

**“RUBBER STAMPS FOR LANDLORDS”: HOW VERMONT’S  
RENT ESCROW STATUTE VIOLATES TENANTS’  
CONSTITUTIONAL RIGHTS IN EVICTION CASES**

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ABSTRACT

*[W]e reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial. . . . Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.<sup>1</sup>*

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1. *Pernell v. Southall Realty*, 416 U.S. 363, 384–85 (1974).

## INTRODUCTION

In any action for possession in Vermont, a landlord may request an order requiring the tenant to pay their rent to the clerk's office at the courthouse for the remainder of the eviction proceedings.<sup>2</sup> The order may also require that the tenant pay into court any rent that has accrued since the action commenced.<sup>3</sup> If a tenant fails to make a payment prescribed in the so-called "rent escrow order," whether a day late or a dollar short, the landlord may immediately request judgment<sup>4</sup> and a writ restoring them to possession seven days after service upon the tenant.<sup>5</sup> By providing landlords with an express lane for retaking possession upon the tenant's nonpayment, Vermont's rent escrow statute violates the tenant's statutory and constitutional right to a jury trial on their defenses, as well as their right to due process and access to the courts.

Tenants in Vermont have a statutory right to a jury trial in all eviction cases,<sup>6</sup> as well as a constitutional right to a jury trial in civil matters, which "ought to be held sacred"<sup>7</sup> and "preserved to the parties inviolate."<sup>8</sup> Tenants also have a constitutional right to seek justice "freely, and without being obliged to purchase it."<sup>9</sup> This Article concerns cases in which a tenant (1) answers their landlord's complaint and asserts affirmative defenses to the landlord's claim for possession, such as retaliation;<sup>10</sup> (2) requests a jury trial on any issue related to their defenses;<sup>11</sup> and (3) subsequently defaults on a rent escrow order.<sup>12</sup> The sheriff will remove the tenant from their home before the latter may submit their defenses to a jury, let alone start discovery or amend their answer to include counterclaims related to the landlord's misconduct.<sup>13</sup> From its inception, the rent escrow statute conditioned the

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2. VT. STAT. ANN. tit. 12, § 4853a(a)–(b) (2026).

3. § 4853a(d).

4. Where a landlord has pleaded discrete claims for possession and damages, the court will issue partial judgment for possession and schedule a final hearing on the landlord's remaining claim for damages. *See* VT. R. CIV. P. 54(b) ("When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.").

5. tit. 12, § 4853a(h).

6. § 4852.

7. VT. CONST. ch. I, art. 12.

8. VT. R. CIV. P. 38(a).

9. VT. CONST. ch. I, art. 4.

10. VT. STAT. ANN. tit. 9, § 4465 (2026).

11. VT. R. CIV. P. 38(b).

12. VT. STAT. ANN. tit. 12, § 4853a(d) (2026).

13. *See* § 4853a(h) ("If the tenant fails to pay rent into court in the amount and on the dates ordered by the court, the landlord shall be entitled to judgment for immediate possession of the premises.

tenant's ability to assert their rights in court upon timely payment of rent. Even where a landlord bases their ejectment action on grounds other than nonpayment, a missed rent payment may nevertheless be the reason why a writ issues for their dispossession.<sup>14</sup>

Landlords and their counsel might argue that our judicial system affords the low-income tenant the same opportunity as any other litigant to mount a robust defense against any remaining damages claims. Such a view ignores the barriers to the low-income tenant's continued participation in the judicial process after losing possession of their home. As Justice Douglas dissented in *Lindsey v. Normet*,

[W]here the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.<sup>15</sup>

Immense difficulty awaits a pro se litigant unable to charge their cell phone or access the internet to receive or submit court filings. Documents relevant to the case might be stashed away in a hastily packed storage unit or lost altogether in the turbulence. With transience comes transportation issues that can place the courthouse door beyond the tenant's reach.

Vermont's housing landscape has only grown harsher for renters in the four decades since the rent escrow statute's enactment. Between 1990 and 2020, for example, Vermont's rental vacancy rate halved.<sup>16</sup> Both the number of homeless children and the estimated overall number of homeless people more than tripled just between 2020 and 2024.<sup>17</sup> In 2023, Vermont's housing stock comprised roughly as many renter-occupied homes as vacant and

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The court shall forthwith issue a writ of possession directing the sheriff of the county in which the property or a portion thereof is located to serve the writ upon the defendant and, not earlier than seven days after the writ is served . . . to put the plaintiff into possession.”)

14. § 4853(a) (“In *any* action against a tenant for possession . . . .”) (emphasis added).

15. *Lindsey v. Normet*, 405 U.S. 56, 89–90 (1972) (Douglas, J., dissenting).

16. Vt. Hous. Fin. Agency, *Rental Vacancy Rate*, HOUSINGDATA.ORG, <https://housingdata.org/profile/rental-housing-costs/vacancy-rate> (last visited May 17, 2026).

17. Vt. Hous. Fin. Agency, *Homelessness*, HOUSINGDATA.ORG, <https://housingdata.org/profile/housing-needs/homelessness> (last visited May 17, 2026).

seasonal homes combined.<sup>18</sup> The number of homes listed as short-term rentals for platforms like Airbnb and Vrbo in Chittenden County, Vermont's most populous county, more than doubled between April 2020 and April 2024.<sup>19</sup> The hourly wage that a household must earn while working 40 hours a week to afford fair market rent without paying more than 30 % of their income toward housing costs increased nearly \$5.00 to \$23.20 between 2022 and 2024—about \$10.00 more than the state minimum wage.<sup>20</sup> The trial court that issues a writ of possession pursuant to a rent escrow order jettisons the defaulting tenant into an uncertain future on a brutal economic terrain.<sup>21</sup> The tenant may delay their exit or successfully defend themselves in court and remain in their home—but only if they conform with a rent escrow order once entered.<sup>22</sup>

Part I of this Article will trace the origins of eviction proceedings in Vermont and situate the rent escrow statute, as well as the Residential Rental Agreements Act (RRAA), within that history.

The rent escrow statute's legislative history reveals that lawmakers responded to landlords' complaints about the length of ejection proceedings by creating a provisional remedy to recover rent pending judgment.<sup>23</sup> Already doubtful if the landlord has terminated their tenancy for nonpayment, the tenant's ability to pay thus became a threshold requirement for continued proceedings on the issue of possession. Part II will survey the sundry legal and equitable theories undergirding the rent escrow statute and demonstrate how it operates in practice precisely as intended to discourage the tenant who cannot pay their rent from participating in the judicial process.

Part III will examine the constitutional issues raised upon the tenant's dispossession without the jury trial they had requested. Two Supreme Court

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18. Vt. Hous. Fin. Agency, *Housing Stock*, HOUSINGDATA.ORG, <https://housingdata.org/profile/housing-stock/housing-units> (last visited May 17, 2026).

19. Vt. Hous. Fin. Agency, *Short Term Rentals*, HOUSINGDATA.ORG, <https://housingdata.org/profile/housing-stock/short-term-rentals> (last visited May 17, 2026).

20. Vt. Hous. Fin. Agency, *Housing Wage*, HOUSINGDATA.ORG, <https://housingdata.org/profile/income-employment/housing-wage> (last visited May 17, 2026).

21. See Derek Brouwer, *Out of House & Home: Chittenden County Landlords Are Evicting at a Record Pace. But It's the Sheriff Who Comes Knocking*, SEVEN DAYS (Dec. 6, 2023), <https://www.sevendaysvt.com/news/out-of-house-and-home-chittenden-county-landlords-are-evicting-at-a-record-pace-but-its-the-sheriff-who-comes-knocking-39672913/> (describing eviction of tenant who missed her first rent escrow payment).

22. VT. STAT. ANN. tit. 12, § 4856 (2026) (“When the plaintiff's complaint is dismissed or he or she does not prove his or her right to the possession, the defendant shall have judgment for his or her costs, and execution therefor.”).

