the laws themselves. Therefore, if the Torah institutes *chazakah* by land, and we cannot extend this institution to *mitaltelin*, we can still ask the question after the fact: What is the Torah's inner logic that explains such a restriction?
While we do find certain halachos that lack an understandable inner logic (often called a "*gezeiras hakasuv*"), I believe that we should only assert this as a last resort, because I believe that in most cases 1) Halachos are purposeful, and 2) the reasoning is within the grasp of mankind. I believe this especially with monetary laws. Since monetary laws exist to facilitate peaceful interactions between people, I expect the reasoning of these laws to be within our grasp.

metaltelin in writing; we cannot transfer land through *hagbahah* (lifting) since land cannot be lifted.

One such restrictive *kinyan* is a *kinyan chazakah*. A *kinyan chazakah* is a method of acquiring something through interaction (a more precise definition is subject to debate and will be discussed further). This method only works to acquire land (*Kiddushin* 26a). For example, land can be acquired by adding a fence or locking the property's door.[5] However, we find no such method of transfer by *metaltelin*[6]—for example, you cannot acquire a sailboat by adding a sail. Why does *kinyan chazakah* work to acquire land but not *metaltelin*?

One approach is to actually view *chazakah* for land as being analogous

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5 תלמוד בבלי מסכת בבא בתרא דף נב עמוד ב:
אבל חזקה שאין עמה טענה, כגון נותן מתנה, והאחין שחלקו, והמחזיק בנכסי הגר, דלמקני בעלמא הוא, נעל, גדר, פרץ כל שהוא - הרי זו חזקה.

6 One might argue that we *do* find this method of transfer by *mitaltelin*—*shinui* (change) of a stolen object. If a thief stole an object, and then changed the object (made a *shinui*), the thief acquires the object (Rambam, *Gezeilah VeAveidah* 2:1). Even though the thief must still pay back the item's value, the item itself belongs to him. Therefore, we might argue that acquiring a stolen *mitaltelin* object through a *shinui* is comparable to a *chazakah* on land.
However, the methods themselves are different. A *chazakah* is a way of acquiring this very object by modifying it. In contrast, a *shinui* is a way of destroying the old object and then acquiring what emerges.
This can be seen from the following difference: Rambam says that a *shinui* only accomplishes a *kinyan* if the change is irreversible (Rambam, *Gezeilah VeAveidah* 2:10). For example, if someone stole sand and turned it into a brick, this is not a valid *kinyan*, since the change can be reversed by smashing the brick (Rambam, *Gezeilah VeAveidah* 2:11). However, a *chazakah* on land can be accomplished even with a reversible change. For example, locking the property's door is a *chazakah* (Rambam, *Mechirah* 1:8), even though the door can be unlocked.
A reversible change suffices for a *chazakah* because *chazakah* is a way to acquire this very object. But a *shinui* requires an irreversible change because a *shinui* gives one ownership of a newly created object.

to movement for *metaltelin* (for example, *Rabbeinu Yonah*[7] makes this comparison). There are three ways to acquire *metaltelin* through movement.[8]

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7 עליות דרבינו יונה מסכת בבא בתרא דף נב עמוד ב:
חזקה בקרקעות במקום משיכה במטלטלין.
In context, Rabbeinu Yonah is discussing the following issue: *Kiddushin* 26a says that if a *shtar* is used to effect a transaction, we assume that the sale is only finalized once the money is paid unless explicitly stated otherwise. Rabbeinu Yonah believes that if a *chazakah* is used, we assume the sale is finalized even before the money is paid. He explains that this is because "חזקה בקרקעות במקום משיכה במטלטלין". Just as *mitaltelin* sales are finalized with *meshichah* (pulling), land sales are finalized with a *chazakah*.
One might posit an alternative explanation of Rabbeinu Yonah. *Bava Metzia* 47b explains that Rav Yochanan believes that on a Biblical level, the *mitaltelin* transactions occurs when the seller picks up the money. However, the *Rabanan* instituted a rule that the transaction only occurs when the purchaser does *meshichah*. The reason is to protect the buyer from cases such as *nisrifu chitecha be'aliyah*. *Nisrifu chitecha be'aliyah* is a case where Reuven hands Shimon payment for wheat in Shimon's attic, but he does not yet collect the wheat. Then, Shimon's house catches fire. If the transaction was finalized through payment, then the wheat in Shimon's attic belongs to Reuven, and Shimon has no incentive to save it. But if the transaction is only finalized through *meshichah*, then the wheat still belongs to Shimon and Shimon is incentivized to save it.
Tosafos *"Nisrifu Chitecha Be'aliyah"* in *Bava Metzia* 47b asks: Why not require both *meshichah* and payment to finalize the transaction? Tosafos answer that it is to protect the seller's interest in the reverse case—Reuven collects wheat from Shimon before paying for it. If the wheat still belongs to Shimon, then Reuven will have no incentive to save it. Therefore, we always want the person in possession of the item to be the owner.
We might use this idea to explain Rabbeinu Yonah. Both *meshichah* and *chazakah* are forms of taking physical possession. Perhaps they both work even without payment because we want to incentivize protecting the property; we want to ensure that whoever possesses the entity is also the owner.
However, we can reject this explanation because there does not seem to be any concern for *nisrifu chitecha be'aliyah* by land. If there was such a concern, then we would expect *Rabanan* to have prohibited *kinyan kesef* by land just as they did by *mitaltelin*. But there is no such prohibition. Moreover, neither the Gemara nor Rabbeinu Yonah mentions this concern.

