



**THE HOUSEBREAKING CRIME TO REMAIN A COMMON-LAW CRIME IN  
SOUTH AFRICA**

**By**

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THIS RESEARCH PROJECT IS SUBMITTED IN PARTIAL FULFILMENT OF THE  
REGULATIONS FOR THE DEGREE OF MASTERS OF CRIMINAL JUSTICE IN THE  
COLLEGE OF LAW AND MANAGEMENT STUDIES UNIVERSITY OF KWAZULU-  
NATAL.

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## **ACKNOWLEDGEMENTS**

The author is grateful to the supervisor, Professor Shannon Hoctor and Doctor Caroline Goodier who both dedicated their time to provide much appreciated guidance throughout this project and ensured that this project is successful.

Thanks also to Doctor Rose Kuhn who contributed by providing the required reading material whenever she was requested to.

I would also like to thank my family, especially, my wife, Thandekile Maureen Mkhize for providing emotional support and, of course, my children, namely, Nomvelo, Mdumiseni and Samkelo for being with me every step of the way.

## **ABSTRACT**

The crime of housebreaking with intent to commit a crime was unknown in Roman and Roman-Dutch law. This crime was treated as an aggravated form of theft. It emanates from the English law crimes of burglary and housebreaking. Its development was fraught with technicalities due to the fragmentary nature of its elements. However, the South African law followed its own developmental path even though the English law authorities contributed to its development by way of authorities. There have been calls for this crime to be abolished or statutorily regulated due to the difficulties or problems caused by some of its elements and due to a lack of overarching rationale for it.

The purpose of this dissertation is to examine the ‘breaking’ and ‘premises’ requirements of the common-law crime of housebreaking with intent to commit a crime from South African law perspective. These two elements have been criticised for causing most difficulties or problems for this crime. The various journal articles, textbooks, relevant case law and statutory provisions on this topic are considered for this dissertation. After due consideration of all the relevant material, it becomes conspicuous that the South African law cannot afford not to have this crime as part of our law; thus the crime cannot be abolished. The dissertation concludes that the crime of housebreaking should remain a common-law crime as opposed to the proposal to have it becoming a statutory offence.

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## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1 The historical background

The historical background of the crime of housebreaking pertains to the origin of this crime. The prominent sources of South African law insofar as the common law is concerned are Roman law and Roman-Dutch law. The position in Roman law and Roman-Dutch law insofar as the crime of housebreaking is concerned is discussed in the next paragraph, then English law in the following paragraph.

##### 1.1.1 Roman Law and Roman-Dutch Law

Crime of housebreaking<sup>1</sup> was unknown in Roman and Roman-Dutch law.<sup>2</sup> Instead, the crime of housebreaking with intent to steal and theft was treated as an aggravated form of theft.<sup>3</sup> There had to be actual theft in the crime of housebreaking with intent to steal for the housebreaking to form the aggravating circumstance.<sup>4</sup> The housebreaking without theft was treated as attempted theft in Roman-Dutch law.<sup>5</sup> When housebreaking was committed with intent to commit any other offence other than theft, the housebreaking could be punished as an iniuria.<sup>6</sup> The emphasis was on the theft and not on housebreaking.<sup>7</sup>

##### 1.1.2 English Law

Intrusions into another person's home were punishable as a specific and separate offence of burglary.<sup>8</sup> The word burglary is derived from "burgum" which means the house and "latro" which means theft.<sup>9</sup> This crime was developed as a means of protecting the security, sanctity

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<sup>1</sup> For the sake of brevity, the crime of housebreaking will be used throughout this dissertation instead of its full name: housebreaking with intent to commit a crime.

<sup>2</sup> J M Burchell *Principles of Criminal Law* 4ed (2013) 746; C R Snyman 'Reforming the law relating to housebreaking' (1993) 6 SACJ 38, 39; M Watney 'Unnecessary confusion in respect of housebreaking' (2014) 3 TSAR 606, 609.

<sup>3</sup> J R L Milton *South African Criminal Law and Procedure Vol II: Common Law Crimes* 3ed (1996) 794; Burchell (note 2 above) 746; Watney (note 2 above) 609.

<sup>4</sup> Snyman (note 2 above) 39.

<sup>5</sup> Milton (note 3 above) 794; Snyman (note 2 above) 39.

<sup>6</sup> Milton (note 3 above) 794; Snyman (note 2 above) 39; Watney (note 2 above) 609.

<sup>7</sup> Snyman (note 2 above) 39.

<sup>8</sup> Milton (note 3 above) 794; Watney (note 2 above) 609.

<sup>9</sup> Milton (note 3 above) 794.

and privacy of the home.<sup>10</sup> The purpose of this crime was to prevent the contemplated attacks upon and the destruction of the defences of “hamesocn” and “hus-brice”.<sup>11</sup> When the attacks occurred at night they were regarded as aggravating circumstances of the crime.<sup>12</sup> As time went on, the crime began to change and became complete only when the attack had taken place at night.<sup>13</sup> By the seventeenth century the crime of burglary had been restricted to only cases of breaking and entering into the house or mansion of another with intent to commit any felonious crime at night.<sup>14</sup> This necessarily meant that all the intrusions which occurred during the day were excluded from the burglary definition.

A burglar was then described as a person who would, in the night time, break and enter into another person’s house or mansion, with intent to kill some reasonable creature, or to commit some other felony within the same house or mansion, irrespective of whether the felonious intent was executed or not.<sup>15</sup> Since burglary was a felony it was punishable by death.<sup>16</sup> Hus-brice, or housebreaking, became a burglary if it took place during the day; however, it was a misdemeanour and carried a lesser punishment compared to the action which occurred in the night time.<sup>17</sup>

The common-law crime of burglary was developed and comprised six elements which were as follows: (a) breaking, (b) entering, (c) the house/mansion/dwelling, (d) of another, (e) in the night time and (f) with intent to commit a felony inside.<sup>18</sup> As a result of the severity of the penalty for the burglary<sup>19</sup> following a conviction, the judges began to adopt a strict construction of these burglary elements.<sup>20</sup> Then the crime came to be fraught with meaningless distinctions and aimless definitions.<sup>21</sup> The crime of burglary only ceased to be a capital offence in 1837 when it became punishable by life imprisonment.<sup>22</sup> Housebreaking

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<sup>10</sup> Ibid 792.

<sup>11</sup> Ibid 794, where ‘hamesocn’ is described as an assault upon another person in his or her home and ‘hus-brice’ is described as a forcible or furtive entry into the house another person.

<sup>12</sup> Ibid 794.

<sup>13</sup> Ibid 794.

<sup>14</sup> Ibid 794.

<sup>15</sup> Ibid 794.

<sup>16</sup> Ibid 794.

<sup>17</sup> Ibid 794.

<sup>18</sup> Ibid 794-95.

<sup>19</sup> It became a capital offence thus capital punishment was applicable.

<sup>20</sup> Milton (note 3 above) 795.

<sup>21</sup> Ibid 795.

<sup>22</sup> Ibid 795

was made a felony by statute through the Larceny Act of 1916.<sup>23</sup> The English authorities emphasised that housebreaking was a crime against someone's habitation, for which the English laws had a special respect, for the reason that every person by law had special protection in their houses, mansions or dwellings.<sup>24</sup>

A new era began when Theft Act of 1968 (Theft Act) introduced a new offence of burglary. Most of the elements of the common-law crime of burglary were abandoned.<sup>25</sup> Section 9 of the Theft Act provides that 'a person is guilty of burglary if, with intent to commit a specific offence, he<sup>26</sup> enters any building or part of a building as a trespasser and steals or attempts to steal anything in the building or in the part of the building or inflicts or attempts to inflict on any person therein any grievous bodily harm'.<sup>27</sup> The specific offences, that are said may be committed inside the building or part of the building, are mentioned as follows: theft; infliction of grievous bodily harm on any person; raping of any woman; and doing of unlawful damage to the building or anything therein.<sup>28</sup> The 'building' is defined as an inhabited vehicle or vessel, whether or not the inhabitant is there.<sup>29</sup> In terms of section 10 of the Theft Act, a person who is guilty of aggravated burglary is liable to more severe penalties if he commits any burglary and at the time of such commission had with him any firearm or imitation firearm, any weapon or any explosive.<sup>30</sup>

The 'breaking' element was replaced, with the hope that it would simplify the position that the offender is a trespasser when he enters the building.<sup>31</sup> All that was required for the complete crime of burglary was mere entry into the building with intent to commit a crime. The English authors opine that the concept of entry as a trespasser has not proved to be an easy one.<sup>32</sup> The lesson to be learnt from the English law are that the mere replacing of difficult concepts is no quick fix solution as the new concepts will again still require interpretation and development, giving rise to challenges of their own.<sup>33</sup> This tells us that the

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<sup>23</sup> Ibid 795.

<sup>24</sup> Ibid 794.

<sup>25</sup> Ibid 795.

<sup>26</sup> Any reference to the man in this dissertation shall, unless the context indicates otherwise, be construed as a reference inclusive of a woman.

<sup>27</sup> Milton (note 3 above) 795.

<sup>28</sup> Ibid 795.

<sup>29</sup> Ibid 795.

<sup>30</sup> Ibid 795.

<sup>31</sup> Watney (note 2 above) 610.

<sup>32</sup> Ibid 610.

<sup>33</sup> Ibid 610.

replacement of the 'breaking' element with mere 'entry' never yielded any positive results in English law as there are still current difficulties experienced with the statutory offence of burglary.

## **1.2 Development of the crime**

The perceived deficiencies of the housebreaking crime may be attributed to its historical development.<sup>34</sup> This crime was developed on a piecemeal basis, the courts having a central role in shaping it by interpretation, and it gradually took a different form.<sup>35</sup> The development of the crime was fraught with technicalities and propelled by the capital nature of the crime, which resulted in the courts trying to avoid convictions by creating fine distinctions with regard to the elements of this crime.<sup>36</sup> The accretion of the occasional statutory provisions also had an effect of changing the crime from what it had originally been.<sup>37</sup> Burglary crime was then exported to the English colonies where the technical nature of the crime enabled intruders to avoid liability if the entry into the premises had been lawful as their acts were not against the artificialities created by the judicial fiat.<sup>38</sup> Although the English law offences of burglary and housebreaking together closely approximated the housebreaking crime in South African law and contributed immensely to its development by way of authorities, the South African law followed its own developmental path thereby avoiding some of the eccentricities of English law.<sup>39</sup> This clearly tells us that the problems and difficulties of this crime go as far back as the ancient times, before it even became part of our law. The development of the crime was overshadowed by these difficulties as has been mentioned.

## **1.3 Rationale for this study**

The crime of housebreaking has been a common-law crime ever since it became part of South African law.<sup>40</sup> As mentioned above, this crime emanates from the English law crimes of

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<sup>34</sup> S V Hoor 'The historical antecedents of the housebreaking crime' (1999) 5 *Fundamina* 97, 98.

<sup>35</sup> *Ibid* 98.

<sup>36</sup> *Ibid* 98.