23. *Discussing the Landlord/Tenant Issue: Hearing on H.339 Before the H. Judiciary Comm.*, 1985 Leg., Spec. Sess., 65–67 (Vt. 1985) (statement of Rep. Davenport) [hereinafter *Hearing on H.339*].

cases decided at the apex of the “tenants’ rights revolution” of the 1970s,<sup>24</sup> *Lindsey v. Normet*<sup>25</sup> and *Pernell v. Southall Realty*,<sup>26</sup> suggest the form that a successful challenge to Vermont’s rent escrow law could take. Though the *Lindsey* decision is notorious for its holding that there is no constitutional right to quality housing, the Court nevertheless conceded that a law conditioning the speed of the eviction process upon the tenant’s payment of rent could be “applied so as to deprive a tenant of a proper hearing in specific situations.”<sup>27</sup> Whenever the court issues a writ of possession in spite of a tenant’s demand for a jury trial, Vermont’s rent escrow statute presents such a situation.

Vermont courts have recognized that “removing persons from their rightful homes and subjecting them to homelessness is an irreparable harm.”<sup>28</sup> Given all that hangs in the balance, the tenant must be afforded the opportunity to submit their defenses to a jury before losing possession of their home. As written and in application, the rent escrow statute subordinates the tenant’s constitutional rights to the landlord’s right to timely payment.

## I. RENT ESCROW’S ORIGINS: ACTIONS FOR POSSESSION AND THE AVAILABILITY OF DAMAGES PENDING JUDGMENT

### A. Common Law and Justice Ejectment

Though Ethan Allen took Fort Ticonderoga without firing a shot, he found fighting ejectment actions before a skeptical court far more challenging.<sup>29</sup> The common-law right of action for ejectment catalyzed Vermont’s early political formation. Four centuries before the Green Mountain Boys formed to forcibly resist New York landlords’ claims to

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24. See generally David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 392–93 (2011) (collecting the “wide-ranging changes in tenants’ rights” that characterized the period, including the imposition of rent control, just cause eviction protections, and prohibitions on racial discrimination).

25. 405 U.S. 56 (1972).

26. 416 U.S. 363 (1974).

27. *Lindsey*, 405 U.S. at 65.

28. *Duprey v. Samuelson*, No. 23-CV-02299, 2023 Vt. Super. LEXIS 76, at \*15 (Washington Cty. Jun. 1, 2023); *Groundworks Collaborative Inc. v. Vt. Agency of Hum. Servs.*, No. 24-CV-00999, 2024 Vt. Super. LEXIS 45, at \*6 (Chittenden Cty. Mar. 22, 2024) (recognizing that “losing one’s housing—whether temporary or permanent—meets the standard for irreparable harm”).

29. See Clarence W. Rife, *Ethan Allen, an Interpretation*, 2 NEW ENG. Q. 561, 564 (1929) (“Assuming a place of leadership, he helped the settlers prepare their defense for the coming suits of ejectment which the New York land jobbers had instituted in the Supreme Court at Albany. These cases resulted adversely, but the incensed settlers decided to defend their possessions by force and made Ethan Allen ‘colonel commandant’ of a band of volunteers called the Green Mountain Boys.”).

possession, the right of action of ejectment emerged in England in the 14th century<sup>30</sup> as a byzantine string of legal fictions used to test title and circumvent the even more cumbersome real actions,<sup>31</sup> which “rarely proceeded for compensation in damages or for personal property.”<sup>32</sup> In the United States, we may understand the ensuing development of the legal forms of landlord-tenant law in the United States as a succession of innovations designed to make recovery of possession more convenient for the landlord. Ancient, clunky real actions gave way to ejectment actions, which begot forcible entry and detainer actions and a summary eviction process.<sup>33</sup> Ever-present was the threat of the landlord’s resort to disruptive self-help should the state not provide more peaceable means to assert their entitlement to possession.<sup>34</sup>

In the early 19th century, the Vermont Legislature codified the common-law right of action of ejectment as “justice ejectment” and outlined the legal means by which a landlord may retake possession of the premises without self-help:

It provides a summary remedy for a landlord whose tenant holds over without right after the determination of the lease. It lies where common law ejectment would lie. It is given for wrongful holding over of demised premises, and thus has all the characteristics of ejectment. The action sounds in tort. All the provisions of the statutes creating and allowing justice ejectment . . . proceed upon the supposition that the lease is at an end. It is only when the lessee holds without right after the determination of the lease that a plaintiff can resort to the remedy.<sup>35</sup>

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30. MARTIN L. NEWELL, *A TREATISE ON THE ACTION OF EJECTMENT* § 2, at 2 (1892).

31. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 23 (2d ed. 1985) (“This mummery (which everybody, the court included, knew to be false) served the purpose of bringing the issue of title before the court; but at the same time, because it was a *lease* case, the ancient land actions (which did not apply to leases) were avoided.”).

32. NEWELL, *supra* note 30, § 11, at 15; *Pernell v. Southall Realty*, 416 U.S. 363, 373–74 (1974) (“Ejectment originated as a very narrow remedy . . . . But by a variety of intricate fictions, ejectment eventually developed into the primary means of trying either the title to or the right to possession of real property. . . . [Q]uestions of fact arising in an ejectment action were resolved by a jury.”).

33. Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 397–98 (2022).

34. *Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972) (“An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges. Hence, the Oregon statute was enacted in 1866 to alter the common law and obviate resort to self-help and violence.”).

35. *Sabourin v. Woish*, 116 Vt. 385, 387, 78 A.2d. 333, 334 (1950) (citations omitted).

Revocation of the landlord's consent to the tenant's continued possession of the demised premises is thus a crucial prerequisite to commencing an ejectment action.<sup>36</sup> Though the lease governing the tenant's use of the premises creates rights and obligations under contract law, such as the warranty of habitability,<sup>37</sup> the action to oust a tenant following termination of the lease and regain possession sounds in tort.<sup>38</sup> Foreshadowing the Law and Economics movement by a century, the Vermont Supreme Court opined in 1875 that "[s]uch cheap and speedy remedy operates to the advantage of poor tenants, by rendering landlords willing to rent to them when they would not if the process of regaining possession necessarily required time and considerable expense."<sup>39</sup> Rest assured, the summary remedy effecting the tenant's speedy dispossession is for the tenant's own good.<sup>40</sup>

Landlords had often paired actions for ejectment to recover possession with actions for trespass for mesne profits,<sup>41</sup> but as early as 1837 the Vermont Supreme Court noted that the two actions had *merged*.<sup>42</sup> In addition to possession of the land, the landlord could seek "what its use is worth" plus consequential damages resulting from acts of the tenant while in wrongful occupation.<sup>43</sup> The Vermont Supreme Court has long affirmed the landlord's

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36. See *Andrus v. Dunbar*, 2005 VT 48, ¶ 15, 178 Vt. 554, 557, 878 A.2d 245, 249 ("Because the tenancy had not been terminated on the date that the landlord brought the ejectment action, the trial court should have entered judgment for tenant.").

37. See *Hilder v. St. Peter*, 144 Vt. 150, 159–60, 478 A.2d 202, 208 (1984).

38. See *Cap. Garage Co. v. Powell*, 98 Vt. 303, 306, 127 A. 375, 377 (1925) ("At common law, a successful plaintiff in ejectment recovered the demanded premises, but with nominal damages, only. He could then bring an action of trespass for mesne profits, in which he recovered damages as the law gave him.").

39. Compare *Pitkin v. Burch*, 48 Vt. 521, 523 (1875), with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 359 (2d ed. 1977) ("The right to a hearing before eviction is an especially good example of a provision that makes it cheaper for the landlord to deal with a more responsible (normally higher income) tenant against whom a cheap and speedy remedy of eviction is less likely to be needed.").

40. See *South Park: The Mexican Staring Frog of Southern Sri Lanka* (Comedy Central television broadcast Jun. 10, 1998) ("[W]e have to kill animals, or else they'll die.").

41. See *Action for Mesne Profits*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A lawsuit seeking damages suffered by a landowner who has succeeded in a common-law action of ejectment whereby the plaintiff may recover for both the use of the land during the wrongful occupation and the costs of ejectment.").