8 תלמוד בבלי מסכת בבא בתרא דף פו עמוד א:
תנן התם: נכסים שיש להן אחריות - נקנין בכסף ובשטר ובחזקה, ושאין להן אחריות - אין נקנין אלא במשיכה. בסורא מתנו לה להא שמעתא משמיה דרב חסדא, בפומבדיתא מתנו לה משמיה דרב כהנא, ואמרי לה משמיה דרבא: לא שנו אלא דברים שאין דרכן להגביה, אבל דברים שדרכן להגביה - בהגבהה אין, במשיכה לא.
תלמוד בבלי מסכת קידושין דף כה עמוד ב:
מתני'. בהמה גסה נקנית במסירה, והדקה - בהגבהה, דברי רבי מאיר ור' אליעזר; וחכ"א: בהמה דקה נקנית במשיכה .

1. Lightweight *metaltelin* can be acquired through *hagbahah* (lifting the object).
2. Heavier objects can be acquired through *meshichah* (pulling).
3. Animals that are too heavy to pull can be acquired through *mesirah* (leading the animal).

   In this perspective, a *chazakah* is the next step in this progression:
4. Since land cannot be lifted, pulled, or led, land is acquired through stationary engagement (e.g., sleeping on the land,[9] adding a fence).

These *kinyanim* form a hierarchy of physical engagement, and we require the most direct physical engagement the property allows. Therefore, *chazakah* by land is fundamentally similar to movement by *metaltelin*—the transaction is effected through physically engaging the item.[10]

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9 תלמוד בבלי מסכת בבא בתרא דף נג עמוד ב:
המציע מצעות בנכסי הגר - קנה.

10 One might raise a difficulty with this comparison. While *Kiddushin* 26a states that *chazakah* on land works on a Biblical level, some Amoraim believe that by *mitaltelin*, *hagbahah*, *meshichah,* and *mesirah* are only effective on a rabbinic level. *Bava Metzia* 47b records the following argument: When *mitaltelin* is exchanged for money, what effects the transaction? Does the transaction occur when the seller picks up the money, or when the buyer picks up the item? Everyone agrees that in practice, the transaction occurs when the buyer picks up the item. Reish Lakish believes this to be true on a Biblical level. Rav Yochanan believes that on a Biblical level, the transaction occurs when the seller picks up the money. However, in order to protect the buyer's interests, *Rabanan* instituted a rule that the transaction only occurs when the purchaser picks up the item (see *Bava Metzia* 47b for an explanation of this rule).

Therefore, according to Reish Lakish, who believes that *hagbahah*, *meshichah*, and *mesirah* work on a Biblical level, my comparison between *chazakah* by land and *hagbahah* by *mitaltelin* is sound. However, according to Rav Yochanan, how can I compare *chazakah*, which works on a Biblical level, to *hagbahah*, which only works on a rabbinic level?

The answer is that Rav Yochanan's position—that picking up the money effects the transaction—is limited to sales. By sales specifically, Rav Yochanan rules that the *kinyan* can only occur through *kesef*. However, many transactions lack a monetary component: gifts, trading objects (*chalifin*), and acquiring from *hefker* (unowned property). In these cases, since we are dealing solely with objects, presumably Rav Yochanan believes that *hagbahah does* work as a *kinyan*. For example, Tosafos say Rav Yochanan believes that on a Biblical level, gifts are acquired through lifting (תוספות מסכת עבודה זרה דף עא עמוד א ד"ה "פרדשני"). Ramban says that even Rav Yochanan believes that trading objects (*chalifin*) works on a Biblical level (השגות הרמב"ן לספר המצוות לרמב"ם סוף שורש ב).