<sup>37</sup> *Ibid* 98, where the learned author has given an example of the statutory provision which included breaking out of the premises after a lawful entry within the definition of the crime.

<sup>38</sup> *Ibid* 98-99.

<sup>39</sup> *Ibid* 100.

<sup>40</sup> Milton (note 3 above) 795; Burchell (note 2 above) 746.

burglary and housebreaking<sup>41</sup> and was unknown in Roman and Roman-Dutch law.<sup>42</sup> There have been calls from some criminal law writers to have this crime: abolished without replacing it with any new one; treated as a qualified form of the offence committed inside the premises; created as a new offence of unlawful intrusion on certain types of premises; or, required to add to the unlawful entering of the premises an ulterior intention by the intruder, that is, an intention to commit some further crime inside.<sup>43</sup> The calls have been forthcoming due to the difficulties experienced with some of its elements, namely, the ‘breaking’, ‘premises’ and ‘further intention’ requirements.<sup>44</sup>

There are divergent points of view relating to the reformation of the crime of housebreaking. The controversy pertaining to the existence of the crime of housebreaking revolves around the ‘breaking’ and ‘premises’ requirements. There has been no hard and fast rule relating to what constitutes the ‘breaking’ and what constitutes the ‘premises’. Neither the South African courts nor criminal law writers could agree on the extent to which these two requirements may be applied. There is no piece of legislation relating to either the definition of these two requirements or the crime of housebreaking itself.

The existence of the crime of housebreaking has been trenchantly criticized by South African and Anglo-American scholars who have called for its demise and its replacement with the statutory offence of trespass.<sup>45</sup> The origin of the criticisms is said to be that the elements which comprise housebreaking crime are fragmentary and technical in nature and further that there is a lack of overarching rationale for the crime.<sup>46</sup> The requirements that are subject to criticism are ‘breaking’, ‘premises’ or ‘structure’ and the ‘additional intention’.<sup>47</sup> The most problematic element of these three requirements is that of ‘breaking’, which pertains to the facilitation or causing of entry into the premises.<sup>48</sup> It is not only criminal law writers who have been critical of this crime and called for the legislative intervention but also judicial

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<sup>41</sup> Hoctor (note 34 above) 100.

<sup>42</sup> Milton (note 3 (above) 794; Burchell (note 2 above) 746; Watney (note 2 above) 609.

<sup>43</sup> Snyman (note 2 above) 38.

<sup>44</sup> Snyman (note 2 above) 43-44.

<sup>45</sup> Hoctor (note 34 above) 98; Watney 611.

<sup>46</sup> *Ibid* 98.

<sup>47</sup> Snyman (note 2 above) 40.

<sup>48</sup> Hoctor (note 34 above) 104.

officers.<sup>49</sup>

## **1.4 Statement of Purpose**

This dissertation will focus on the two elements of the crime of housebreaking, namely, the ‘breaking’ and the ‘premises’ requirements.<sup>50</sup> The case law pertaining to these two requirements will be examined. The origin and the extent of the controversy around these two requirements will be considered. The research will consider the nature of the crime of housebreaking in general and the developments made by the courts as well as the invaluable contributions made by the criminal law writers. It will, furthermore, consider the impracticality of doing away with any of the requirements which presently constitute the crime of housebreaking from South African law perspective. At the end, it will be argued that the crime of housebreaking should neither be abolished nor legislated but should remain a common-law crime in South African law, however, the extension of the concept of ‘breaking’ is to be employed and the adoption of the common-sense approach insofar as ‘premises’ is concerned is to be preferred. Thus the purpose of this study is to examine the ‘breaking’ and ‘premises’ requirements of the common-law crime of housebreaking with intent to commit a crime from South African law perspective.

## **1.5 Research Questions**

### **1.5.1 ‘Breaking’ requirement - questions**

How significant is the ‘breaking’ requirement in the crime of housebreaking? What difficulties does it cause, if any? What could possibly be the effects of the elimination of this requirement from the definition of the crime?

### **1.5.2 ‘Premises’ Requirement - questions**

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<sup>49</sup> C R Snyman *Criminal Law* 6ed (2014) 543 cites the following three cases of *S v Ngobeza* 1992 1 SACR 610 (T), *S v Abrahams* 1998 2 SACR 655 (C) and *S v Woodrow* 1999 2 SACR 109 (C) in respect of which the presiding judicial officers were critical of this common-law crime.

<sup>50</sup> The reason for focusing on the ‘breaking’ and ‘premises’ requirements of the crime housebreaking is because they are the most difficult and problematic elements compared to the additional intention element of the crime.

What is the ‘premises’ in the context of this crime? What has been the courts’ approach over the years towards this element? How consistent have the courts been adopting the same approach? What are the scholars’ perspectives on this element?

## **1.6 Methodology**

Desktop research methodology has been employed for this dissertation. Various textbooks on criminal law pertaining to this topic have been used. The case law germane to the topic has been used to illustrate or demonstrate that the crime of housebreaking should remain a common law in South African law as opposed to the call to have it abolished and/or subsumed by trespass offence. The case which began the criticism of the nature of this crime is *S v Ngobeza*.<sup>51</sup> Various scholarly articles have been reviewed for this dissertation including Hoor’s thesis.<sup>52</sup> The articles have been used to support the viewpoint that this crime serves the interest of all South Africans and that the difficulties and problems relating to some of its elements may be overcome.

## **1.7 Outline of the Dissertation Structure**

This chapter has introduced the dissertation. It has covered the historical background of the crime of housebreaking where different sources of our law have been discussed, namely, Roman and Roman-Dutch Law as well as English Law. Development of this crime, rationale for this study, statement of purpose and research questions as well as the methodology employed have all been discussed in this chapter.

Chapter two deals with the current formulation of the crime of housebreaking in South African law. All the elements of the crime are briefly discussed apart from the ‘breaking’ and ‘premises’ requirements. The nature and purpose of this crime is covered. The proposed reformation of this crime is considered and analyzed.

Chapter three deals with the element of ‘breaking’ as one of the vital elements of the crime of

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<sup>51</sup> *Ngobeza* (note 49 above) 610.

<sup>52</sup> Hoor S V *The crime of housebreaking in South African Law - A comparative approach* (1997) D Juris thesis Leyden University.

housebreaking. The current position in South African law relating to the courts' interpretation of this element is discussed. The origin of the controversy and the critical role played by this element in the crime of housebreaking are also covered.

Chapter four deals with the element of 'premises'. There is an in-depth analysis of the literature on this element covering the origin and common-law jurisdictions in relation to this element. The current position in South African law is covered. De Wet/Snyman and Hoctor perspectives are examined.

Chapter five provides a conclusion to the dissertation. The findings are summarized and their significance discussed. Recommendations are made with regard to the treatment of housebreaking in South African law.

## CHAPTER TWO

### 2. THE CRIME OF HOUSEBREAKING IN SOUTH AFRICAN LAW

#### 2.1 Definition

The crime of housebreaking consists in unlawfully and intentionally breaking into and entering the building or the structure with the intention of committing some crime in it.<sup>53</sup> The element of intention is divided into two parts: firstly, the accused must have the intention of unlawfully breaking into and entering the house or the structure; and secondly, the accused must, at the time of housebreaking, have the intention of committing some other crime inside.<sup>54</sup> It can be deduced from this definition that the crime of housebreaking comprises six elements, namely, (a) unlawful and (b) intentional, (c) breaking into and (d) enter (e) the premises (f) with intent to commit a crime within the premises.<sup>55</sup> Criminal liability only follows once all six elements have been fulfilled. Each of these elements apart from two elements is briefly described in this chapter the two elements not considered here, namely, the ‘breaking’ and the ‘premises’ elements, will be discussed in details in chapters three and four respectively.

#### 2.2 The Nature and Purpose of the Crime

The South African common-law crime of housebreaking reflects the development by the South African courts from the early English law, with some of its eccentricities removed.<sup>56</sup> The South African law has avoided many of the former technical English distinctions by unifying housebreaking into one crime in terms of the common law and is wider than the crimes of burglary and housebreaking in English law.<sup>57</sup> The effect of this development is that

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<sup>53</sup> Snyman (note 49 above) 543; Milton (note 3 above) 792; Burchell (note 2 above) 744 defines it as a crime consisting in unlawfully breaking and entering premises with the intent to commit that crime. Milton cites the definition given by Gardiner and Lansdown in their 6th edition, 1717 which reads as follows “consists: (1) in the removal or displacement of some part of the structure of a house, or of premises in the nature of a house, with the object of gaining admission thereto and committing some crime therein, and (2) in the entry of the offender into the house or premises broken, or the insertion by him into the house or premises of any part of his body or any instrument with which he proposes to exercise control over anything within the house or premises”. The learned author is critical of this definition for the reasons that it gives the detailed discussion of the breaking, entering and premises elements in the definition instead of giving such a detailed discussion in the text; that the definition of these elements in the definition is superfluous; that this makes the definition unwieldy and that the definition omits the unlawfulness element.

<sup>54</sup> Snyman (note 49 above) 548.

<sup>55</sup> Burchell (note 2 above) 744; Snyman (note 49 above) 543.

<sup>56</sup> Milton (note 3 above) 795; Snyman (note 49 above) 543.

<sup>57</sup> Ibid 795.

housebreaking is no longer regarded as an aggravated form of theft, that housebreaking with intent to commit a crime is a substantive crime on its own and that, when the crime is committed inside the premises, such crime is a completely separate one.<sup>58</sup> It is important to note that all these developments were brought about by the South African courts without any form of statute being enacted to assist in the development of the housebreaking crime in South African law. The South African courts have been at the forefront in this development from the stage when the crime was inherited from the English law more than a century ago.

The crime of housebreaking was developed as a means of protecting the security, sanctity, and privacy of the home.<sup>59</sup> The purpose of the crime of housebreaking is to preserve the sanctity of the home or habitation against intrusions that involve danger or harm to the inhabitants.<sup>60</sup> The purpose is “not so much to protect the dwellings as a building but to protect its security that represented the indefinable idea, existent at all times that the home was inviolable: every individual exercised their greatest freedom at home”.<sup>61</sup> The nature of this crime provides that a person who enters another person’s habitation with the intention to commit some crime within the premises can be punished even though he has proceeded no further in his criminal object than to force an entry into the premises.<sup>62</sup> The law authorizes the criminalization of the offenders intending to commit some crime within the premises at a stage when the offender has not yet approached the commencement of the consummation of the intended crime by making entry with criminal intent an independent substantive crime.<sup>63</sup> With this early intervention of the law, the safety and security of the home and its inhabitants are improved.<sup>64</sup> Our courts have shaped this crime in order to ensure that there is a maximum protection of South African societal interests at a very early stage by criminalizing the conduct of the offender at the stage when he has made his criminal intent known but before the crime or the offence is actually committed. The courts have, for years, fashioned this crime to suit South African societal needs. This fashioning has been effected without any legislative interference apart from only two provisions in the Criminal Procedure Act<sup>65</sup> relating to the crime of housebreaking.<sup>66</sup>

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<sup>58</sup> Ibid 795.

<sup>59</sup> Ibid 792.