42. See *Brinsmaid v. Mayo*, 9 Vt. 31, 34 (1837) ("Whether after the ouster, the recovery of nominal damages will conclude the plaintiff's right to recover further damages, it may be sufficient to say, that such has always been the practice of Courts in this State, since the statute giving the plaintiff the right to recover damages, as for *mesne* profits, in ejectment."); *Lippett v. Kelley*, 46 Vt. 516, 524 (1874) (noting the legislature's intent "to make the remedy of the plaintiff in ejectment, co-extensive with the remedy given by the action of trespass for mesne profits in England").

43. *Toussaint v. Stone*, 116 Vt. 425, 430, 77 A.2d 824, 828 (1951) (citing *Powers v. Trs. of Caledonia Cty. Grammar Sch.*, 93 Vt. 220, 239–40, 106 A. 836, 844–845 (1919)) (ruling that at-will tenant had "without question . . . a reasonable time" to "gather up his property, dismantle and remove his

right to these damages.<sup>44</sup> But landlords were not satisfied with a judgment for mesne profits that only arrived after the judicial process reached conclusion, adequate in scope as it may be to embrace the landlord's damages resulting from the tenant's wrongful occupation of the premises.<sup>45</sup> The rent escrow statute would empower the landlord to retake possession based on the mere existence of mesne profits, turning the traditional order of ejectment and trespass for mesne profits actions on its head.<sup>46</sup>

### *B. The Residential Rental Agreements Act*

In *Hilder v. St. Peter*, the Vermont Supreme Court read an implied warranty of habitability into every residential rental agreement "that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation."<sup>47</sup> Partly in response to the landmark ruling, the Legislature enacted the Residential Rental Agreements Act (RRAA) in 1986, "in which it expressed its desire to protect the state's tenant population from unscrupulous and recalcitrant landlords, while striking a fair balance between the rights of landlords and tenants."<sup>48</sup> It resolved to "codify the common law relationship for residential rental agreements" with additional "tenant-protection and landlord-protection provisions."<sup>49</sup> The Vermont Supreme Court would later read the RRAA harmoniously with other consumer protection laws, such as the Vermont Consumer Protection Act.<sup>50</sup>

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cabin and depart" where action had not been brought until two years after tenancy was terminated); *Lippett*, 46 Vt. at 522.

44. *Walker v. Hitchcock*, 19 Vt. 634, 638 (1847).

45. *Hearing on H.339*, *supra* note 23, at 77–78 (statement of Rep. Donald Chioffi) ("The reason there are so many self-help evictions is that the present process isn't working. And, when it does work and you get a piece of paper and you can paper your wall with them. But, you don't get any money and you still have your obligations to pay. You've still got the tenant, you've still got the bills, you've got a nice writ and they can't pay, and it should have been established at the outset that they couldn't pay. Because that is what is happening at the end of the process. They can't pay. So, you've got a judgment for \$1,600.00 with costs, so what. So what?").

46. RANSOM H. TYLER, A TREATISE ON THE REMEDY BY EJECTMENT AND THE LAW OF ADVERSE ENJOYMENT IN THE UNITED STATES 840 (1870) (noting that "an action for the *mesne profits* is *consequential* to the recovery in ejectment").

47. 144 Vt. 150, 159–60, 478 A.2d 202, 208 (1984); *Birkenhead v. Coombs*, 143 Vt. 167, 172, 465 A.2d 244, 246 (1983) (citing support for diminished value approach in contract cases).

48. *Willard v. Parsons Hill P'ship*, 2005 VT 69, ¶ 16, 178 Vt. 300, 306–7, 882 A.2d 1213, 1218.

49. *Vt. Tenants, Inc. v. Vt. Hous. Fin. Agency*, 170 Vt. 77, 86, 742 A.2d 745, 751 (1999).

50. *Bisson v. Ward*, 160 Vt. 343, 350, 628 A.2d 1256, 1261 (1993) ("There is no indication that by enacting the Residential Rental Agreements Act, the Legislature intended to deny tenants the additional protections provided by the Consumer Fraud Act. Because the Residential Rental Agreements Act does not govern all aspects of the landlord-tenant relationship, it does not preclude other claims between tenants and landlords." (citations omitted)).

Minutes of the House Judiciary Committee's August 21, 1985, hearing on landlord-tenant issues provide revealing insight into the presuppositions upon which the proposed rent escrow mechanism rested. Representative Amy Davenport, a future chief administrative judge, recognized that the rent escrow mechanism was a "fairly strong provision" because "you basically are taking a lot away from the tenant at that point when you say that you must pay into court and if you don't pay into court a writ of possession issues immediately."<sup>51</sup> She felt it important that "if you have a fast track eviction process that is fair that it be very clear in the law in statute."<sup>52</sup> Representative Ruth Stokes, a Republican from Chittenden County, recounted that landlords' chief complaint was tenant nonpayment of rent during the eviction process.<sup>53</sup> Court-ordered payment of rent into court would deter the "false raising of issues" by tenants:

I think you would have less of a maneuvering of the system if the obligation to pay during the process was there. You would have less of a gerrymandering of the system, if you would, if that money was having to be paid to someone. I think there would be less false raising of issues.<sup>54</sup>

She endorsed speeding up nonpayment ejection cases upon the tenant's default on a rent escrow order.<sup>55</sup>

For Representative Donald Chioffi, a Republican from Rutland County, the "deadbeats" who bounce from place to place without honoring their obligation to pay ultimately foist the burden of higher rents on "good tenants," and ought to enjoy only conditional access to the courts to assert counterclaims related to their tenancy:

It should be established right away if the tenant does not have the money to pay. Then why go through process and get a writ of possession and a judgment order when there isn't any money? You can't get blood from a stone. So let's establish that right off and say, "Okay, go find some place else to live so that we can get somebody who can pay something."<sup>56</sup>

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51. *Hearing on H.339, supra* note 23, at 67 (statement of Rep. Davenport).

52. *Id.* at 69.

53. *Id.* at 70 (statement of Rep. Ruth Stokes, Member, H. Judiciary Comm.).

54. *Id.*

55. *Id.* at 71.

56. *Id.* at 78 (statement of Rep. Chioffi).

“[T]he landlord automatically gets the writ” and may evict the tenant “[e]ven if they have filed” affirmative defenses or counterclaims relating to the landlord’s obligation to provide habitable premises: “Let them file[,] . . . you have to have that [rent] regardless of whether the place is habitable or not. I mean you don’t automatically come up with less money available to you just because the place is uninhabitable [sic].”<sup>57</sup>

The House Judiciary Committee repeatedly considered the rent escrow process to be a paid prerequisite to “fighting it out” with their landlord in court:

REP. NUOVO: So, if you want to fight it out you’ve got to pay the rent the first of February.

REP. PINGERT: To the court.

REP. NUOVO: To the court so that the court can then make the adjustment. That’s what your procedure is saying.

REP. CHIOFFI: That’s right. Then they will determine whether it’s adjusted. The court may determine that in fact it needs to be adjusted and then through the appeal process it may go through this 85 days. Well, that brings us to another month’s rent. Then the adjusted month’s rent would be paid into court. On final resolution the money is going to be there.<sup>58</sup>

The landlord’s assurance that “the money is going to be there” upon final judgment thus justifies the imposition of a paid requirement upon the tenant’s right to “fight it out” in a jury trial. Perhaps the landlord’s convenience superseded the tenant’s right to mount a defense because legislators remained skeptical of the sincerity of the latter’s counterclaims:

REP. BATTEN: So now you’ve got it up to 55 days  
(interrupted)

REP. DAVENPORT: If there was a counterclaim. I mean it’s going to be hard to counterclaim if you don’t have any warranty of habitability issues to raise.

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57. *Id.* at 66, 76–77.

58. *Id.* at 77.

REP. CHIOFFI: Well, if you don't why haven't you paid the rent?