Moreover, it seems conceptually untenable to believe that on a Biblical level, objects can *exclusively* be acquired through purchasing. If that were true, how

The explanation just presented assumes that a *chazakah* is a form of physical interaction. However, certain types of *chazakos* can occur without any physical interaction. In addition to effecting an acquisition (*chezkas kinyan*),[11] a *chazakah* can also be used to prove ownership over disputed land (*chezkas re'aya*).[12] A *chezkas re'aya* does not require physical interaction with the land. For example, the new owner can attain a *chezkas re'aya* simply by having the previous owner lift a basket of the field's fruit on his behalf.[13]

Therefore, many Rishonim fundamentally distinguish between *chezkas re'aya* and *chezkas kinyan*.[14] The *chazakah* of a *chezkas re'aya* is simply an act of *demonstration* verifying the new owner, and therefore even lifting a basket of fruit suffices. However, *chezkas kinyan* is an act of *physical interaction* with the land that effects an acquisition. Acquisition requires physical interaction, even if demonstration does not. These Rishonim even reject eating the land's fruit as a means of acquisition, since the fruit is considered separate from the land itself.[15]

However, Rambam makes no distinction between the methods of *chezkas kinyan* and *chezkas re'aya*. Eating the land's fruit, or being presented with the harvest, suffice for either type of *chazakah*.[16] Therefore, Rambam cannot define a *chezkas kinyan* as an act of physical engagement. For Rambam, just as a *chezkas re'aya* is fundamentally a demonstration, so too is a

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would anyone come to own anything? Is it "purchases all the way down"? At the very least, there must be a Biblical mechanism to acquire property from *hefker*.

11 תלמוד בבלי מסכת בבא בתרא דף נב עמוד ב:
אבל חזקה שאין עמה טענה, כגון נותן מתנה, והאחין שחלקו, והמחזיק בנכסי הגר, דלמקני בעלמא הוא, נעל, גדר, פרץ כל שהוא - הרי זו חזקה.

12 תלמוד בבלי מסכת בבא בתרא דף כח עמוד א:
מתני'. חזקת הבתים, והבורות, והשיחין, והמערות, והשובכות, והמרחצאות, ובית הבדין, ובית השלחין, והעבדים, וכל שהוא עושה פירות תדיר - חזקתן שלש שנים מיום ליום, שדה הבעל - חזקתה שלש שנים ואינן מיום ליום.

13 תלמוד בבלי מסכת בבא בתרא דף לה עמוד ב:
א"ר אבא: אי דלי ליה איהו גופיה צנא דפירי - לאלתר הוי חזקה.

14 ראב"ד על רמב"ם הלכות מכירה פרק א הלכה טו:
חידושי הרמב"ן קידושין כב: ד"ה "מתני' בחזקה", חידושי הרשב"א בבא בתרא דף נג: ד"ה "המציע מצעות", חידושי הריטב"א קידושין דף כב: ד"ה "מתני' עבד".

15 חידושי הרשב"א מסכת בבא בתרא דף נג עמוד ב:
אינו דומה לאכילת פירות שאינה חזקה דהתם לא נהנה מגוף הקרקע אלא מפירותיו.
חידושי הריטב"א מסכת קידושין דף כב עמוד ב:
חזקת קנין שבקרקעות אינה אכילת פירות אלא תקון בגופה של קרקע כגון נעל וגדר ופרץ וכיוצא בו.

16 חזקת קנין - רמב"ם הלכות מכירה פרק א הלכה טז:
חזקת ראיה - רמב"ם הלכות טוען ונטען פרק יא הלכה ט

chezkas kinyan.[17] Thus, in a *chezkas kinyan*, you acquire the land by demonstrating ownership rather than through physically engaging it.[18]

Unlike previous Rishonim who compare *chazakah* by land to movement by *metaltelin*, Rambam fundamentally distinguishes these methods. Movement by *metaltelin* works through physical engagement,[19] while *cha-*

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17 Arguably, Rambam aligns with the simple understanding of the Gemara. The Gemara gives the same name—*chazakah*—to both *chezkas kinyan* and *chezkas ra'aya*. This implies that the underlying action is the same, even though the results differ. Unlike the previous Rishonim, Rambam believes that the *chazakah* is performed the same way whether we are dealing with a *chezkas kinyan* or *chezkas re'aya*.