<sup>60</sup> Ibid 792; Burchell (note 2 above) 744; Hoctor (note 52 above) 226-30.

<sup>61</sup> Ibid 792.

<sup>62</sup> Ibid 792; Burchell (note 2 above) 744.

<sup>63</sup> Ibid 793.

<sup>64</sup> Ibid 793.

<sup>65</sup> Criminal Procedure Act 51 of 1977.

<sup>66</sup> The provisions are sections 95 (12) and 262.

Prior to the Union of South Africa in 1910, statutory forms of the crime of housebreaking were enacted by the four provincial legislatures; however, such statutes were not intended to override the common law version of the crime, but to supplement it.<sup>67</sup> The purpose of those provincial statutes was to provide an alternative basis of criminal liability with reference to the prohibited conduct which overlapped with the ambit of the common law crime, and thereby extended the scope of the prohibited conduct as such.<sup>68</sup> These provincial statutes were repealed by the General Law Third Amendment Act 29 of 1993, which created a national offence.<sup>69</sup> The crime of housebreaking remained a common-law crime from as early as when it was inherited from English law until now and there has never been a stage when there has been any attempt to have it legislated for the purposes of creating a new national statutory crime of housebreaking.

## **2.3 Elements of the crime**

### **2.3.1 Unlawfulness**

The unlawfulness element relates to the lack of consent by the owner or the lawful occupier of the premises to the breaking into and entering by the offender.<sup>70</sup> There is no dispute amongst the criminal law writers relating to this element of the crime and it does not present any difficulties.<sup>71</sup> For this element to be fulfilled, the entry into the premises must be unlawful.<sup>72</sup> Where one breaks into and enters one's own premises, no crime is committed for the reason that this element has not been satisfied.<sup>73</sup>

### **2.3.2 Intention**

This element relates to the intent to unlawfully break and enter the premises.<sup>74</sup> The accused lacks intention if he believes that he is breaking into his own premises or that he is breaking

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<sup>67</sup> Hoctor (note 52 above) 75.

<sup>68</sup> Ibid 75.

<sup>69</sup> Ibid 76.

<sup>70</sup> Snyman (note 2 above) 40.

<sup>71</sup> Ibid 40.

<sup>72</sup> Milton (note 3 above) 796; Burchell (note 2 above) 746; Snyman (note 49 above) 548.

<sup>73</sup> Ibid.

<sup>74</sup> Burchell (note 2 above) 749; Snyman (note 49 above) 548.

and entering with the approval of the owner of the premises.<sup>75</sup> This general intention does not present particular difficulty.<sup>76</sup>

### 2.3.3 Additional Intention

The additional intention refers to the intention of committing some crime or offence inside the premises at the time of breaking and entering since the housebreaking on its own does not constitute a crime or an offence.<sup>77</sup> The further crime or offence intended to be committed by the accused inside the premises should be a different one from the housebreaking itself.<sup>78</sup> If it is difficult or uncertain as to which crime or offence the accused intended to commit inside the premises, the possibilities are that he may either be charged with the crime of housebreaking with intent to contravene the provisions of the Trespass Act<sup>79</sup> or the contravention of the provisions of the Criminal Procedure Act.<sup>80</sup> This form of intention is subject to criticism by various criminal law writers.<sup>81</sup> It is also referred to as the second intention or the ulterior intention.<sup>82</sup> Most criminal law writers have trenchantly criticised the second possibility where the accused's ulterior intention cannot be established.<sup>83</sup>

### 2.3.4 Entry

Criminal law writers agree that this element cannot be dispensed with. Unlawful entry has been said to be the gravamen of the crime of housebreaking.<sup>84</sup> It relates to the insertion by the accused of any part of his body into the premises or any instrument he is using for the purposes of insertion into the opening with the intention of thereby exercising control over some articles or contents of the premises.<sup>85</sup>

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<sup>75</sup> Snyman (note 49 above) 548.

<sup>76</sup> Snyman (note 2 above) 40.

<sup>77</sup> Snyman (note 49 above) 548.

<sup>78</sup> Milton (note 3 above) 805; Burchell (note 2 above) 749.

<sup>79</sup> Section 1 of the Trespass Act 6 of 1959.

<sup>80</sup> Section 95 (12) of the Criminal Procedure Act 51 of 1977.

<sup>81</sup> Snyman (note 2 above) 40, points out that the additional intention is one of the three elements or requirements that is subject to criticism.

<sup>82</sup> Snyman (note 2 above) 40.

<sup>83</sup> Snyman (note 2 above) 43.

<sup>84</sup> Snyman (note 2 above) 46.

<sup>85</sup> Snyman (note 49 above) 548; Burchell (note 2 above) 748; Milton (note 3 above) 801.

## 2.4 Proposed Reformation

The crime of housebreaking operates as the pre-eminent preparatory offence as it is committed prior to the intended crime or the offence being achieved.<sup>86</sup> It constitutes a species of attempt made substantive.<sup>87</sup> It is one of the best known crimes in our law; however, its definitional structure reveals important shortcomings which sometimes lead to the arbitrary results in practice.<sup>88</sup> All the authors of the textbooks on the criminal law are critical of the construction of this crime.<sup>89</sup> It is not only the authors of criminal law textbooks who criticize the crime but also the South African courts that have the misgivings about it, as was the case in the judgment of Smit J in the *Ngobeza*<sup>90</sup> case.<sup>91</sup> The court's criticism is welcomed and the proposed intervention by the legislature is fully supported by Snyman.<sup>92</sup>

The first model has the least to recommend it because of the difficulties in applying and interpreting the 'breaking', which cannot be solved simply by defining the 'breaking'

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<sup>86</sup> S V Hoorer 'The crime of housebreaking: To reform or to reformulate?' (2001) *Obiter* 163 163.

<sup>87</sup> *Ibid* 163.

<sup>88</sup> Snyman (note 2 above) 38.

<sup>89</sup> *Ibid* 38; Snyman mentions the various authors, namely, J C De Wet and H L Swanepoel (*Strafreg* 4ed (1985) 360-73); P M A Hunt (*South African Criminal Law and Procedure Vol II: Common-Law Crimes* revised 2ed (1990) by J R L Milton 706, 708); C R Snyman (*Criminal Law* 2ed (1989) 525, 529-30); Jonathan Burchell and John Milton (*Principles of Criminal Law* (1991) 542).

<sup>90</sup> *Ngobeza* (note 49 above) 610.

<sup>91</sup> Snyman (note 2 above) 38, 39 points out that the court regretted that the accused could not be convicted of some form of housebreaking since their moral culpability did not differ from that of a criminal who broke open a door in order to gain access to a building. Further points out that according to the court the interpretation of the meaning of the elements of the offence created unnecessary confusion and uncertainty; that the offence protects a person's rights to undisturbed habitation of his house or storage of his property, but the technicalities in the applicable legal rules created uncertainty; and that the time has come for the legislature to look into the matter and try and create legal certainty.

<sup>92</sup> Snyman (note 2 above) 38, 39 and 43-44; Snyman proposed five models for reform of the crime of housebreaking, namely,

Firstly, the retention of the crime in its current or present form, but merely try to smooth its rough edges by statutorily defining its elements in such a way that most of the artificialities are removed from its ambit;

Secondly, completely abolish the crime without replacing it with any new one. The housebreakers would be liable to be convicted of the malicious injury to property in respect of the breaking, of the contravention of the provisions of the Trespass Act 6 of 1959 in respect of entry and of the crime committed inside the premises, if any;

Thirdly, reverting back to the original common law and treat housebreaking merely as a qualified form of the offence or the crime committed inside the premises, that is, treating unlawful entry as an aggravating form of the crime committed inside the premises, that is, treating unlawful entry as an aggravating form of the crime committed inside the premises;

Fourthly, the adoption of the model found in jurisdictions on European continent and creating a new offence of unlawful entering or intruding on certain types of the premises; and

Fifthly, opting for an amended version of the previous model by requiring the unlawful entering of the premises to be accompanied by an ulterior intention by the intruder, that is, an intention to commit some further crime or offence inside the premises.

A possible weakness of the fourth possibility is that such a new offence would overlap with the trespass offence which is an already existing offence under Act 6 of 1959. This weakness might be overcome by preferring the fifth possibility, which is the solution that was adopted in England through section 9(1) (a) of the Theft Act 1968. The ulterior intent which requires the existence of intent to commit some unspecified offence inside is a wide description which would open the door to the charges alleging intent to trespass, which is unsatisfactory because the wrongdoer's very presence in the building already amounts to trespassing. Alternatively, the ulterior intent could be circumscribed by specifically listing the offences intended for commission inside, as is the position in terms of section 9 of the Theft Act of 1968 in England.

requirement in a certain way as the difficulties relating to this requirement are inherent in its very existence.<sup>93</sup> This requirement should be discarded, as very little can be gained by simply redefining it.<sup>94</sup> The second model does not appeal at all, as the abolition of the crime would leave a vacuum in the substantive criminal law.<sup>95</sup> Merely falling back on the offence of trespassing coupled with the possible conviction of the malicious injury to property would not satisfy the undoubted need to treat the housebreakers separately.<sup>96</sup> The moral turpitude of a housebreaker is more than that of a trespasser.<sup>97</sup> The third model complements the fourth or fifth model instead of being an alternative and applies if the wrongdoer commits a crime after entering.<sup>98</sup> If he is apprehended before execution of his ulterior intent, then the fourth or fifth models may apply.<sup>99</sup> A combination of third and fourth or fifth makes it unnecessary to require a real breaking into the premises since the gravamen of the offence would be the unlawful entry.<sup>100</sup>

A combination of the third and fourth models is preferred to that of the fifth.<sup>101</sup> The difficulty with this preferred model is that it negates the functioning of the crime of housebreaking as a preparatory crime and this pre-eminent feature is by definition excluded if the housebreaking merely serves as a qualification of a crime which has already been committed.<sup>102</sup> In defining the crime this way, the true historical antecedents of the crime, contained principally in the common law, and in turn its antecedents and the South African law are ignored and the central rationale of the crime is discarded.<sup>103</sup> The utility of the crime is lessened further in the jurisdictions which limit its functioning to an aggravation of theft.<sup>104</sup> Unlawful entry is unsuited to the role of the 'breaking' as it does not include any requirement that the intruder have any intent to commit a further crime or offence upon entry, and is obviously not punishing a preparatory crime, instead the harm being punished is simply an unlawful entry.<sup>105</sup> The requirements of an entry and certain types of the premises cannot be thrown

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<sup>93</sup> Ibid 45.

<sup>94</sup> Ibid 45.

<sup>95</sup> Ibid 45.

<sup>96</sup> Ibid 45-46.

<sup>97</sup> Ibid 46.

<sup>98</sup> Ibid 46.

<sup>99</sup> Ibid 46.

<sup>100</sup> Ibid 46.

<sup>101</sup> Ibid 47.

<sup>102</sup> Hoctor (note 86 above) 168.

<sup>103</sup> Ibid 168.

<sup>104</sup> Ibid 168; Hoctor submits that other offences may equally be aggravated when committed under circumstances which amount to housebreaking.