REP. NUOVO: Well, you get hassles by the landlord or whatever.<sup>59</sup>

The rent escrow statute that emerged had its intended effect of weeding out those tenants unable to pay their rent, regardless of the merits of their counterclaims and defenses to possession.

## II. THE RENT ESCROW PROCESS IN THEORY AND PRACTICE

### A. *In Theory*

A rent escrow order is a provisional remedy.<sup>60</sup> Like a prejudgment writ of attachment, a rent escrow order ensures the plaintiff's ability to recover.<sup>61</sup> Just as the court may dissolve an injunction in response to changing circumstances<sup>62</sup> or where an action is dismissed for lack of jurisdiction,<sup>63</sup> a rent escrow order may be vacated on motion upon dismissal of the landlord's ejectment claim.<sup>64</sup> Like an *ex parte* temporary restraining order, a rent escrow order requires the landlord to support their motion with an affidavit. Like a preliminary injunction, the court affords the tenant a hearing before ordering their timely payment of rent.<sup>65</sup> Unlike a preliminary injunction, a rent escrow

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59. *Id.* at 67.

60. See 11A FED. PRAC. & PROC. CIV. § 2931 (3d ed. 2017) (Provisional remedies "provide for seizure of a person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action.").

61. See VT. R. CIV. P. 65.1(c) (conditioning issuance of preliminary injunction upon applicant's posting bond); VT. R. CIV. P. 4.1 (stating that in most civil actions, prejudgment writ will issue "upon hearing and a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance, bond, or other security shown by the defendant to be available to satisfy the judgment.").

62. See *Boiselle v. Boisselle*, 162 Vt. 240, 243, 648 A.2d 388, 389–390 (1994) (citing *United States v. Swift & Co.*, 286 U.S. 106 (1932)).

63. *Auclair v. Vt. Elec. Power Co. Inc.*, 133 Vt. 22, 29, 329 A.2d 641, 645 (1974).

64. *Northgate Hous. Ltd. v. Kirkland*, No. 2002-152, 2002 WL 34422174, at \*3 (Vt. Nov. 2002).

65. Compare VT. STAT. ANN. tit. 12, § 4853a(a) (2026) ("The motion shall be accompanied by affidavit setting forth particular facts in support of the motion."), and § 4853a(d) ("If the court finds the tenant is obligated to pay rent and has failed to do so."), with VT. R. CIV. P. 65(a) ("A temporary restraining order may be granted . . . only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true.").

order does not require the landlord to establish the threat of irreparable harm—only the tenant's breach of their contractual obligation to pay rent and the amount of the landlord's money damages,<sup>66</sup> which would ordinarily preclude the availability of a preliminary injunction.<sup>67</sup>

The rent escrow order's availability in "any action against a tenant for possession,"<sup>68</sup> including those in which the landlord does not allege nonpayment of rent as the grounds for termination of the tenancy, further distinguishes it from a preliminary injunction, whose "very purpose . . . is to give temporary relief based on a preliminary estimate of the strength of the plaintiff's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case."<sup>69</sup> In an ejectment action based on the tenant's alleged interference with others' peaceful enjoyment of the premises,<sup>70</sup> for example, the landlord may obtain a rent escrow order by establishing only the tenant's obligation to pay rent and failure to do so.<sup>71</sup> The court thus provides the landlord with temporary relief for a claim they did not allege—i.e., nonpayment of rent—and a shortcut to the same final relief, possession, where the tenant appears likely to promptly default on the order. The rent escrow statute does not expressly require the landlord to demonstrate that the issuance of an order would advance the public interest.

The circumstances in which the tenant's obligation to pay rent would be suspended, warranting denial of the landlord's rent escrow motion, thus gain crucial importance. This obligation is subject to one express reservation: where the tenant has properly withheld rent after providing their landlord actual notice of an issue materially affecting health and safety as well as a "reasonable time" to perform repairs.<sup>72</sup> Landlords frequently violate their statutory and contractual obligation "to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean, and fit for human habitation and that comply with the requirements of applicable building, housing, and health regulations,"<sup>73</sup> yet their noncompliance rarely disposes of the action.

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66. tit. 12, § 4853a(d). After obtaining a rent escrow order but prior to final judgment, a landlord may obtain a disbursement of the tenant's rent paid into court by demonstrating they are "in actual danger of loss of the premises or other personal hardship resulting from the loss of rental income." § 4853a(f).

67. *See Taylor v. Town of Cabot*, 2017 VT 92, ¶ 40, 205 Vt. 586, 605, 178 A.3d 313, 325 (citing FED. PRAC. & PROC. CIV., *supra* note 60, § 2948.1).

68. tit. 12, § 4853a(a).

69. FED. PRAC. & PROC. CIV., *supra* note 60, § 2948.3.

70. VT. STAT. ANN. tit. 9, § 4467(b)(1) (2026); § 4456(b).

71. tit. 12, § 4853a(d).

72. *See* tit. 9, § 4458(a)(1).

73. § 4457(a).

The Legislature never expressly subordinated this obligation to that imposed upon the tenant to pay rent “without demand or notice at the time and place agreed upon by the parties.”<sup>74</sup> In *Hilder*, the Vermont Supreme Court opined that recognition of these obligations as mutual covenants accorded with longstanding case law for the availability of contract remedies for breaches of lease agreements and “does not represent an abrupt change in Vermont law.”<sup>75</sup> The Residential Rental Agreements Act (RRAA) affords the tenant an infrequently invoked equitable remedy in the form of an injunction commanding the landlord to uphold their obligation to maintain habitable, code-compliant premises, just as a rent escrow order requires the tenant to uphold their obligation to pay rent.<sup>76</sup> While there is no equivalent to the landlord’s immediate entitlement to a writ of possession under the rent escrow statute, the tenant may seek an order to show cause why their landlord has not complied with the court’s order to provide habitable premises,<sup>77</sup> or move to dismiss the action altogether.<sup>78</sup>

The tenant’s obligation to pay rent and the landlord’s obligation to maintain habitable premises do not stand on equal footing and historically never have.<sup>79</sup> Whereas a landlord may move for a rent escrow order at the commencement of the ejectment action, the tenant may obtain their injunction only after meeting a series of statutorily prescribed yet judicially malleable prerequisites, while at risk of the landlord engaging in self-help in the meantime.<sup>80</sup> A judge’s discretion as to what a “reasonable time” would be for the landlord to continue depriving the tenant of the basic necessities of life, such as water and heat, before the tenant may seek injunctive relief, or whether the tenant’s issues “materially affect health and safety,” may affect the tenant’s success in obtaining an injunction.<sup>81</sup>

If they succeed, however, and the landlord defaults on the court’s order by failing to repair the serious habitability issues, the tenant can move to

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74. § 4455(a).

75. *Hilder v. St. Peter*, 144 Vt. 150, 159, 478 A.2d 202, 208 (1984).

76. tit. 9, § 4458(a)(2).

77. VT. STAT. ANN. tit. 12, § 122 (2009).

78. Should the landlord fail to make repairs and default on a preliminary injunction issued under Section 4458(a)(2), the tenant could move for judgment “[f]or failure of the plaintiff . . . to comply with . . . any order of court.” VT. R. CIV. P. 41(b)(2).

79. See Mason, *supra* note 33, at 397 (“The status conferred upon landowners and the prioritization of their possessory interests have dominated the landowner-lessee relationship ever since.”).

80. tit. 9, § 4458(a)(2).

81. See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEVELAND STATE L. REV. 137, 155 (2013) (“Judges without exposure to the lives of low-income people simply don’t appreciate the realities faced by poor individuals.”).

initiate contempt proceedings<sup>82</sup> and request relief, ranging from the provision of water fit for human consumption<sup>83</sup> to monetary damages.<sup>84</sup> Where a landlord has already demonstrated a recalcitrance necessitating contempt proceedings, however, their compliance with additional orders remains doubtful. In theory, the tenant may seek to imprison their landlord indefinitely until they comply with the court's order, but the court would impose such a startling sanction only in extraordinary cases, if ever.<sup>85</sup> In contrast to the tenant's lackluster prospects for enforcement of a habitability injunction, the landlord is all but certain to receive their due when the tenant defaults on a rent escrow order—a writ restoring them to possession of the premises in a fraction of the time.