18 One could argue that the *chazakos* Rambam mentioned really functions as a type of exertion of control, and not as a demonstration of ownership. We can reject this idea as follows:

Most types of *chazakos* (e.g., building a fence) work to acquire land from a person, as well as from *hefker* (ownerless property). However, eating the land's fruit is only a good *chazakah* to acquire land from a person. It will not work to acquire land from *hefker* (*Zechiyah Umatanah* 2:2).

If *chazakos* work through exerting control, then this exception by eating the land's fruit is puzzling; why can *hefker* land be acquired through adding a fence, but not through eating the land's fruit? Why does eating the land's fruit work to acquire land from a person, but not from *hefker*? If *chazakah* really works through a demonstration of ownership, then we can answer these questions.

Q1: Why can *hefker* land be acquired through adding a fence, but not through eating the land's fruit?

A: A *chazakah* requires a demonstration of ownership. Adding a fence to *hefker* land does signify ownership, because why else would this person make a fence? However, eating *hefker* fruit does not signify ownership; maybe the person just wanted the fruit.

Q2: Why does eating the land's fruit work to acquire land from a person, but not from *hefker*?

A: Eating the fruit from land that initially belonged to someone else does signify ownership. Since the land is not ownerless, only the owner is entitled to the fruit. By eating the fruit, you demonstrate that you are the new owner. But if the land is ownerless, then eating the land's fruit does not demonstrate ownership.

19 One might claim that Rambam believes that even movement by *mitaltelin* works through demonstration. However, this does not seem to be true. There is a category of items called "דברים שעשויין להשאיל ולהשכיר". Rambam defines these as items which are specifically made to be lent or rented out (e.g., scaffolding, Citi bikes). For this class of items, physical possession does not suffice as evidence of ownership (Rambam *To'en Venitan* 8:3). Nonetheless, these items can be acquired through *hagbahah*, *meshichah*, *mesirah* (see *Rambam Mechirah* 3. Rambam makes no distinctions). If movement by *mitaltelin* was effective because it

zakos by land work through demonstration. Therefore, according to Rambam, why are land and *metaltelin* acquired in fundamentally different ways? Why does demonstrating ownership (e.g., affixing a sail to a sailboat) not work to acquire *metaltelin*?[20]

Burden of Proof

Another area where Rambam differentiates land from *metaltelin* is in how the status quo is determined. In a monetary dispute, whoever disputes the status quo carries the burden of proof. There are two competing ways we might evaluate the status quo:

1. Physical possession: we assume the object's current physical possessor is the owner.
2. Prior knowledge: if we can verify that this object belonged to a particular person in the past (commonly called the *mara kama,* lit. the first owner), we assume they are the owner, regardless of who currently physically possesses the object.

We would expect that land disputes and *metaltelin* disputes share a single method for evaluating the status quo, whichever method that may be. The Gemara uses prior knowledge (*mara kama*) to evaluate the status quo in land disputes.[21] Therefore, we would expect to use prior knowledge to evaluate the status quo in *metaltelin* disputes as well.

Many Rishonim follow our expectation and believe that we use prior knowledge in *metaltelin* disputes. We can see this from their understanding of a Gemara in *Shevuos* 46b.

Shevuos 46b[22] defines a special category of *metaltelin*— "דברים שעשויין להשאיל ולהשכיר", items that are generally lent or rented out (as we will see,

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demonstrates ownership, we would not expect these mechanisms to work by "דברים שעשויין להשאיל ולהשכיר".

20 As a somewhat contrived example, if the giver places the object into a courtyard that is owned by the receiver but is not guarded, this is not a good *kinyan* even though having the object on one's property does constitute evidence in a dispute. If demonstrating ownership was sufficient by *mitaltelin*, we might expect this transaction to work.

21 It takes three years for a resident on land to establish his *chazakah*. Until that point, the previous owner will be believed in any dispute.

תלמוד בבלי מסכת בבא בתרא דף כח עמוד א:

מתני'. חזקת הבתים, והבורות, והשיחין, והמערות, והשובכות, והמרחצאות, ובית הבדין, ובית השלחין, והעבדים, וכל שהוא עושה פירות תדיר - חזקתן שלש שנים מיום ליום, שדה הבעל - חזקתה שלש שנים ואינן מיום ליום.

22 תלמוד בבלי מסכת שבועות דף מו עמוד ב:

the exact definition is subject to debate). The Gemara poses the following rule:

- In disputes over "דברים שעשויין להשאיל ולהשכיר", we assess the status quo with our prior knowledge. The last verified owner is the presumed owner.
- In disputes over items that are not "עשוין להשאיל ולהשכיר", we assess the status quo with physical possession. The current physical possessor is the presumed owner.