<sup>105</sup> Ibid 169.

overboard; otherwise it would not be possible to replace the existing crime with any new offence.<sup>106</sup> The best that can be done would be to circumscribe these requirements in such a way as to avoid most of the uncertainties.<sup>107</sup>

There is a strong historical rationale for having a separate crime to punish the ‘breaking’ or the unlawful entry, as a precursor to preventing possible serious harm inside the premises.<sup>108</sup> It functions as an important preparatory crime which operates distinctly from the law of attempts.<sup>109</sup> Our courts can and do distinguish between the gravity of the completed crimes of housebreaking by differentiation of punishment.<sup>110</sup> The crime of housebreaking is a very serious crime and the acts associated with it constitute an aggravated form of intrusion, which invariably results in psychological trauma.<sup>111</sup> This crime operates to prevent the infringement of the universal social construct of territoriality in that it provides for the commission of the crime at the point of entry into the premises.<sup>112</sup> The housebreaking act is aggravated compared to the trespassing act, in that it comprises an infringement of what someone has sought to secure and protect.<sup>113</sup> In our law, intrusion into a building is customarily associated with housebreaking whereas trespassing usually relates to property rather than the buildings in practice.<sup>114</sup> Trespass compares unfavorably with breaking and entering in terms of proximity to the commission of the crime, in that an act of breaking and entry goes beyond mere trespass.<sup>115</sup> It is inappropriate to have a trespass offence punishing this peculiarly gross infringement of the territorial rights of another, which may lead to severe psychological repercussions.<sup>116</sup> Accordingly, none of these proposed models should be used to replace the existing crime of housebreaking.<sup>117</sup>

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<sup>106</sup> Snyman (note 2 above) 47.

<sup>107</sup> *Ibid* 47.

<sup>108</sup> Hoctor (note 86 above) 165.

<sup>109</sup> *Ibid* 166.

<sup>110</sup> *Ibid* 166.

<sup>111</sup> *Ibid* 166.

<sup>112</sup> *Ibid* 166.

<sup>113</sup> *Ibid* 166.

<sup>114</sup> *Ibid* 166.

<sup>115</sup> *Ibid* 167.

<sup>116</sup> *Ibid* 169; Hoctor further points out that housebreaker’s conduct has always been regarded as much more heinous than the thief.

<sup>117</sup> *Ibid* 169.

## CHAPTER THREE

### 3. THE 'BREAKING' REQUIREMENT

#### 3.1 The South African Law Current Position

##### 3.1.1 The definition of 'breaking' requirement

The third requirement in the definition of crime of housebreaking in South Africa is 'breaking'. For criminal liability to ensue there must be 'breaking' into the premises.<sup>118</sup> In other words, where the 'breaking' element is lacking, there is no crime of housebreaking committed.<sup>119</sup> To break into premises means to create a way into the premises by displacing some obstruction which forms part of the premises.<sup>120</sup> Obstruction does not have to be a permanent attachment to the building.<sup>121</sup> 'Breaking' is a term of art in the sense that it can occur without any physical damage.<sup>122</sup> This element reflected the basic notion of the English common law which effectively differentiated between accused who forced their way into a building and an accused who simply took advantage of an open door or window to gain access.<sup>123</sup> By the inclusion of the 'breaking' element the law made housebreaking a crime of forcible entry to a habitation as opposed to mere unlawful entry.<sup>124</sup> "The English law principles relating to burglary were of a very strong persuasive value, if not authoritative in South African law."<sup>125</sup>

##### 3.1.2 The nature of 'breaking' requirement

Our courts have held that the conduct of the accused constituted a breaking where he opened a closed window<sup>126</sup> or door<sup>127</sup> irrespective of whether such window or door was locked,

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<sup>118</sup> Burchell (note 2 above) 746.

<sup>119</sup> S v Hoorer 'The 'Breaking' requirement in the crime of housebreaking with intent' (1998) 19 2 *Obiter* 201, 204; S v *Rudman* 1989 (3) SA 368 (E) 385.

<sup>120</sup> Milton (note 3 above) 798; Burchell (note 2 above) 747. *R v Fourie/Louw* 1907 ORC 58; *R v Mososa* 1931 CPD 348; *R v Makoelman* 1932 EDL 194; *R v Gomaseb* 1936 SWA 16.

<sup>121</sup> *S v Lekute* 1991 2 SACR 221 (C); Snyman (note 49 above) 547; Hoorer (note 52 above) 22.

<sup>122</sup> Milton (note 3 above) 798; *R v Faison* 1952 (2) SA 671 (SR) 673.

<sup>123</sup> Milton (note 3 above) 798.

<sup>124</sup> *Ibid* 798.

<sup>125</sup> Hoorer (note 119 above) 204; *Fourie/Louw* (note 120 above) 58; the English definition of housebreaking was explicitly accepted.

<sup>126</sup> *Fourie/Louw* (note 120 above) 58; *R v Crawford* 1924 PH H5 (GW); Hoorer (note 119 above) 205.

<sup>127</sup> *Asbury v Rex* 1946 NPD 565; *R v Ovamboland* 1931 SWA 11.

unlocked or ajar.<sup>128</sup> When shaping and fashioning the boundaries of breaking, our courts generally seek to avoid the technicalities of the English law.<sup>129</sup> A typical example is that in the former English law there was only a breaking if the point of entry that was partly open was widened by tampering with a fastening or locking device.<sup>130</sup> The South African courts have never tried to fashion a definitive test as to the constitution of a displacement of an obstruction sufficient to effect an entry into the premises, instead they are dealing with each case on its own merits.<sup>131</sup> However, in the case of *Mososa*<sup>132</sup> the court held that if a householder had left a door or a casement window ajar, without taking steps to secure it so that it did not swing open and the accused pushed it open, there would be no breaking.<sup>133</sup>

The facts in *Mososa*<sup>134</sup> were that the accused had entered premises by pushing up a sash window, which had been left slightly open. The accused was interrupted in his act; hence nothing was stolen.<sup>135</sup> This decision was trenchantly criticised by the court in *S v Moroe*<sup>136</sup> and some criminal law writers.<sup>137</sup> In the case of *Moroe*,<sup>138</sup> the court held that where the accused pushed a door which was slightly open, thereby further opening it, in order to enter premises with intent to steal, that conduct constitutes breaking.<sup>139</sup> The question still persists

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<sup>128</sup> Milton (note 3 above) 798; Hoctor (note 119 above) 205.

<sup>129</sup> Hoctor (note 119) 205.

<sup>130</sup> *Ibid* 205.

<sup>131</sup> *Ibid* 205.

<sup>132</sup> *Mososa* (note 120 above) 352.

<sup>133</sup> Milton (note 3 above) 799; Hoctor (note 119 above) 206; *Mososa* (note 120 above) 352.

<sup>134</sup> *Mososa* (note 120 above) 352.

<sup>135</sup> The judgment of Gardiner J P, as he then was, read as follows: If the house is close to intruders, then the creation of an opening is a breaking. "Close to intruders" mean to all intruders, I should not be prepared to say that a breaking was committed where a stout man had to enlarge slightly an opening which would admit a thin one. A person who left his window in this condition could not be said to have closed it to intruders. There must be some displacement of the means adopted by the householder to exclude intruders. I should not be prepared to say that where a householder had left a door or a casement window ajar, without taking steps to secure that it did not swing open, a person who pushed it wider open committed a breaking.

<sup>136</sup> *S v Moroe* 1981 (4) SA 897 (O) 898-99, the court criticised the "fat-man" approach as flawed in the reasoning as it would demand that the courts will have to try to define the differences between a "stout" or "fat" and a "thin" accused.

<sup>137</sup> Milton (note 3 above) 799; Milton points out some pitfalls of this "fat-man" approach in the form of questions that 'what is the girth of the average man?'; 'can one say the householder has secured his premises against intrusion if a small boy can get through, but not an average man?'; he questions the significance of the distinction between a slightly or partially open casement window and sash window, whether the fact that one opens upwards and other inwards is the basis for an important legal distinction or not; 'why should it matter whether the householder's purpose was to exclude intruders or draughts?' He points out the danger of this approach that the difficulties will arise if we make 'breaking' turn on the efficacy of the measures taken to keep intruders out and concludes that, 'for as long as we accept that 'breaking' is a term of art, there is no point in drawing distinctions and enunciating tests of the this kind as proposed by the court in the case of *Mososa*.' He correctly points out that the primary enquiry insofar as the displacement is concerned is whether part of the premises was displaced by the accused, whether householder thought he was excluding intruders is irrelevant, as is the stature of the accused. It is only when there is no displacement or trifling one is there no breaking.

<sup>138</sup> *Moroe* (note 136 above) 899.

<sup>139</sup> *Ibid* 899.

as to what exactly should constitute a displacement or non-displacement.<sup>140</sup>

### 3.2 The Origin of the Controversy

At one end of the scale, there does not seem to be any difficulties when an actual ‘breaking’ occurs, that is, physical and literal breaking.<sup>141</sup> The same cannot be said at the other end of the scale, as problems and difficulties still prevail relating to the position of the minimal cut-off point or how little displacement is required before a breaking for the purposes of housebreaking is complete.<sup>142</sup> The decision of the courts in *S v Lekute*<sup>143</sup> and *S v Hlongwane*<sup>144</sup> did not help in settling the difficulties and problems entailed by the concept of displacement for purposes of criminal liability. The issue as to what is the extent of the displacement required for criminal liability to ensue remains unsettled in our law.<sup>145</sup>

The physical and literal breaking is not confined to the actual physical damage to the premises; however, an actual ‘breaking’ includes such actions as disconnecting the external burglar alarm of the premises or any similar act which overcomes the security of a building, for example, ‘breaking’ by burning down part of a building or digging under a building.<sup>146</sup> The ‘breaking’ requirement is prone to technicality and for it to be retained, it is necessary that it be defined so as to eliminate the subtleties associated with it.<sup>147</sup> In practical terms, the rules relating to entry through an open, or partly open, window or door or an opening in the structure itself need to find consistent application.<sup>148</sup> Treatment of the notion in South African law has resulted in the excluding from breaking of an entry through an opening which did not

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<sup>140</sup> Hoctor (note 119 above) 207.

<sup>141</sup> Ibid 207; For example, in *R v Coetzee* 1958 (2) SA 8 (T), the Yale lock on the door of the office had been forced, then door opened and entry gained as a result. In *R v George* 1921 EDL 125, the accused had wrenched off the padlock and staple of the door with a pickaxe. In *S v Ndhlovu* 1963 (1) SA 926 (T), the accused was caught in the act of throwing the stone at the display case before the stone left his hand. In all these cases the courts did not experience any difficulties before concluding that the breaking element had been satisfied.

<sup>142</sup> Ibid 207.

<sup>143</sup> *S v Lekute* 1991 (2) SACR 221 (C), the court held that it was not necessary that the obstacle to be removed before the accused gains entry into the premises had to be of an immovable nature and the mere moving of blinds in an open window in gaining access to a house was sufficient to constitute housebreaking.