It bears repeating that a landlord may obtain a rent escrow order even where their complaint does not allege nonpayment of rent.<sup>86</sup> In such cases, the tenant's compliance with their contractual and statutory obligation to pay rent is not a controversy properly before the court, as the landlord did not provide actual notice of the termination of their tenancy for this reason, nor did they allege nonpayment in the complaint.<sup>87</sup> If the tenant defaults on the rent escrow order, the court will award the landlord, on motion, the same relief sought by the claims the landlord might have actually pleaded, such as no-cause or for-cause eviction, or sale of the property.<sup>88</sup> The landlord has not demonstrated their entitlement to possession—at a minimum, in the last example, a valid notice of termination and an averment that the landlord “has contracted to sell the building.”<sup>89</sup> The court will nevertheless restore the

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82. tit. 12, § 122 (“When a party violates an order made against him or her in a cause brought to or pending before a Superior judge or a Superior Court after service of the order upon that party, contempt proceedings may be instituted against him or her before the court or any Superior judge.”); *see* *Town of Hinesburg v. Dunkling*, 167 Vt. 514, 526, 711 A.2d 1163, 1170 (1998) (“[C]ivil contempt penalties are assessed to coerce the defendant to do some act ordered by the court for the benefit or advantage of the opposite party.”) (citing *Spabile v. Hunt*, 134 Vt. 332, 335, 360 A.2d 51, 52 (1976)).

83. *See* tit. 9, § 4457(c).

84. *See* *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 197 (1949) (“Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.”); *but see* *Obolensky v. Trombley*, 2015 VT 34, ¶ 43, 198 Vt. 401, 419, 115 A.3d 1016, 1029–30 (affirming the trial court's decision in declining to hold in contempt a party whose violation of a stipulated order resulted in “only nominal damages”).

85. *See* tit. 12, § 123; *Sheehan v. Ryea*, 171 Vt. 511, 512, 757 A.2d 467, 468 (2000) (“Imprisonment of indefinite duration may be the means to compel a party to do some act ordered by the court, and the party must be released on compliance with the order.”).

86. tit. 12, § 4853a(a).

87. VT. R. CIV. P. 54(c) (“Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.”).

88. *See* tit. 9, § 4467(b)–(e).

89. *See* § 4467(d) (requiring 30 days' actual notice where landlord “has contracted to sell the building”).

landlord to possession once the landlord establishes that the tenant fell behind on rent either prior to or during the action.

*B. In Practice*

In Vermont's most populous counties, the superior courts schedule rent escrow hearings in 15- or 30-minute blocks. Tenants who appear may apply for and receive limited representation in their hearing from Legal Services Vermont,<sup>90</sup> Vermont Legal Aid, or a pro bono volunteer if they meet financial eligibility criteria.<sup>91</sup> When tenants do not appear, the landlord may proceed and receive their desired order in the tenant's absence.

An attorney will sift through the filings in the tenant's case with a keen eye for grounds for dismissal of the entire action, or at least denial of the landlord's request for a rent escrow order. The tenant has several options, which may be winnowed by court scheduling. Recall that the court may order not only rent as it accrues during pendency of the ejectment action but also rent that has accrued since commencement.<sup>92</sup> The rent escrow statute does not specify when this portion of back rent must be paid, though many courts typically require payment in about seven days.<sup>93</sup> Where a tenant is plainly unable to pay rent, finding several months' worth of rent in one week's time to keep their case alive is highly unlikely, especially when the first of the month follows closely behind. In such cases, everyone in the courtroom knows that the tenant will default on the first payment and a writ will issue. The parties may stipulate to a rent escrow order and negotiate a schedule that allows the tenant to demonstrate, through timely, court-ordered payment, their ability to pay the landlord, who may not immediately request a final hearing.

Some tenants have not failed to pay rent but instead exercised, or attempted to exercise, their statutory right to withhold rent in response to severe habitability issues in their home that their landlord failed to address within a reasonable time after receiving notice.<sup>94</sup> Few tenants are aware that withholding rent requires providing their landlord with written notice either hand-delivered or mailed via first-class or certified mail.<sup>95</sup> In-person conversations, phone calls, text messages, and emails all fall short of "actual

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90. The author worked as a staff attorney for Legal Services Vermont from 2023 until 2025.

91. Legal Services Vermont is funded by the Legal Services Corporation, which establishes maximum income levels for individuals eligible for legal assistance. *See* 45 C.F.R. § 1611 (2026).

92. VT. STAT. ANN. tit. 12, § 4853a(d) (2026).

93. *Id.*

94. *See* tit. 9, § 4458(a).

95. *See* § 4451(1).

notice.”<sup>96</sup> As a result, even where the tenant has obvious habitability issues in their home, they may be prevented from using them at the rent escrow hearing, either to reduce the amount ordered into court or to assert they had been relieved of their obligation to pay rent given the severity of the defects.

Sometimes, the court will entertain an oral motion made at the start of the rent escrow hearing suggesting that the court lacks subject matter jurisdiction and ought to dismiss the action.<sup>97</sup> At other times, the court will request the submission of written briefing and a full motion cycle before deciding on its jurisdiction;<sup>98</sup> in the meantime, it may impose a rent escrow order. Courts are hesitant to stay a rent escrow order pending disposition of a motion to dismiss and may issue a writ despite the tenant’s objections to jurisdiction.

Facing packed dockets,<sup>99</sup> Vermont courts have a limited appetite to make evidentiary findings at a rent escrow hearing; where one or both parties are unrepresented, such fact-finding can be doubly time-intensive.<sup>100</sup> The rent escrow statute permits, but does not require, the tenant to file a memorandum in opposition supported by affidavit “pursuant to Rule 7(b)(6).”<sup>101</sup> In turn, Rule 7(b)(6) requires the opposing party to include a written request to present evidence within their memorandum in opposition.<sup>102</sup> A court adopting a literal reading of Section 4853a(c) may streamline a morning’s worth of potentially contentious rent escrow hearings by precluding tenants who failed to file opposition and request to present evidence from doing so, even if it places the court’s subject matter jurisdiction in doubt.<sup>103</sup> Setting aside how even the most attentive pro se litigant in an ejectment action might be unaware of this requirement, this literal reading would betray the rent escrow order’s intended purpose as a provisional remedy to ensure the landlord’s collection. As a practical matter, a rent escrow motion and affidavit filed at the commencement of an action

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96. *Id.*; see *In re Soon Kwon*, 2011 Vt. 598, 603, 19 A.3d 139, 145 (2011) (“Landlord’s argument is based on a definition of actual notice as receipt of written notice, regardless of how that notice is delivered. The Legislature adopted a more narrow definition of what can constitute actual notice.”).

97. VT. R. CIV. P. 12(h)(3).

98. See VT. R. CIV. P. 7(b)(1)–(4).

99. The Vermont Judiciary reported a 6% increase in the civil backlog from fiscal years 2024 to 2025, despite an 8% increase in civil case dispositions during the same period. VT. JUDICIARY, STATISTICAL SUMMARY FY 2025 I (2025).

100. See *Super*, *supra* note 24, at 413 (noting that “the tenants’ rights revolution imposed stresses that the courts hearing eviction cases were ill-equipped to handle,” in part because “hearing these cases demanded far greater resources than had been required to grant possession routinely to landlords under a legal regime in which tenants had few defenses”).