Ramban[23] and Ritva[24] expand the scope of "דברים שעשויין להשאיל ולהשכיר" to include most everyday items (e.g., books, cutlery, tools, etc.) by rendering "דברים שעשויין להשאיל ולהשכיר" as "items that are *often* lent/rented out." With this interpretation, nearly all *metaltelin* disputes rely on prior knowledge to assess the status quo. Physical possession only ever matters if the item is nearly *never* rented/lent out (e.g., a slaughtering knife is not lent out for fear of nicks). Even then, we can understand this as follows: We still use prior knowledge to set the status quo, but since the item would never normally be given out, physical possession is strong enough evidence for the plaintiff to dispute the status quo. But the starting point in all cases, land and *metaltelin*, is to determine the status quo through prior knowledge.

Unlike Ramban and Ritva, Rambam believes that *metaltelin* cases generally use physical possession to determine the status quo. Rambam restricts the category of "דברים שעשויין להשאיל ולהשכיר" to items *specifically* created to be lent/rented out[25] (e.g., scaffolding, Citi bikes, etc.). Because these items were created for distribution, physical possession is not meaningful, and we set the status quo by prior knowledge. But the default for

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ולא אמרן אלא בדברים העשוין להשאיל ולהשכיר, אבל דברים שאין עשוין להשאיל ולהשכיר – נאמן.

23 חידושי הרמב"ן מסכת שבועות דף מו עמוד ב:
והוי יודע שפירוש דברים העשויין להשאיל ולהשכיר שדרך העולם להשאיל אותם הדברים וזה האיש עשוי להשאיל לזה וזה עשוי לשאול ממנו.

24 חידושי הריטב"א מסכת שבועות דף מו עמוד ב:
ובפירוש דברים העשויין להשאיל ולהשכיר, כתב הרמב"ם ז"ל שאין זה אלא בדברים שתחלת עשייתן הוא לכך כגון היורות העשויות לכך וכלים של תכשיטי כלה שרגילים לעשות לכך, וכן היה זוגא דסרבלא וספרא דאגדתא, אבל כל שאין עשויין מתחלתן לכך אע"פ שרגילין בעליהם להשאילם או להשכירם הרי הם כשאר כל הכלים, והרב ז"ל חיזק מאד הסברא הזאת ואמר דליכא למינדא מינה.
ואין זה נכון בעיני שאר הפוסקים הבאים אחריו ובכללם הרמ"ה ז"ל והרמב"ן ז"ל, אלא כל שרגילין בני אדם להשאיל ולהשכיר אותם וזה עשוי להשאיל לזה וזה עשוי לשאול מזה הוי דברים העשויים להשאיל ולהשכיר.

25 רמב"ם הלכות טוען ונטען פרק ח, הלכה ט.

metaltelin items, even if they are occasionally lent/rented out (e.g., books, cutlery, tools, etc.), is to use physical possession to determine the status quo.

Rambam makes this point explicitly:

רמב"ם הלכות טוען ונטען פרק ח, הלכה א
כל המטלטלין בחזקת זה שהן תחת ידו, אע"פ שהביא התובע עדים שהמטלטלין הללו ידועין לו

However, this is in stark contrast to Rambam's methodology by land, where Rambam says that the last verified owner is the status quo.

רמב"ם הלכות טוען ונטען פרק יא, הלכה א
כל הקרקעות הידועות לבעליהן אע"פ שהן עתה תחת יד אחרים הרי הן בחזקת בעליהן

Plotting the opinions of the various Rishonim, we get the following:

How the Status Quo is Determined:

	Ramban, Ritva	**Rambam**
Land disputes	Prior knowledge	Prior knowledge
***Metaltelin* disputes**	Prior knowledge	Possession

On one hand, there is a debate amongst the Rishonim on how to settle *metaltelin* disputes. However, I want to focus on a different aspect of this argument. Ramban and Ritva use the same methodology to assess the status quo in land and *metaltelin* disputes. However, Rambam distinguishes between land and *metaltelin*. Ramban and Ritva seem more reasonable in this regard. Why does Rambam distinguish the methodology for determining status quo between land and *metaltelin*?[26]

[26] Now, there is a possible physical interpretation to Rambam. We might argue that Rambam believes that the status quo in all cases is the physical possessor unless physical possession provides no evidence. We already see this with things that are "עשוין להשאיל ולהשכיר". Perhaps by land, we only follow the original owner because it is similar to "עשוין להשאיל ולהשכיר"—in both cases, physical possession is not informative. By "עשוין להשאיל ולהשכיר" this is true because physical possession generally just means you borrowed or rented it. By land, this is true because anyone can easily walk onto anyone else's property. Therefore, perhaps land and *mitaltelin* follow the same rule for identifying the status quo; we believe the physical possessor, unless physical possession provides zero evidence.