<sup>144</sup> *S v Hlongwane* 1992 (2) SACR 484 (N), the court accepted that accused was responsible for moving the curtain, however, such did not meet the required displacement of some obstruction which forms part of the premises and held that displacement of curtains could not amount to a breaking.

<sup>145</sup> Hoctor (note 119 above) 208.

<sup>146</sup> Ibid 221 gives Scots case as the authority for this submission, that is, *Burns v Allan* 1987 SCCR 449, where the court held that an alarm system is an integral part of the security of a building, and to disconnect it is an attempt to overcome that security.

<sup>147</sup> Ibid 222.

<sup>148</sup> Ibid 222.

require any displacement of an obstacle, this being indicative that the old common law rationale of ‘implied invitation’ still holds sway.<sup>149</sup> It has been due to the problems inherent in this approach that there have been calls for reform of this requirement.<sup>150</sup> With regard to the situation in *S v Ngobeza*<sup>151</sup> where the accused had climbed in through a hole in the structure, there is common law authority for deeming this act to be a ‘breaking’.<sup>152</sup>

The acceptance of English law by our courts regarding breaking inside the premises complicates the description of the breaking requirement further.<sup>153</sup> This form of housebreaking was unknown to our law prior to the *Xabela*<sup>154</sup> case.<sup>155</sup> The court in *Xabela* held that the opening of an interior or inner door constitutes housebreaking.<sup>156</sup> However, no reasons were given and no authorities quoted.<sup>157</sup> Support for the court’s view is found in the English textbooks by Russell and Roscoe, which lay down as the English law position that the opening of an inner door to commit a crime inside is burglary.<sup>158</sup> The court concluded that there appears no reason why the English law should not be accepted.<sup>159</sup> So, the current position is that where the accused does not commit any external breaking but breaks into the inner portion of the premises, such conduct is ‘breaking’ in South African law.<sup>160</sup> The problem in inner breaking cases will usually not be whether there is a breaking, but whether the thing broken is part of the premises.<sup>161</sup>

Although the degree and nature of displacement may be controversial, it appears to be accepted that, if there is no displacement of any part of the premises, there is no breaking.<sup>162</sup>

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<sup>149</sup> Ibid 222.

<sup>150</sup> Ibid 222 referring to the case of *Ngobeza* (note 49 above) 610, as a good example of the problems created by the technical distinctions.

<sup>151</sup> *Ngobeza* (note 49 above) 610.

<sup>152</sup> Hoctor (note 119 above) 223, cites the case of *Knotts v State* (Tex Crim App 1895) 32 SW Rep 532 which held that crawling through a hole was a breaking under the Texas Statute.

<sup>153</sup> Hoctor (note 119 above) 208; *R v Shela and Others* 1950 (2) PH H 193 (W) 361, Malan, J. followed the decision of the case of *R v Xabela* 1945 PH H 282 (T) which laid down that the opening of an inner door constitutes breaking, relying solely on the English authorities and concluded that there is no reason why the English law should not be accepted on the question of opening an inner door. As a result of these two case laws this principle became part of South African law. *Heyns v Regina* 1956 (2) PH H 247 (C) and *Coetzee* (note 141 above) 8, both followed *Xabela* and *Shela* decisions.

<sup>154</sup> *Xabela* (note 153 above) H282

<sup>155</sup> Hoctor (note 119 above) 209.

<sup>156</sup> *Xabela* (note 153 above) H282.

<sup>157</sup> Hoctor (note 119 above) 209.

<sup>158</sup> Ibid 209.

<sup>159</sup> *Xabela* (note 153 above), Ibid 209.

<sup>160</sup> Hoctor (note 119 above) 209.

<sup>161</sup> Milton (note 3 above) 798.

<sup>162</sup> Hoctor (note 119 above) 209.

Where the accused has walked through an open door he does not commit housebreaking.<sup>163</sup> The position is the same where the accused has climbed through an open window.<sup>164</sup> There is no breaking where the accused has put his hand through a pre-existing hole in a window.<sup>165</sup> There is also no breaking where the accused has climbed through a skylight.<sup>166</sup> Where accused displaces something which does not form part of the premises whilst on his way to the premises to commit crime; such displacement does not constitute breaking.<sup>167</sup> However, there were two exceptions to the ‘no displacement, no breaking’ rule in English common law, meaning that these exceptions were applicable in pre-1968 English law.<sup>168</sup>

### 3.2.1 English common-law exceptions

The exceptions were applicable in English law before the Theft Act<sup>169</sup> was promulgated in 1968.

#### 3.2.1.1 First exception

The first exception was that, if accused had descended down a chimney, he was considered to have broken into and entered the premises.<sup>170</sup> In *Makoelman*,<sup>171</sup> Gane A J, in support of applying the chimney rule in South African law, quoted a passage in Gardiner and

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<sup>163</sup> The court in *Makoelman* (note 120 above) 194 held that there was no evidence that the cellar door was locked, closed or it had a door; as such the conviction by the magistrate of housebreaking under the circumstances was not justified. In *R v Moyana* 1921 EDL 139, the court held that there was no evidence to show whether or not the office had been open or closed when the accused entered. The conviction and sentence in respect of housebreaking were quashed.

<sup>164</sup> In *Gomaseb* (note 120 above) 16, the court held that by climbing through the broken window accused had not committed housebreaking. In *Rudman* (note 119 above) 368, the court held that an unlawful entry into the premises through an open window does not constitute a breaking in. The court arrived at the same conclusion in *S v Maunatlala* 1982 (1) SA 877 (T).

<sup>165</sup> In *R v Chalala* 1947 (3) SA 62 (O), accused had put his hand through the store’s ventilation aperture and stole matches. In *S v Dyentyi* 1973 PH H40 (T), accused had pushed a piece of wire through a narrow gap between the show window and the door of a shop and had by that managed to extract certain pieces of clothing.

<sup>166</sup> In *R v Mamawecke* 1939 (2) PH H 178 (SR), accused had entered through an open space between the roof and the tops of the walls of the dwelling house and whilst inside he opened a closed window and removed some articles. It was held that neither the entry through an open space nor the opening of an inside window constituted housebreaking.

<sup>167</sup> In *Makoelman* (note 120 above) 194, accused forced open the yard-door of the store by the breaking of a padlock. The court held that the breaking into the yard as a preliminary to entering the cellar was not a housebreaking. In *Ngobeza* (note 49 above) 610, accused had cut a hole in the wire and climbed through a security fence to gain access to the warehouse premises.

<sup>168</sup> Milton (note 3 above) 800; Hoctor (note 119 above) 210.

<sup>169</sup> The Theft Act of 1968 of England changed the position; in terms of which the crime of burglary became a statutory offence and the breaking element was done away with.

<sup>170</sup> Milton (note 3 above) 800; Hoctor (note 119 above) 210.

<sup>171</sup> *Makoelman* (note 120 above) 194.

Lansdown's textbook.<sup>172</sup> The court disagreed with the notion of extending breaking to open skylights; however, it supported the notion of including chimneys in the definition of 'breaking'.<sup>173</sup> Gane A J, quoted the English authority,<sup>174</sup> which held that an entry by chimney was a breaking, but a hole in the roof, left open for the purpose of light, may be entered without a breaking being committed in law.<sup>175</sup> Despite judicial approval and application of the rule in South African law, Milton still has reservations about this rule being imported, referring to it as an arbitrary exception and not worthy of import.<sup>176</sup> It has also been argued that to draw a distinction between a chimney and an opening in the wall or roof of a building is indefensible.<sup>177</sup>

### 3.2.1.2 Second Exception

The second exception is the doctrine of constructive breaking, in terms of which 'breaking' is considered to have taken place where a person secures admission to premises by the use of some trick, artifice, fraud, or colluding with any other person within the premises.<sup>178</sup> It is questionable whether South African law has adopted this doctrine; however, there are aspects of the doctrine which have been accepted in South African law, for example, where a threat of force has been used to compel a third party to 'break' the premises.<sup>179</sup> The person who made use of threat can be convicted of housebreaking with intent to commit crime on the principle of *qui facit per alium facit per se* (*qui facit* rule).<sup>180</sup> The principle also applies where the owner of the premises, whilst acting under duress, opens a door to admit the accused.<sup>181</sup> This principle means that he who commits the crime through another, he commits it

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<sup>172</sup> Ibid 195; Gardiner and Lansdown *South African Criminal Law* 3ed 1123 read "The meaning of "breaking" has, in practice, been extended to cover an entry by means of a chimney, or an open skylight, though no physical displacement of any part of the material of the structure occurs." Gane A J, in his judgment, held: I have not been able to discover any Roman-Dutch authority which would justify such an extension in the case of an open skylight. English law does not support such an extension in the case of an open sky-light or similar aperture. A case of a chimney is different for it is a necessary opening in every house which needs protection. If a man chooses to leave an opening in the wall or roof of his, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking.

<sup>173</sup> Hoctor (note 119 above) 210.

<sup>174</sup> *R v Brice* (1821) Russ & Ry 450 and *R v Spriggs & Hancock* (1834) 1 Mood & R 357.

<sup>175</sup> *Makoelman* (note 120 above) 195; Hoctor (note 119 above) 211.

<sup>176</sup> Milton (note 3 above) fn 71, 800 opines that this rule is not part of South African law. It seems to have been somewhat arbitrary exception and not worthy of import; and argues that "just as a man may glass in an opening in his wall, so he may have a chimney such as cannot be entered from outside".

<sup>177</sup> Hoctor (note 119 above) 225 quotes Enemeri, 414.

<sup>178</sup> Hoctor (note 119 above) 211; Milton (note 3 above) 800, describes it as giving entry to premises by force or fraud and Hoctor submits that this description is little simplistic, as constructive breaking consists not of entry to premises gained by force but by threat of force.

<sup>179</sup> Hoctor (note 119 above) 211

<sup>180</sup> *S v Cupido* 1975 (1) SA 537 (C).

<sup>181</sup> Milton (note 3 above) 800.

himself.<sup>182</sup> The principle also applies where the owner of the premises, whilst acting under duress, opens a door to admit the accused.<sup>183</sup>

#### **1.2.1.2.1 Threats, duress and intimidation**

Constructive breaking in the form of threat, duress or intimidation was dealt with in *S v Cupido*<sup>184</sup> and the unreported decision of Appellate Division in *S v Robyn* on 02 October 1972.<sup>185</sup> The Appellate Division decided the matter on the basis of principle, rather than precedent and applied the *qui facit per alium facit per se* rule which meant that the perpetrator of the crime can commit the unlawful conduct through an innocent agent and be held liable on this basis.<sup>186</sup> Liability flowing from the acts of an innocent agent amounts to a repetition of the English doctrine of “innocent agency”, which has never been part of South African law.<sup>187</sup> If the court accepts that ‘breaking’ can occur through the fear-motivated actions of another, then it accepts that this form of ‘constructive breaking’ forms part of South African law.<sup>188</sup> Hoctor submits that in preference to attempting to found liability on the *qui facit* rule where accused obtains access by means of duress or threats, thus using the owner or householder as an “instrument” to gain entry, this should simply be regarded as breaking.<sup>189</sup> By adopting this approach, the primary focus of the enquiry relates to lack of consent on the part of the owner or occupant of the premises.<sup>190</sup> The view of Hoctor is to be preferred to that of Milton that this form of constructive breaking has to form part of our law.