101. VT. STAT. ANN. tit. 12, § 4853a(c).

102. VT. R. CIV. P. 7(b)(6).

103. See VT. R. CIV. P. 12(h)(3).

cannot attest to the rent that subsequently accrues before the court schedules the hearing, nor can the tenant's opposition and affidavit attest to a subsequently occurring habitability issue warranting a reduction in the amount of rent ordered into court. As Representative Davenport said: "[Y]ou have got to have a hearing."<sup>104</sup>

Once entered, a rent escrow order is difficult, though not impossible, to modify.<sup>105</sup> The rent escrow statute does not establish the criteria that the tenant must set forth in their affidavit to warrant reduction of the amount ordered paid into court, nor does it expressly authorize the court to modify the order's payment schedule.<sup>106</sup> Where a tenant has stipulated to a rent escrow order, a court might be less inclined to grant a modification, especially if the tenant had the benefit of counsel. Nevertheless, the court has the inherent authority to revise its own orders.<sup>107</sup>

Where a tenant has defaulted on a rent escrow order, they may oppose the landlord's motion for a writ before it issues "forthwith" and mount a longshot equitable defense.<sup>108</sup> Alternatively, they may file a motion to set aside the judgment for possession.<sup>109</sup> In *Northgate Housing Limited v. Wilson*, the Vermont Supreme Court took an interlocutory appeal from the trial court's issuance of a writ of possession based on the tenant's default on the rent escrow order.<sup>110</sup> Analogizing to contempt proceedings appeals, which recognize the defense of inability without fault to comply, the Court concluded that:

[T]o construe § 4853a(h) to apply automatically and mechanically, despite evidence of what amounts to impossibility of timely performance as to one payment would be draconian. Though the legislative intention to provide for an immediate and straightforward means for a landlord to obtain possession where the ultimate step of a

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104. *Hearing on H.339, supra* note 23, at 66 (statement of Rep. Davenport).

105. *See Dolgin v. Masure*, No. 123-5-12-Cacv (Vt. Superior Ct., Caledonia Cty. Aug. 27, 2012) (granting motion to modify on equitable grounds where defendant gave birth then went on maternity leave from her job at Dunkin' Donuts) (unpublished).

106. tit. 12, § 4853a(g) ("The motion for reduction shall be accompanied by affidavit setting forth particular facts in its support.").

107. *See Hill v. Springfield Hosp.*, 2023 VT 23, ¶ 12, 218 Vt. 64, 71, 297 A.3d 504, 509 ("The trial court certainly has discretion to revise interlocutory orders prior to judgment.") (citing *Dudley v. Snyder*, 140 Vt. 129, 131, 436 A.2d 763, 764 (1981)).

108. tit. 12, § 4853a(h).

109. The court may relieve a party from a final judgment for, inter alia, "mistake, inadvertence, surprise, or excusable neglect," due process defects rendering the judgment void, or "any other reason justifying relief from the operation of the judgment." VT. R. CIV. P. 60(b)(1), (4), (6).

110. No. 94-546, slip op. 59, 59 (Vt., Mar. 24, 1995) (unpublished).

payment-into-court order has been obtained, that end is not served nor justice done when the writ issues without any inquiry as to third-party fault. There was evidence in this case that the circumstances of noncompliance were temporary and beyond the tenant's control. This evidence was not considered by the court. Its resultant order was clearly erroneous.<sup>111</sup>

Though not a formal requirement, courts may be more likely to grant a motion to set aside a rent default when filed contemporaneously with the delinquent payment, demonstrating that the tenant's noncompliance was temporary and beyond their control.<sup>112</sup>

### III. CONSTITUTIONAL IMPLICATIONS OF THE RENT ESCROW STATUTE

#### *A. Right to Jury Trial Under Article 12 of the Vermont Constitution*

Article 12 of the Vermont Constitution provides “[t]hat when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.”<sup>113</sup> The Vermont Supreme Court interpreted this provision as a right to jury trial “to the extent that it existed at common law at the time of the adoption of the constitution in 1793,” requiring an inquiry not into whether Vermont courts actually recognized the action at issue in the late 18th century, but rather into “the nature of the action and whether it is the type of controversy that would have been tried by a jury under common law at that time.”<sup>114</sup> The constitutional right to a jury trial also attaches to claims “traditionally tried in a court of law,”<sup>115</sup> such as those for recovery of possession of real property.<sup>116</sup> A law is “unconstitutional with respect to juries if it ‘destroys or

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111. *Id.* at 61.

112. *Cf.* *Russell v. Armitage*, 166 Vt. 392, 399, 697 A.2d 630, 635 (1997) (requiring obligor accused of violating child-support order to show “an inability to comply”) (citing *Spabile v. Hunt*, 134 Vt. 332, 335, 360 A.2d 51, 52 (1976)); *State v. Bostwick*, 2014 VT 97, ¶ 8, 197 Vt. 345, 348, 103 A.3d 476, 478 (requiring defendant accused of probation violation to show that “failure to comply was not willful but rather resulted from factors beyond his control and through no fault of his own.”) (quoting *State v. Austin*, 165 Vt. 389, 398, 685 A.2d 1076, 1082 (1996)).

113. VT. CONST. ch. I, art. 12.

114. *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 155, 624 A.2d 1122, 1125 (1992) (citations omitted); *see Plimpton v. Town of Somerset*, 33 Vt. 283, 291–92 (1860).

115. *LeBlanc v. Snelgrove*, 2015 VT 112, ¶¶ 37–38, 200 Vt. 570, 586–587, 133 A.3d 361, 372–373.

116. *Id.* at 38 (citing *Ross v. Bernhard*, 396 U.S. 531, 533 (1970)); *Pernell v. Southall Realty*, 416 U.S. 363, 371 (1974) (“The various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded.”).

materially impairs the right of trial by jury according to the course of the common law.”<sup>117</sup>

The tenant’s right to a jury trial under both Article 12 and the ejectment statute<sup>118</sup> “shall be preserved to the parties inviolate” under Rule 38(a) of the Vermont Rules of Civil Procedure.<sup>119</sup> Nevertheless, the right is not self-executing; the tenant must file and serve a demand for a jury trial on any issues.<sup>120</sup> Imposing such a requirement does not ultimately deprive a tenant of their right in a legal sense,<sup>121</sup> but in a practical sense, this often proves an insuperable hurdle.<sup>122</sup> In *Jones v. Spear*, the Vermont Supreme Court upheld a county court rule conditioning the right to a jury trial upon the furnishing of an affidavit that a money claim was disputable, reasoning that in both England and states with comparable constitutional provisions, court rules often bar parties from making certain defenses without an affidavit, and “in neither country has it ever been supposed[] that the right of trial by jury was thereby impaired or trespassed upon.”<sup>123</sup>

For our purposes, assume the tenant files an answer to the landlord’s claim for ejectment.<sup>124</sup> They may raise standard affirmative defenses,<sup>125</sup> such as accord and satisfaction or waiver where the landlord has executed a new rental agreement after terminating the tenant’s previous tenancy; estoppel where the landlord may have permitted conduct later alleged as a lease violation; fraud or illegality where the landlord has engaged in fraudulent or

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117. *In re* Vt. Sup. Ct. Admin. Dir. No. 17, 154 Vt. 392, 399, 579 A.2d 1036, 1040 (1990) (quoting *Plimpton*, 33 Vt. at 290).

118. VT. STAT. ANN. tit. 12, § 4852 (1971) (“Either party shall have the right to a trial by jury.”).

119. VT. R. CIV. P. 38(a).

120. VT. R. CIV. P. 38(b), (d) (requiring party seeking jury trial to “serv[e] upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 14 days after the service of the last pleading directed to such issue” and file same with the court); VT. R. CIV. P. 38(d) (failure to serve and file demand constitutes waiver of right to jury trial).

121. *See Bloomer v. Gibson*, 2006 VT 104, ¶ 12, 180 Vt. 397, 402, 912 A.2d 424, 427 (holding that Rule 38 “provides the procedure for administration of the jury trial right,” and that “rules consistent with the Constitution can require that ‘reasonable notice be given of the intention of a party to avail himself of his right, in a civil case, to put his case before a jury.’”) (quoting *Muzzy v. Curtis*, 127 Vt. 516, 517, 253 A.2d 149, 150 (1969)); *In re* Admin. Dir. No. 17, 154 Vt. at 401, 579 A.2d at 1041 (ruling that “actions that may delay or condition the jury trial right do not by themselves infringe on that right”).