Answer

We have seen Rambam differentiate between land and *metaltelin* in two key areas: the method of acquisition and the burden of proof. In both cases, the physical differences between land and *metaltelin* do not seem to explain the halachic differences:

1. Transferring ownership. Rambam thinks that land can be acquired through a demonstration of ownership (*chazakah*), while *metaltelin* cannot. If demonstrating ownership works to acquire land, why not *metaltelin* as well?
2. Investigating ownership. Rambam differentiates how the status quo is determined in monetary disputes. Land disputes use prior knowledge, while *metaltelin* disputes use physical possession. Why do these methods differ?

However, we can reject this interpretation because Rambam still differentiates between *mitaltelin* that is "עשוין להשאיל ולהשכיר" and land. We can see this difference with regard to the rule of "חזקה שאין עמה טענה". This rule means that whoever is challenging the status quo must be able to back up every part of their claim. This rule is especially relevant when a third party is involved, such as the following case:

- Reuven initially owned something, then Shimon took possession of it, then Shimon sold it to Levi.
- Reuven now claims that Shimon stole the entity and wants the entity back from Levi.
- Levi claims that Shimon bought the entity, and therefore the entity is rightfully Levi's.

The ambiguity of the case lies with the third party. The rule of "חזקה שאין עמה טענה" means that whoever is disrupting the status quo must somehow verify their claim about Shimon's actions. Who do we view as disrupting the status quo? Rambam says that by land cases, the current resident (Levi) is disrupting the status quo (Rambam *To'en Venitan* 14:14). However, by *mitaltelin*, even in cases where it is "עשוין להשאיל ולהשכיר", the original owner (Reuven) is disrupting the status quo (Rambam *To'en Venitan* 8:5)—despite the fact that physical possession provides no evidence for items that are "עשוין להשאיל ולהשכיר".
If Rambam viewed the differences between land and *mitaltelin* as arising from physical differences, then we would expect that Rambam should distinguish between *mitaltelin* that is not "עשוין להשאיל ולהשכיר" on one hand, and land + *mitaltelin* that is "עשוין להשאיל ולהשכיר" on the other. However, Rambam differentiates between land and all cases of *mitaltelin*. Therefore, the distinction between land and *mitaltelin* cannot be explained by physical differences.

In truth, before we analyze why land and *metaltelin* differ in how to transfer ownership and investigate ownership, we need to understand monetary transactions and investigations in general. How would we expect ownership to be transferred and investigated in the first place? To answer these questions, we need to define the concept of "ownership."

I would like to propose the following framework. Ownership, at the very least, entails granting the owner exclusive rights to use the object.[27] If ownership involves rights, then the next question is, what is the nature of these rights? There are two types of rights a person can have.

The first type of rights are individual rights (e.g., the right to protect oneself against physical harm). Though we often rely on society to enforce these rights (e.g., police officers to protect us from physical harm), these rights still exist without society (e.g., the wilderness) since they stem from the individual.

The second type of rights are communal rights. These are rights that individuals cannot claim on their own, but the community agrees to honor. For example, in the USA, the rightmost car at an intersection has the right of way. Since the source of these rights is communal agreement, they would not exist in the wilderness (e.g., there is no concept of "right of way" without a society).

Ownership rights might stem from either model. Perhaps property is viewed as an extension of the body. Our individual right to protect our body extends to our property as well. Alternatively, perhaps our individual rights stop at our body, and property rights are a social construct to allow for peaceful coexistence and cooperation.

We would expect property laws to differ depending on which model we use.

How might we expect to transfer ownership? If ownership rights stem from a communal agreement, then acquisition is fundamentally a form of *communication;* the acquirer must inform the community that they are the new owner. However, if ownership rights stem from the individual's power over the object, then an acquisition is fundamentally an act of *personal dominion* over the object.