#### **1.2.1.2.2 Fraud, trick and artifice**

It does not appear that the question of fraud, trick or artifice has ever arisen in our courts.<sup>191</sup> The common law notion of ‘breaking’ includes constructive breaking, that is, entry effected

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<sup>182</sup> S V Hoctor ‘Constructive Breaking - A Constructive Part of The Housebreaking Crime?’ (2005) *Obiter* 726, 727.

<sup>183</sup> Milton (note 3 above) 800.

<sup>184</sup> *Cupido* (note 180 above) 537. In this case one of the four accused had held the doorkeeper’s arm fast in such a way that the doorkeeper could not break free of the accused’s grip; therefore, being afraid, he unlocked the gate, allowing all four accused to walk into the premises and dispossess him of the key.

<sup>185</sup> Hoctor (note 182 above) 727; In the *Robyn* case, a marauder had threatened to burn the house down if the door was not opened for him and the door was consequently opened.

<sup>186</sup> *Ibid* 727.

<sup>187</sup> *Ibid* 727-28 quotes Visser and Vorster’s *General Principles of Criminal Law Through the cases* 3ed (1990) 681.

<sup>188</sup> *Ibid* 728.

<sup>189</sup> *Ibid* 728.

<sup>190</sup> *Ibid* 728.

<sup>191</sup> *Ibid* 729.

by means of fraud or threats.<sup>192</sup> In *S v Maisa*,<sup>193</sup> the accused had obtained a key to the premises through fraud, and then entered into the premises.<sup>194</sup> The appeal court confirmed conviction; however, the basis of this conclusion was not discussed or elaborated upon by the court.<sup>195</sup> In *Cupido*<sup>196</sup>, the question was raised whether entry obtained by fraud could be regarded as a breaking.<sup>197</sup> The court declined to comment on what the legal position would be where entry to premises was obtained by fraud or trick, regarding it as unnecessary for the purposes of the case in question to do so.<sup>198</sup>

According to Milton, there is no South African authority on the doctrine and he submits that it is not part of our law.<sup>199</sup> Gardiner and Lansdown<sup>200</sup> disapproved of the possibility of constructive breaking being part of South African law; however, they state that the meaning of 'breaking' has been extended to cover entrance by means of a chimney, citing English case authority of *R v Brice*<sup>201</sup> and *R v Spriggs and Hancock*<sup>202</sup> in this regard as their authority.<sup>203</sup> Such an approach is inconsistent, and entry procured through fraud should equally form part of 'breaking'.<sup>204</sup> Clearly, these authors accepted this exceptional form of breaking as part of South African law, notwithstanding their rejection of the doctrine of constructive breaking.<sup>205</sup> It is not clear as to why these scholars preferred to accept the exception relating to the chimney as part of South African law and not the doctrine of constructive breaking, yet their authority for reliance on the chimney exception is entirely based on English common law, which is the source of both these exceptions.

It has been submitted that a better approach is to enquire whether there is consent to the specific conduct or not, requiring for the purposes of liability that there be a causal link between deception and harm, such that the deceit deprived the complainant of the ability to

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<sup>192</sup> Hoctor (note 119 above) 222.

<sup>193</sup> *S v Maisa* 1968 (1) SA 271 (T).

<sup>194</sup> Hoctor (note 182 above) 729.

<sup>195</sup> *Ibid* 729.

<sup>196</sup> *Cupido* (note 180 above) 537.

<sup>197</sup> Hoctor (note 182 above) 729.

<sup>198</sup> *Ibid* 730.

<sup>199</sup> Milton (note 3 above) 800; Gardiner and Lansdown *South African Law and Procedure Vol. II: Specific Offences* 6ed (1957) 1720 submit that doctrine of constructive breaking would probably not be approved by South African courts if the matter came into question.

<sup>200</sup> *Ibid* 1720.

<sup>201</sup> *Brice* (note 174 above) 450

<sup>202</sup> *Spriggs and Hancock* (note 174 above) 357

<sup>203</sup> Hoctor (note 182 above) 730.

<sup>204</sup> Hoctor (note 119 above) 222.

<sup>205</sup> Hoctor (note 182 above) 730.

exercise his will in relation to his physical integrity with respect to the activity in question.<sup>206</sup> The advantages of this approach are the following: it focuses on the liability of the accused; it applies the principles relating to deception equally to the crime of housebreaking as they apply to property crimes such as theft; and it accords with autonomy.<sup>207</sup> There is no good reason for protecting a property interest more rigorously than the “psychological trauma and sense of violation invariably accompanying housebreaking”.<sup>208</sup> Only consent obtained without negating the voluntary agency of the complainant is legally valid in order to maximise the protection of physical integrity and personal autonomy.<sup>209</sup>

The South African law should also follow the principles of constructive breaking.<sup>210</sup> This is, indeed, a better approach for the reason that, once it has been established, there exists a link between the deception practised by the accused and the harm which befell the complainant; there can be no talking of the consent thereafter. It is submitted that where the entrance was obtained as a result of fraud, trick or artifice, it should be regarded as a form of ‘breaking’. This is, in fact, a worse form of housebreaking, where the owner or occupant of the premises is made to believe that a certain fact exists, which is a misrepresentation, and as a result of that a housebreaker is allowed ingress to the premises and the harm follows after that. The question should be: would the complainant have allowed the entry into the premises had he known of the correct facts? If the answer is negative, then breaking has occurred. However, if the answer is affirmative, then there is no breaking as the entrance would have been allowed anyway.

### **1.2.1.2.3 Collusion with a collaborator within the premises**

Another form of the constructive breaking doctrine is collusion with a collaborator within the premises.<sup>211</sup> This would include the situation where one person had a conspiracy with someone lawfully on the premises and where the latter opened the door for the former.<sup>212</sup> Both would be liable for burglary.<sup>213</sup> There could be no ‘breaking’ if the servant opened the

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<sup>206</sup> Ibid 730.

<sup>207</sup> Ibid 730-31.

<sup>208</sup> Ibid 731.

<sup>209</sup> Ibid 731.

<sup>210</sup> Ibid 732

<sup>211</sup> Ibid 731.

<sup>212</sup> Ibid 731.

<sup>213</sup> Ibid 731.

door whilst acting under the instructions of the police or his master as the door would have been lawfully open.<sup>214</sup> However, where a servant gave a key to the accused in order to set a trap for him, with the knowledge of the master, and the accused made a duplicate set of keys with which he opened the door, this was held to be a breaking.<sup>215</sup> In *R v Tusi*,<sup>216</sup> the scenario was dealt with where the accused obtained ingress through an associate (an employee), who had hidden within the premises, and opened the door to allow them to enter.<sup>217</sup> The court found liability on the basis of a common purpose between the accused and the person inside the premises, and held that the persons acting under common purpose had effected a ‘breaking’.<sup>218</sup> This decision was approved in *S v Maelangwe*,<sup>219</sup> where the door had been opened by another person to allow ingress to the accused.<sup>220</sup> The court held that there was a common purpose between the accused and his associates and those who entered the premises to commit crime within the premises and that there was thus a ‘breaking’.<sup>221</sup>

Hocor submits that a better approach would be to regard collusion with a collaborator within the premises as a form of ‘breaking’.<sup>222</sup> In other words, the fact of the opening of the door fulfills the breaking requirement, and therefore liability for housebreaking would be found.<sup>223</sup> Common purpose constitutes an infringement of the presumption of innocence and ought to be avoided wherever possible.<sup>224</sup> One finds oneself inclined to agree with Hocor’s view for the reason that for purposes of proof, all that is required is whether the door was closed or open; it would not matter as to the circumstances under which the door was open. So, once it has been established that a closed door was open, the requirement of ‘breaking’ has been met and each accused is individually liable. Common purpose may be invoked in a situation where the evidence shows that one or some of the accused never entered the premises, for example, where the driver of a get-away car remained behind whilst others went in and out of the premises to bring items to be loaded into the car.

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<sup>214</sup> Ibid 731 quoting the English case of *R v Johnson* 1841 C & M 218.

<sup>215</sup> Ibid 731 quoting the English case of *R v Chandler* [1913] 1 K.B. 125.

<sup>216</sup> *R v Tusi* 1957 4 SA 553 (N).

<sup>217</sup> Hocor (note 182 above) 731.

<sup>218</sup> *Tusi* (note 216 above) 556 B-C; Hocor (note 182 above) 731.

<sup>219</sup> *S v Maelangwe* 1999 1 SACR 133 (NC).

<sup>220</sup> Ibid 146i-j; Hocor (note 182 above) 731.

<sup>221</sup> Ibid 147d-e; Hocor (note 182 above) 731.

<sup>222</sup> Hocor (note 182 above) 732.

<sup>223</sup> Ibid 732.

<sup>224</sup> Ibid 732.

The notion of breaking has been primarily shaped by English law precedent.<sup>225</sup> South African writers have been reluctant to accept the doctrine of constructive breaking per se; however, the South African legal position in relation to entry by threats or duress, as well as entry through the means of a collaborator on the premises, accords with the principles of constructive breaking.<sup>226</sup> Where the situation is doubtful is with the existence of entry through fraud or trick.<sup>227</sup> It is submitted that there is no reason why the English law doctrine of constructive breaking should not be accepted into our law. It does not make any sense to accept only certain forms of constructive breaking and not accept other forms, in particular entry obtained fraudulently or trickily.

### 3.2.2 The exclusion of ‘breaking out’

There was uncertainty whether the ‘breaking’ requirement could be satisfied by a ‘breaking out’ of the premises.<sup>228</sup> ‘Breaking out’ would occur where accused enters the premises unlawfully for some criminal purpose, unaccompanied by a breaking in, then breaks out of the premises to effect his escape.<sup>229</sup> This remained a matter of some dispute in the early English law until it was resolved in 1713 by means of legislation which declared a breaking out sufficient for burglary and this remained the law in England until the passing of the Theft Act of 1968.<sup>230</sup> In *R v Thus*<sup>231</sup> and *R v Gomaseb*,<sup>232</sup> the accused had broken the windows from inside the premises in order to facilitate their escape. The possibility of housebreaking liability was not considered; instead the courts were either concerned with whether the intention of the accused in breaking into the premises was unlawful or chose not to express an opinion on the matter.<sup>233</sup> In *R v Steyn*,<sup>234</sup> Horwitz A J, cited the English authority of *R v Joseph Wheeldon*,<sup>235</sup> when he stated that a lodger may be guilty of ‘breaking out’ of the premises in English law.<sup>236</sup> However, there was no indication whether court regards this as

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<sup>225</sup> Ibid 732.

<sup>226</sup> Ibid 732.

<sup>227</sup> Ibid 732.

<sup>228</sup> Hoctor (note 119 above) 213.

<sup>229</sup> Ibid 213.

<sup>230</sup> Ibid 213.