122. The tenant would likely make their jury demand in an answer to the landlord’s complaint for ejectment, should they file one. *See Nicole F. Summers & Justin Steil, Evicted by Default*, 57 CONN. L. REV. 1233, 1249 (2025) (“[A] requirement to file an answer is more onerous for tenants. Many tenants do not understand that an answer is required, do not know how to file an answer, and are unaware of the information an answer ought to include.”).

123. 21 Vt. 426, 430 (1849).

124. VT. R. CIV. P. 8(b).

125. VT. R. CIV. P. 8(c).

illegal activity related to the tenancy;<sup>126</sup> or laches where a landlord relies upon a lease violation from a previous lease term. The tenant may also raise the failure to join a necessary party, or object to the action not having been brought in the name of the real party in interest.<sup>127</sup> Though a breach of the warranty of habitability may not itself be a defense to ejectment for cause or no cause, a tenant who complains to their landlord about any violation of the RRAA has a defense in any retaliatory action for possession.<sup>128</sup>

Suppose the landlord brought a no-cause action<sup>129</sup> in retaliation for the tenant's complaint to the state Division of Fire Safety about unsafe conditions in their home.<sup>130</sup> The tenant may fall behind on rent during pendency of the action for any number of reasons. Nevertheless, the landlord may immediately request a writ of possession upon the tenant's default on a payment required under the rent escrow order.<sup>131</sup> Before the tenant may submit their affirmative defenses to a jury and thereby exercise their constitutional and statutory right, the landlord may execute the writ and render moot the issue of possession altogether.<sup>132</sup>

The trial court's occasional reluctance to engage in robust fact-finding at a rent escrow hearing underscores the need to safeguard the tenant's right to submit to a jury of their peers their defenses to the landlord's claim to possession. If the court is unwilling to consider a tenant's habitability defense at a rent escrow hearing, not even for the limited purpose of reducing the tenant's monthly obligation,<sup>133</sup> the tenant's only other opportunity would be their final hearing before a jury. Should the tenant miss a payment under the

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126. See, e.g., *L'Esperance v. Benware*, 2003 VT 43, ¶ 14, 175 Vt. 292, 298, 830 A.2d 675, 681 (“A landlord can commit a deceptive act prohibited by § 2453 of Title 9 when a landlord rents property to a tenant that is in violation of law.” (citing *Bisson v. Ward*, 160 Vt. 343, 351, 628 A.2d 1256, 1261 (1993))); *Sawyer v. Robson*, 2006 VT 136, ¶ 13, 181 Vt. 216, 224, 915 A.2d 1298, 1304 (holding that the plain meaning of “other violator” under VT. STAT. ANN. tit. 9, § 2461(b) includes landlords who engaged in unfair or deceptive commercial practices).

127. VT. R. CIV. P. 17(a). A landlord may commence an ejectment action in the name of one of their limited liability companies that does not own the subject property, and so long as the entity that actually owns it comes into the action within a reasonable time, they do not risk dismissal of their case. *S. Burlington Mech. & Elec. Contractors, Inc. v. Graybar Elec. Co., Inc.*, 138 Vt. 580, 581, 421 A.2d 1275, 1276 (1980).

128. tit. 9, § 4465(b).

129. See § 4467(c)–(e).

130. See § 4465(a)(1).

131. See VT. STAT. ANN. tit. 12, § 4853a(h) (2026).

132. See *Handy v. Fiske*, 2023 VT 46, ¶ 6, 218 Vt. 634, 635, 308 A.3d 544, 547 (ruling the issue moot upon the landlord retaking possession).

133. See tit. 12, § 4853a(d) (noting that the court shall order “full or *partial* payment” of rent into court. (emphasis added)). The reduced rent reflects the tenant's entitlement, where the landlord has breached the warranty of habitability and failed to make necessary repairs within a reasonable time, to “withhold the payment of rent for the period of the noncompliance.” tit. 9, § 4458(a)(1).

rent escrow order in the meantime, the court will issue partial judgment for possession and a writ before the tenant may put the issue to the jury.<sup>134</sup>

The rent escrow statute—specifically, Title 12, Sections 4853a(d) and (h)—threatens tenants’ uninhibited exercise of their constitutional and statutory right to a jury trial. This is especially evident in cases where nonpayment of rent is not part of the landlord’s claim for ejectment or pleaded as a separate cause of action, such as breach of contract. The tenant may have affirmative defenses to the landlord’s claim for ejectment, such as a retaliation defense to a no-cause claim. They will lose possession of their home after judgment issues on a claim the landlord never pleaded before they may exercise their right to a jury trial.

#### *B. Right to Access the Courts Under Article 4 of the Vermont Constitution*

Broadly speaking, Article 4 of the Vermont Constitution “ensure[s] access to the judicial process”<sup>135</sup> but has “never been held . . . to give rise to a substantive constitutional right”<sup>136</sup>:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably [sic] to the laws.<sup>137</sup>

This so-called “open courts provision” traces back to Chapter 29 of the 1225 Magna Carta.<sup>138</sup> “[F]reely, and without being obliged to purchase” does not

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134. A writ will issue “forthwith.” tit. 12, § 4853a(h). But there is no constitutional right to “instant access to a jury.” *In re Vt. Sup. Ct. Admin. Dir. No. 17*, 154 Vt. 392, 402, 579 A.2d 1036, 1041 (1990). When the Supreme Court decided *In re Admin Dir. No. 17* in 1990, Vermont juries decided about 50 civil trials in a typical six-month period. *Vermont Court Upholds Delay in Civil Trials*, N.Y. TIMES, Jun. 5, 1990, at A24. Vermont juries decided 17 civil trials in fiscal year 2025. VT. JUDICIARY, *supra* note 99, at 10.

135. *Shields v. Gerhart*, 163 Vt. 219, 223, 658 A.2d 924, 928 (1995).

136. *Levinsky v. Diamond*, 151 Vt. 178, 197, 559 A.2d 1073, 1086 (1989), *overruled on other grounds by Muzzy v. State By & Through Rutland Cty. State’s Att’y*, 155 Vt. 279, 583 A.2d 82, 83 (1990).

137. VT. CONST., ch. I, art. 4.

138. Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 BRANDEIS L.J. 613, 614–15 (2000); see Paul Blakeslee, ‘Certain Remedy Afforded for Every Wrong’: *State Constitutional Right-to-Remedy Provisions as a Vehicle for Climate Litigation*, 104 B.U. L. REV. 1829, 1836 (2024).

mean free of charge;<sup>139</sup> the Vermont Supreme Court has held that Article 4 does not prohibit courts from charging filing and transcript fees.<sup>140</sup> Nor do statutory awards of attorney's fees impermissibly force a defendant to purchase justice.<sup>141</sup>

For comparison, Oregon's open courts provision—which guarantees that “justice shall be administered, openly and without purchase”<sup>142</sup>—bars the procurement of legal redress by such means as paying money for a particular outcome,” such as “bribery and other forms of improper influence” or “the judicial imposition of fees and costs in amounts so onerous as to unreasonably limit access to the courts.”<sup>143</sup> In *Perce v. Hallett*, the Rhode Island Supreme Court ruled that the state's open courts provision prohibited “gratuities or exactions given or demanded for the direct purpose of influencing the course of legal proceedings and is to prevent the selling of justice by the sovereign.”<sup>144</sup> It was “designed to abolish, not fixed fees, prescribed for the purposes of revenue, but the fines which were anciently paid to expedite or delay law proceedings and procure favor.”<sup>145</sup>

In Vermont, once the court enters a rent escrow order, the tenant must make the prescribed payments to delay a writ from issuing against them before they can submit their affirmative defenses to a jury.<sup>146</sup> The tenant makes regular payments to the court for the landlord's ultimate benefit pending a motion for disbursement.<sup>147</sup> By failing to make a rent escrow payment, the tenant would effectively waive their right to a jury trial under Article 12, as discussed above. A hastily filed opposition to the landlord's motion requesting a writ would be their last opportunity to dispute the landlord's entitlement to possession—a poor substitute for a jury trial.