How might we expect to investigate ownership? If ownership rights stem from a communal agreement, then we investigate communal

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[27] In American law, ownership is commonly understood as nothing more than a "bundle of rights." It is possible that halachah believes there is more to ownership. For example, halachah might conceivably believe that ownership is a real metaphysical status objects can have. However, all I am claiming for the moment is that no matter how you conceive ownership, it entails granting the owner certain rights. This is true whether ownership is nothing more than those rights, or the rights stem from some more abstract model of ownership.

memory; we search for the most recent verified owner. If ownership rights stem from individual dominion, then we will examine who currently physically possesses the object.

Understanding these two models is the key to understanding Rambam. How is ownership transferred and investigated? Let us review once more:

Land:

- How is ownership transferred? A *chazakah* allows us to acquire land through *demonstrating ownership*, even without engaging with the land.
- How is ownership investigated? We look in our communal memory to find the last verified owner, regardless of who currently resides on the land.

Metaltelin:

- How is ownership transferred? Demonstrating ownership is insufficient for transferring ownership. Objects can be acquired through direct physical engagement.[28]
- How is ownership investigated? We look at the physical possessor, regardless of who previously owned the item.

This brings us to the key to Rambam. Rambam fundamentally distinguishes between land ownership and *metaltelin* ownership. Land ownership stems from a communal agreement, while *metaltelin* ownership is an individual right.[29] Since land ownership stems from a communal agreement, land is transferred through communication and the status quo is

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[28] In a sale, Rambam believes that on a Biblical level, a *kinyan mitaltelin* is performed when the seller accepts the money, not when the buyer picks up the item (Rambam *Mechirah* 3:1).
However, this simply means that the *kinyan* prioritizes accepting the money in transactions where money is present. In cases where money is not present, such as acquiring a gift (Rambam *Zechiyah u'Matanah* 3:1) or acquiring from *hefker* (ibid., 1:1), physical engagement with the object is a *kinyan* on a Biblical level. If acquiring from *hefker* did not work on a Biblical level, then no one could ever own anything in the first place.

[29] This perspective about ownership works well within Rambam, but it does not work for many of the other Rishonim we have seen.
I make the following claims: If ownership is an individual right, then the acquisition method should work through a physical exertion of control and the status quo should be determined by physical possession. If ownership is a communal agreement, then the acquisition method should work through communication, and the status quo should be determined through prior knowledge.

determined by communal memory. Since *metaltelin* stems from an individual right, *metaltelin* is transferred through physical engagement and the status quo is determined through physical possession.

This distinction between the nature of ownership may also explain why *shtar kinyan* (acquisition through a contract) works by land but not by *metaltelin.*[30]

One explanation is that land can be unambiguously referred to in writing, whereas *metaltelin* generally cannot. According to this explanation, if there are *metaltelin* that can be specified in writing (e.g., the Hope Diamond, the Rosetta Stone), then a *shtar kinyan* might work.[31]

However, we might propose an alternative explanation. Perhaps a *shtar kinyan* is similar to a *chazakah* in that they are both forms of communication. A *chazakah* communicates ownership through demonstration, whereas a *shtar kinyan* communicates ownership through writing. Since land ownership stems from a communal agreement, transactions can be accomplished through demonstrative (i.e., *chazakah*) or written (i.e., *shtar kinyan*) communication. But since *metaltelin* ownership stems from an individual right, communication is insufficient for *metaltelin* transactions.[32]

However, many of the Rishonim we have seen break this dichotomy. For example, Ramban thinks that both land and *mitaltelin* are acquired through exertion of control, while the status quo is determined through prior knowledge. Therefore, while this approach explains Rambam, a different perspective is needed for other Rishonim.

30 Rambam *Zechiyah Umatanah* 3:1.

31 *Kovetz Shiurim* (*Bava Kamma* 84).

32 One might suggest another alternative explanation: Perhaps a *shtar kinyan* accomplishes the transaction through giving the recipient proof of ownership. This also fits with our distinction. Since land ownership is rooted in communal memory, land can be transferred by giving the recipient proof of ownership.
However, this approach does not seem to fit with Rambam. Rambam *Mechirah* 1:7 says that a contract can accomplish a transaction even without any witnesses. If a contract worked through giving the recipient proof of ownership, then we would not expect this contract to work.
One might counter that perhaps a contract without witnesses can still serve as evidence if they can authenticate the seller's signature. Indeed, this is implied by *Kesuvos* 21a:

תלמוד בבלי מסכת כתובות דף כא עמוד א:
אמר אביי: לכתוב חתימת ידיה אחספא ושדי ליה בבי דינא, ומחזקי ליה בי דינא, (וחזו ליה) ולא צריך איהו לאסהודי אחתימת ידיה, ואזיל איהו והאי ומסהדי אאידך. ודוקא אחספא, אבל אמגלתא לא, דלמא משכח לה איניש דלא מעלי וכתב עילויה מאי דבעי, ותנן: הוציא עליו כתב ידו שהוא חייב לו, גובה מנכסים בני חורין.
Abaye discusses the following case. In certain scenarios, the court needs to confirm that a signature on a contract belongs to a specific witness. In those cases,

Conclusion

Even though our distinction explains Rambam, we are still left with a similar question to what we started: Why *does* land ownership fundamentally differ from *metaltelin* ownership? Whichever model of ownership rights we are drawn to—individual or communal—why distinguish between land and *metaltelin*? As far as I can tell, Rambam gives no explanation. The reasons I am about to offer are my own.

First, I believe that if we reflect, we will find that our own intuitions agree with Rambam. To explore this, let us imagine navigating a world where society has collapsed. Any rights that still exist must stem from the individual, while any rights that disappear must have stemmed from society.

In this post-apocalyptic world, is it wrong to steal someone's *metaltelin* (e.g., food)? I believe we would think this is wrong. However, what about land? For example, let us say that you set up camp in a field, and then someone runs over and says, "I claimed this field first, it's mine." I think we would not view this as stealing. Without society to support land claims, everyone has an equal right to the land.

Consider the following even more extreme example. Imagine if Adam claimed the entire world for himself and told Cain and Abel they could only rent his land. Does Adam have a right to do that? I think we would believe that without a society reinforcing Adam's claim, he cannot "acquire" the entire world.

Given these thought experiments, I think we see that we intuitively believe, similar to Rambam, that *metaltelin* ownership is an individual right, while land ownership is a communal agreement. Therefore, we can stop

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the witness writes his name on something else, and the court sees if the signatures match. Abaye says that in those cases, the witness should write his name on pottery rather than parchment. The concern with parchment is that someone might find a blank piece of parchment with a signature on the bottom and then forge a contract above it. This implies that a contract is valid evidence with the seller's signature alone; it does not require witnesses.

However, Rambam does not rule this way. When he brings down this law, he changes the wording:

רמב"ם הלכות עדות פרק ז הלכה ה:

שנים שחתומין על השטר ומת אחד מהן צריך שני עדים להעיד על כתב ידו של מת ואם לא נמצא אלא עד אחד עם זה העד החי כותב חתימת ידו בפני עדים אפילו על החרס ומשליכו בבית דין עד שתוחזק כתב ידו בבית דין ולא יהיה צריך לומר שזה כתב ידו, ויעיד הוא ואחר על כתב ידי המת ויתקיים כתב ידו שלא בפניו .

Rambam says that a person can write his name "*even on pottery.*" This implies that parchment would work, which implies that Rambam is not concerned with a potential forgery. This implies that a contract without witnesses does not serve as valid evidence.

exploring Rambam and start exploring our own minds. Why do *we* make such a distinction?

I think we intuitively distinguish between land and *metaltelin* for two reasons.

1. We generally view *metaltelin* as a product of human development and we generally view land as a natural resource. In many cases, this is true. *Metaltelin* are generally assembled by humans (e.g., tools, produce, etc.) while land precedes human development. In cases where *metaltelin* is not a product of human development (e.g., wild fruit), I think we still view the *harvesting* as a significant act of development; you *earned* the fruit by doing the work of finding and collecting it. And even in cases where the land has been developed (e.g., built upon, irrigated), I think we still view the primary utility—space, fertility, etc.—as preceding development and existing inherently in the land. Therefore, *metaltelin* rightfully belongs to its developer, whereas land is shared by all of humanity.

2. Part of what constitutes a "right" is the justification to defend the right by force. Rights can therefore be distinguished by which entity does the enforcing. *Metaltelin* rights can be defended by the individual, even without society. True, in society, we delegate this defense to the justice system; the fundamental defender is the individual. However, with land, individuals are incapable of defending land claims on their own. People can hide, carry, or lock up their *metaltelin*, but they cannot defend all their land at the same time. Land ownership can only be defended through cooperation. Therefore, we view *metaltelin* ownership as stemming from the individual, while land ownership stems from communal agreement.

I cannot know for sure whether Rambam would agree with either of these reasons. We live in a different society than Rambam, and we may likely have different intuitions about ownership. But given that we see Rambam *does* fundamentally distinguish between land ownership and *metaltelin* ownership, and since we can intuitively understand this distinction ourselves, I think these speculations are worth considering. ☙