<sup>231</sup> *R v Thus* 1926 EDL 89.

<sup>232</sup> *Gomaseb* (note 120 above) 16.

<sup>233</sup> Hoctor (note 119 above) 214.

<sup>234</sup> *R v Steyn* 1946 OPD 426.

<sup>235</sup> *R v Joseph Wheeldon* 173 E. R. 700.

<sup>236</sup> *Steyn* (note 234 above) 428.

authoritative for the purposes of South African law.<sup>237</sup> In *R v Mamawecke*,<sup>238</sup> Hudson J, held that the opening of an inside window does not constitute housebreaking either actual or constructive.<sup>239</sup> The court in *R v Shelembe*<sup>240</sup> indicated that it seems that the accepted general rule is that a ‘breaking out’ does not constitute housebreaking for purposes of this crime.<sup>241</sup> The court in *S v Maunatlala*<sup>242</sup> held that the act of opening a door or window from inside in order to leave the premises with stolen goods would not amount to housebreaking and suggested that legislation be enacted to resolve the problem.<sup>243</sup> ‘Breaking out’ does not amount to breaking for purposes of housebreaking.<sup>244</sup> Breaking and entering must be directed at facilitating the intended offence.<sup>245</sup> Breaking after the offence has been committed cannot be housebreaking since that is purely breaking out and not breaking in, which means that there will be no entering after the breaking but exiting instead.<sup>246</sup> The element of breaking must be alleged in the charge sheet or indictment, whatever the case may be.<sup>247</sup> Milton likens the ‘breaking out’ to the assault in the crime of robbery, which must be employed in order to induce submission to the taking, and the vice versa does not suffice for robbery.<sup>248</sup> In other words, once theft precedes assault, under no circumstances can a liability for robbery ensue. Thus breaking must invariably precede the commission of the crime.<sup>249</sup>

A possible justification for allowing breaking out to suffice for housebreaking cases involving theft is the “continuous crime” doctrine.<sup>250</sup> The court in *R v Attia*<sup>251</sup> dealt with this doctrine. To allow ‘breaking out’ to transform the crime committed inside the premises into a second completed offence is undesirable, and the need to consider such an extension is obviated by the elimination of technical requirements to breaking, which allows housebreakers to enter premises without fulfilling the ‘breaking’ requirement.<sup>252</sup> It is

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<sup>237</sup> Hoctor (note 119 above) 214.

<sup>238</sup> *Mamewecke* (note 166 above) H178.

<sup>239</sup> *Ibid* H178.

<sup>240</sup> *R v Shelembe* 1955 (4) SA 410 (N).

<sup>241</sup> Hoctor (note 119 above) 214.

<sup>242</sup> *S v Maunatlala* 1982 (1) SA 877 (T).

<sup>243</sup> *Ibid* 879.

<sup>244</sup> Milton (note 3 above) 800-01.

<sup>245</sup> *R v Andries* 1958 (2) SA 669 (E); Milton (note 3 above) 801.

<sup>246</sup> *Ibid* 801.

<sup>247</sup> *R v Shimbakua* 1955 (1) SA 331 (SWA); Milton (note 3 above) 801.

<sup>248</sup> Milton (note 3 above) 801.

<sup>249</sup> *Ibid* 801.

<sup>250</sup> *Ibid* 801; Hoctor (note 119 above) 214.

<sup>251</sup> *R v Attia* 1937 TPD 102 106 where the court held that: The statement that theft is a continuing offence means no more than that the theft continues as long as the stolen property is in the possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even in the interest of the original thief or party to the theft.

<sup>252</sup> Hoctor (note 119 above) 215.

submitted that this is the correct approach. If ‘breaking out’ were to be allowed to be part of our law, it would have necessitated that the definition of the crime of housebreaking be altered insofar as the element of ‘breaking into’ is concerned. All the scholars and the courts are in agreement with this requirement. The requirement of ‘breaking into’, by necessary implication, excludes ‘breaking out’. Thus ‘breaking out’ should not form part of our law.

### 3.2.3 A right to ‘break’

If the accused has a legal right to enter the premises, even if he breaks the premises with the intent to commit a crime, such a ‘breaking’ cannot amount to housebreaking.<sup>253</sup> In the case of *Andries*,<sup>254</sup> the accused had been in the employ of the complainant for two years at the time of the commission of the crime, and the court held that it is reasonably possible that the accused entered the house for a lawful purpose and only decided to look for something to steal when he was already inside.<sup>255</sup> In the *Ovamboland*<sup>256</sup> case, the accused customarily entered the premises to deliver milk. In the *Steyn*<sup>257</sup> case, both the accused and complainant were lodgers and occupied the same room. In the *Faison*<sup>258</sup> case, both accused and complainant shared a hut and both had keys fitting the padlock. In all these cases, the courts concluded that the requirement of ‘breaking’ was not satisfied for the reason that the accused had a legal right to be on the premises where the crimes were committed. There has not been any dispute or any different point of view relating to these decisions. Thus the position in our law should remain as it is in relation to this aspect.

### 3.3 The importance of the ‘breaking’ requirement

There have been calls for the abolition of the ‘breaking’ requirement in South African law.<sup>259</sup> However, the ‘breaking’ requirement is at the heart of the original crime of housebreaking or burglary.<sup>260</sup> It is still an essential part of the definition of the crime of housebreaking in South

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<sup>253</sup> Ibid 215.

<sup>254</sup> *Andries* (note 245 above) 669.

<sup>255</sup> Ibid 670.

<sup>256</sup> *Ovamboland* (note 127 above) 11.

<sup>257</sup> *Steyn* (note 245 above) 426.

<sup>258</sup> *Faison* (note 122 above) 671.

<sup>259</sup> *Snyman* (note 2 above) 41.

<sup>260</sup> *Hector* (note 119 above) 215.

African law and a number of common law jurisdictions.<sup>261</sup> The purpose of the ‘breaking’ must be to facilitate or cause entry into the premises, that is, to enable the violation of the security of the premises.<sup>262</sup> There is an inherent limitation on the scope of the crime in the breaking requirement, so that a mere trespassory entry is excluded from the ambit of the crime.<sup>263</sup> Trespassory entry cannot be equated to housebreaking, both notionally and practically.

There are three fundamental arguments in favour of the retention of the ‘breaking’ requirement, namely, the nature of the crime, the scope of the crime, and the internal balance of the elements within the crime.<sup>264</sup> Relating to the nature of the crime, ‘breaking’ is the primary focus and historic rationale of housebreaking.<sup>265</sup> Housebreaking is based upon the idea of a positive ‘breaking in’ rather than a mere unauthorised entry.<sup>266</sup> It is essential that there should be a very clear distinction between housebreaking on one hand and trespass on the other hand, if the autonomous crime of housebreaking is to be retained.<sup>267</sup> Housebreaking is universally regarded as wrongful criminal behaviour, whereas trespass is at most a statutory offence.<sup>268</sup> A trespassory offence may be classified as falling within the category of regulatory offences in contrast to housebreaking, whereas common-law crimes generally have a ‘moral’ dimension which may be lacking in statutory offences, and thus are vested with greater authority.<sup>269</sup> The retention of the ‘breaking’ element is of primary importance.<sup>270</sup> The importance of the ‘breaking’ requirement is borne out by the fact that the word ‘breaking’ always features in the shortened version of the crime, for example, ‘housebreaking’, ‘crime of housebreaking’, and ‘housebreaking crime’. The ‘breaking’ element is the hub of the crime of housebreaking, without breaking, there could be no crime of housebreaking in existence as is currently known.

The retention of the ‘breaking’ requirement is necessary to restrict the scope of the crime.<sup>271</sup> The elimination of the ‘breaking’ requirement “may lead to an unwarranted broadening of the

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<sup>261</sup> Ibid 217.

<sup>262</sup> Ibid 215.

<sup>263</sup> Ibid 215.

<sup>264</sup> Ibid 218.

<sup>265</sup> Ibid 218.

<sup>266</sup> Ibid 218.

<sup>267</sup> Ibid 218.

<sup>268</sup> Ibid 218.

<sup>269</sup> Ibid 218.

<sup>270</sup> Ibid 218.

<sup>271</sup> Ibid 218.

behaviour content of this law”.<sup>272</sup> There are problems with the substitution of a trespass for a ‘breaking’ as this would invariably transform every shoplifter into a housebreaker.<sup>273</sup> The general invitation of the shopkeeper does not extend to those entering for the sole purpose of shoplifting.<sup>274</sup> According to this unwarranted broadening of the behaviour content approach, anyone entering a shop for the sole purpose of murdering the manager is a trespasser and therefore a burglar; so is the one who robs the manager at gunpoint in his office, which is made inaccessible to the public by a “no entry” sign on the open door, and escapes with the takings.<sup>275</sup> These examples would be regarded as offences against property and no assault on the particular values protected by the housebreaking crime, that is, the protection of the owner or occupant against the “psychological trauma and sense of violation invariably accompanying a housebreaking”.<sup>276</sup> The elimination of the ‘breaking’ requirement is inappropriate, as such would invariably lead to the extension of the crime of housebreaking to cover the above mentioned situations.<sup>277</sup> Moreover, there is an unwelcome blurring of the boundaries between housebreaking and robbery in the second example.<sup>278</sup> The retention of the ‘breaking’ requirement in the crime of housebreaking would exclude both of the above examples from the ambit of the crime of housebreaking.<sup>279</sup>

The ‘breaking’ requirement acts as a safeguard against the oversubjectivisation of housebreaking.<sup>280</sup> The ancient common law crime of burglary was rooted in the pattern of criminality expressed in the ‘breaking’, while the modern legislative trend of dispensing with the ‘breaking’ requirement takes the pattern of subjective criminality to extremes.<sup>281</sup> A process of subjectivisation, allied to the elimination of ‘breaking’, renders the proof of intent extremely difficult.<sup>282</sup> The existence of the ‘breaking’ requirement in the crime of housebreaking makes it easier to establish the intention of the accused at the earliest possible stage of his nefarious activity. Without the ‘breaking’ requirement, there is no way of

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<sup>272</sup> Ibid 218 giving a quotation from *Columbia Law Review* (1951) 1014.

<sup>273</sup> Ibid 219.

<sup>274</sup> Ibid 219.

<sup>275</sup> Ibid 219.

<sup>276</sup> Ibid 219.

<sup>277</sup> Ibid 219.

<sup>278</sup> Ibid 219.

<sup>279</sup> Ibid 219-20.

<sup>280</sup> Ibid 220.

<sup>281</sup> Ibid 220.

<sup>282</sup> Ibid 220; cites a passage from Enemer’s work, namely: Where the offence of burglary depends upon an unlawful entry into the building without any breaking, it is not immediately apparent how it can be proved that accused entered with an intention to commit a crime if no crime was committed or attempted by him inside the building. The ‘breaking’ requirement plays a vital role in the prosecution of the crime, in that it provides an objective manifestation of the intent of the offender, and thus aids the probative process in the light of the primacy of the intent of the accused in the context of housebreaking.

establishing the intention of the accused at the precise moment of his entry into the premises.