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139. VT. CONST., ch. I, art. 4; *accord* *Jacobsen v. Garzo*, 149 Vt. 205, 208, 542 A.2d 265, 267 (1988) (“Free and uninhibited access to the courts is an important right of all citizens. Indeed, in Vermont this right is recognized by our fundamental law.”).

140. *State v. de Macedo Soares*, 2011 VT 56, ¶ 12, 190 Vt. 549, 551–52, 26 A.3d 37, 41 (“While there is a fundamental right to access the courts, there is no constitutional guarantee that a litigant will be able to do so without expense. Defendant's citation to the Magna Charta [sic] and other historic legal texts does not aid his cause.”).

141. *See Fleury v. Kessel/Duff Const. Co.*, 149 Vt. 360, 364, 543 A.2d 703, 705 (1988) (“Indeed, we have come to recognize as a society that a denial of the right to recover attorney's fees, or alternatively, publicly subsidized counsel, will prevent many individuals including workers' compensation claimants from having access to justice. We find no denial of defendant's state constitutional rights.”).

142. OR. CONST., art. I, § 10.

143. *Allen v. Employment Dept.*, 57 P.3d 903, 905–06 (Or. Ct. App., 2002).

144. *See Square D. Co. v. O'Neal*, 72 N.E.2d 654, 657 (Ind. 1947) (quoting *Perce v. Hallett*, 13 R.I. 363, 365 (1881)).

145. *Perce*, 13 R.I. at 364 (emphasis added); *see State v. Basinow*, 371 A.2d 458, 659–60 (N.H. 1977).

146. *See* VT. STAT. ANN. tit. 12, § 4853a(h) (2026).

147. § 4853a(f); VT. STAT. ANN. tit. 9, § 4451(7) (2026).

Conversely, by making the payments specified in the order, the tenant enjoys time to conduct discovery and develop evidentiary support for their affirmative defenses. Though a tenant pays rent into court and not for the judge's benefit, Vermont's rent escrow statute nevertheless inhibits tenants' access to justice by conditioning the speed of proceedings upon payment.

*C. Rights to Due Process and Equal Protection Under the Fourteenth Amendment of the United States Constitution*

Two decisions of the United States Supreme Court, hardly known for its interventions into landlord-tenant law, illuminate a path that may lead to a successful challenge of the rent escrow statute. The Court's decision in *Lindsey v. Normet* provides perhaps the strongest support for the law and comparable rent escrow mechanisms against attack on Fourteenth Amendment grounds.<sup>148</sup> Oregon's Forcible Entry and Wrongful Detainer (FED) statute required a trial within six days after service of the complaint unless the tenant paid security for accruing rent in the form of a "continuance bond"<sup>149</sup> and restricted the triable issues in a FED action to the tenant's nonpayment, excluding defenses based on the landlord's breach of their duty to maintain the premises.<sup>150</sup> The appellants argued they had been deprived due process because their rental payments had not been suspended while they litigated their habitability claims against their landlord.<sup>151</sup>

The Court found Oregon's rent escrow mechanism "hardly irrational or oppressive."<sup>152</sup> The state was free to "treat[] the undertakings of the tenant and those of the landlord as independent rather than dependent covenants" and insist "that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor."<sup>153</sup> After all,

The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by

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148. 405 U.S. 56, 64 (1972).

149. *Id.* at 70 n.17 (citing OR. REV. STAT. §§ 105.135, 105.140 (2026)).

150. *Id.* at 64.

151. *Id.* at 66–67 n.12.

152. *Id.* at 65.

153. *Id.* at 67–68.

refusing to pay rent and by preventing sale or rental to someone else.<sup>154</sup>

Ignoring how a landlord's failure to maintain habitable premises might place strain on the relationship, the Court noted that it was tenant's nonpayment that had "proved a virulent source of friction and dispute."<sup>155</sup> The Court found in the Constitution no "guarantee of access to dwellings of a particular quality, [n]or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."<sup>156</sup> The Constitution may not "provide judicial remedies for every social and economic ill," but make no mistake: the document "expressly protects against confiscation of private property or the income therefrom."<sup>157</sup> Though the Court conceded that "it is possible" for the Oregon FED statute's continuance bond mechanism "to be applied so as to deprive a tenant of a proper hearing in specific situations," it did not expound further.<sup>158</sup>

Two years after *Lindsey*, Justice Thurgood Marshall penned for a majority of the Court in *Pernell v. Southall Realty* an exhaustive history of the ejectment action, with attention to the longstanding availability of a jury trial.<sup>159</sup> Because the right to recover possession of real property governed by the District of Columbia's ejectment statute was a right recognized by courts at common law, the Seventh Amendment preserved the right to a jury trial to both parties in ejectment actions.<sup>160</sup> Marshall anticipated the concerns of the RRAA's framers about frivolous tenant litigation, noting that "where the failure to pay rent is established and no substantial defenses exist, it is unlikely that a defendant would request a jury trial," and "the trial court's power to grant summary judgment where no genuine issues of material fact are in dispute provides a substantial bulwark against any possibility that a defendant will demand a jury trial simply as a means of delaying an eviction."<sup>161</sup> A tenant may not be evicted from their home without "a fair opportunity to present their case[]." <sup>162</sup>

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154. *Id.* at 72.

155. *Id.* at 73.

156. *Id.* at 74.

157. *Id.*

158. *Id.* at 65.

159. 416 U.S. 363, 371–81 (1974).

160. *Id.* at 376; *Curtis v. Loether*, 415 U.S. 189, 195 (1974).

161. *Pernell*, 416 U.S. at 384; *see* VT. R. CIV. P. 56(a).

162. *Pernell*, 416 U.S. at 385.

Read together, *Lindsey* and *Pernell* suggest the form that a successful challenge to Vermont's rent escrow statute might take. The Court recognized that Oregon's continuance bond mechanism could "be applied so as to deprive a tenant of a proper hearing in specific situations."<sup>163</sup> Noncompliance with the requirement resulted in the action being tried sooner, but as the Court later noted in *Pernell*, the FED statute still provided for a jury trial.<sup>164</sup> The stakes are higher for a Vermont tenant subject to a rent escrow order. Rather than trying their case before a jury sooner than originally anticipated, the tenant loses altogether the right to a jury trial on the issue of possession. Unlike in Oregon, a tenant in the District of Columbia could assert habitability issues as a defense to the landlord's nonpayment claim to possession,<sup>165</sup> underscoring the need for a fair opportunity to present their case. Under Vermont's rent escrow statute, the landlord may obtain a writ upon the tenant's nonpayment despite the tenant's jury demand on their affirmative defenses to possession.<sup>166</sup> "[S]uch procedural protections as the particular situation demands" ought to include those guaranteed by both Article 12 of the Vermont Constitution and the ejectment statute.<sup>167</sup>

#### CONCLUSION

Forty years after its enactment, the rent escrow statute routinely achieves its desired effect. Low-income tenants who cannot pay rent become subject to a rent escrow order, and the court will issue a writ restoring the landlord to possession before the self-represented litigant can perfect their pronouncement of *voir dire*, let alone submit their defenses and counterclaims to a jury. Any convenience achieved for the landlord comes at the expense of the tenant's free exercise of their constitutional rights to access the courts and defend their claim to possession of their home before a jury. So long as the rent escrow statute remains good law, Vermont's courts stand at risk of becoming, as Justice Marshall warned in *Pernell*, "rubber stamps for landlords."<sup>168</sup>

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163. *Lindsey*, 405 U.S. at 65.

164. *Pernell*, 416 U.S. at 384.

165. *Id.* at 364.

166. See VT. STAT. ANN. tit. 12, § 4853a(h) (2026).

167. See *id.*; *Bandler v. Cohen Rosenthal & Kramer, LLP*, 2015 VT 115, ¶ 13, 200 Vt. 333, 338–39, 131 A.3d 733, 737 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

168. *Pernell*, 416 U.S. at 385.