Other jurisdictions have taken a different approach, which amounts to regarding an entry which occurs through an opening which is not ordinarily used as a means of entrance, that is, 'unusual entry' as breaking.<sup>283</sup> The concern is not so much whether the opening existed for any necessary purpose, but whether it was intended to be ordinarily used as a means of entrance into the building.<sup>284</sup> The question of whether an opening in a building is intended for human entrance is one of fact.<sup>285</sup> The householder may leave an opening for purposes of allowing a pet to use it when coming in and going out of the building. Such an opening cannot be said to be intended for human entrance. So, if anyone were to use such an opening to gain entry into the building through it with intention to commit a crime inside, he would have broken into the premises.

The 'breaking' requirement should continue to be an indispensable element of the crime of housebreaking as is the position currently.<sup>286</sup> To offer protection to all forms of structures, then the correct approach would be to admit all manner of breaking within the definition of the crime.<sup>287</sup> In order to solve the difficulties which arise from the open window scenario, the concept of 'breaking' currently employed by our courts should be extended to include any entry by unusual means, that is, in any way but through an open door.<sup>288</sup> The 'breaking' requirement should continue to form part of the crime of housebreaking for the reason that it is the primary focus of the crime and its inclusion is necessary to restrict the scope of the crime and act as a safeguard against the over-subjectivisation of housebreaking.<sup>289</sup> The act of breaking has been accepted as objective proof of the intent to commit further harm within the premises.<sup>290</sup> The proposed extension could be introduced through the courts, however.<sup>291</sup>

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<sup>283</sup> Ibid 223-24 cites Queensland Criminal Code, Canadian Criminal Code, Indian Penal Code, Scots Criminal law and Botswana Criminal Code as the jurisdictions which regard an opening not ordinarily used as a means of entry as a breaking.

<sup>284</sup> Ibid 225.

<sup>285</sup> Ibid 225.

<sup>286</sup> Ibid 227.

<sup>287</sup> Ibid 227-28.

<sup>288</sup> Ibid 228.

<sup>289</sup> Ibid 228.

<sup>290</sup> Ibid 228 cites case law authority of R v George 1921 EDL 125 and S v Ndhlovu 1963 (1) SA 926 (T) in support of his claim.

<sup>291</sup> Ibid 229 If the legislature is to step in to redefine 'breaking' element, it should be defined as: Any displacement of any obstruction which forms part of the premises; any entrance into the premises which constitutes an unusual mode of entry; and any entry gained by means of threat, fraud, or by colluding with any person in the premises..... 'Unusual mode' phrase should be interpreted broadly.

## CHAPTER FOUR

### 4. THE 'PREMISES' REQUIREMENT

#### 4.1 The origin of the 'Premises' Requirement

The 'premises' requirement is the fifth requirement in the definition of the crime of housebreaking.<sup>292</sup> The origins of the crime of housebreaking are bound up with the need to protect the dweller in his abode.<sup>293</sup> The original purpose of the crime of housebreaking was the protection of the sanctity of the home.<sup>294</sup> The interest of a person in the safe and private habitation of his home has been treated reverently and regarded as deserving of a special protection by the law from the earliest times.<sup>295</sup> This concern is reflected by the fact that the common-law jurisdictions have typically classified the crime of housebreaking as a crime against the habitation which implies the right to feel secure in one's own home.<sup>296</sup> The issue of architecture was at the heart of the common law crime of burglary and housebreaking.<sup>297</sup> The focus of the common-law rules of burglary was primarily upon the 'premises' which were used for human habitation.<sup>298</sup> The original term used in defining the burglary was a "mansion house"; however, the term was understood to include a far wider conception of the physical structure including all types of dwelling.<sup>299</sup>

The similar considerations were applicable as are relevant to the ancient crime of 'hamesucken', that is, as the crime constitutes a violation of the security of the habitation, by defining the crime to be confined to the actual dwellings.<sup>300</sup> Where the 'premises' had been broken into, which were not used for the dwelling purpose, the crime was not committed.<sup>301</sup> The common law limitation has largely been abolished.<sup>302</sup> With broadening of the ambit of the crime beyond merely protecting the habitation, the differing approaches have been taken in defining the nature of the 'premises' that can be broken into.<sup>303</sup> The simple distinction has

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<sup>292</sup> The definition is given in Chapter three above.

<sup>293</sup> S V Hoctor 'Which structures does the housebreaking crime protect?' (2011) *Obiter* 417, 417.

<sup>294</sup> Milton (note 3 above) 802.

<sup>295</sup> Hoctor (note 293 above) 417.

<sup>296</sup> *Ibid* 417.

<sup>297</sup> S V Hoctor 'The "premises" requirement in the housebreaking' (1998) *Obiter* 127, 128.

<sup>298</sup> *Ibid* 128; Milton (note 3 above) 802;

<sup>299</sup> Hoctor (note 297 above) 128.

<sup>300</sup> *Ibid* 128.

<sup>301</sup> Milton (note 3 above) 802.

<sup>302</sup> Hoctor (note 297 above) 128.

<sup>303</sup> Hoctor (note 293 above) 417.

become blurred as our courts include within the concept of the ‘premises’ places not used for the human habitation but for storage which were closely associated with the home itself.<sup>304</sup> Thus the crime may now be committed in any building or any part of the building which means that the physical restrictions on the ‘premises’ have been done away with thereby protecting intrusion into all the ‘buildings’ or any ‘house’.<sup>305</sup> The words, a ‘house’, a ‘premises’, a ‘structure’, and a ‘building’, are used interchangeably as they are all referring to the physical structure in respect of which the crime of housebreaking can be committed.

#### 4.2 Common Law Jurisdictions

In many jurisdictions, the ‘building’ notion for the purposes of the crime has gone beyond the natural meaning of the word.<sup>306</sup> Thus not only the temporary ‘structures’, but also the ships or the vessels, and the vehicles have been included within the ambit of the crime.<sup>307</sup> In English law, the ‘structure’ is required to have some degree of permanence<sup>308</sup> and the inhabited vehicle or vessel is specifically included in the term ‘building.’<sup>309</sup> Intrusions into the uncompleted ‘buildings’ may be included as well as the tents; however, the tents were excluded by the case law in Canada.<sup>310</sup> In Canada, the breaking and entering include, within understanding of the ‘structure’ which can be broken into and entered, the spaces enclosed by the fence, but exclude the unenclosed spaces.<sup>311</sup> The argument that the crime may be committed in any ‘house’ and that the nature of the place was irrelevant is stating the position too broadly.<sup>312</sup> The content of the element must conform to the ratio for the crime and thus needs to be limited accordingly.<sup>313</sup>

The early common-law test was whether the ‘premises’ in question should be accorded the protection of the burglary law relating to permanency of the dwelling.<sup>314</sup> This is no longer applied in the modern jurisdictions, even where the statutory requirement is the ‘dwelling-house’ as the ‘dwelling’ can be a very rudimentary ‘building’, provided that the person sleeps

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<sup>304</sup> Milton (note 3 above) 802.

<sup>305</sup> Hoctor (note 297 above) 128.

<sup>306</sup> Ibid 128.

<sup>307</sup> Ibid 128.

<sup>308</sup> In terms of section 9 (1) of the Theft Act of 1968; Hoctor (note 293 above) 417.

<sup>309</sup> In terms of section 9 (4) Theft Act 1968; Hoctor (note 293 above) 417.

<sup>310</sup> Hoctor (note 297 above) 128, citing a Canadian case of *Eldridge* (1944) 81 CCC 388 (BCCA) and Law Reform Commission of Canada Working Paper 48: Criminal Intrusions (1986) 10 which criticised the ruling as “difficult to justify”.

<sup>311</sup> Section 348 of the Canadian Criminal Code RSC 1985 c.C-46; Hoctor (note 293 above) 417.

<sup>312</sup> Hoctor (note 297 above) 128.

<sup>313</sup> Ibid 128-29.

<sup>314</sup> Ibid 129.

in it on the continuous basis.<sup>315</sup> The size of the building is generally not a factor for as long as the building is enclosed.<sup>316</sup> The factors of permanency and the size may be important where the statute distinguishes between a 'dwelling-house' and a 'building'.<sup>317</sup> The position has not been definitively resolved in South Africa, although it can at least be accepted that it is incorrect to state that the breaking into and entering can only be in respect of an immovable 'structure', and cannot be committed by breaking into a movable structure.<sup>318</sup>

### 4.3 The Current Position in the South African Law

It is now well-established that the word 'house' in the 'housebreaking' has acquired a special or technical meaning.<sup>319</sup> The word 'house' is a term of art as there are many types of the 'premises' in respect of which the crime can be committed which a layman would scarcely call a 'house', for example, a storeroom,<sup>320</sup> a garage,<sup>321</sup> a shop,<sup>322</sup> a permanently occupied tent,<sup>323</sup> an office,<sup>324</sup> an immovable display cabinet separate from but forming an integral portion of a shop,<sup>325</sup> a cabin on board ship,<sup>326</sup> a small but heavily built concrete mine dynamite magazine,<sup>327</sup> and a caravan<sup>328, 329</sup>. It is not easy to enunciate a general definition of the 'premises' and there must always be the borderline cases in which the distinction between the 'premises' and the non-'premises' is largely a matter of a degree.<sup>330</sup>

The courts have generally adopted a common-sense approach.<sup>331</sup> This has been the general

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<sup>315</sup> Ibid 129.

<sup>316</sup> Ibid 129.

<sup>317</sup> Ibid 129.

<sup>318</sup> Hooror (note 293 above) 417-18.

<sup>319</sup> Milton (note 3 above) 802; Burchell (note 2 above) 748; Hooror (note 297 above) 127.

<sup>320</sup> *Chalala* (note 165 above) 62.

<sup>321</sup> *R v Dorling* 1954 (2) SA 125 (E).

<sup>322</sup> *R v Van Boven* 1917 CPD 204.

<sup>323</sup> *R v Thompson* 1905 ORC 127.

<sup>324</sup> *Coetzee* (note 141 above) 8 (T).

<sup>325</sup> *Ndhlovu* (note 141 above) 926 (T).

<sup>326</sup> *R v Lawrence* 1954 (2) SA 408 (C); *R v Abrahams* 1953 (1) PH H50 (N); *R v Smith* 1959 (4) SA 524 (N).

<sup>327</sup> *R v Botha* 1960 (2) SA 147 (T).

<sup>328</sup> *S v Madyo* 1990 (1) SACR 292 (E).

<sup>329</sup> Milton (note 3 above) 802; Burchell (note 2 above) 748; Hooror (note 297 above) 127.

<sup>330</sup> Milton (note 3 above) 802-03; Burchell (note 2 above) 748.

<sup>331</sup> Milton (note 3 above) 803; Hooror (note 297) 129. Gardiner and Lansdown, *South African Criminal Law and Procedure* 6ed (1957) Vol. II 1717. This approach was perhaps first expressed in the case of *Johannes* and subsequently enunciated by Gardiner and Lansdown who state that 'the 'premises' must be such as are, or might ordinarily be, used for human habitation or for the storage or housing of property of some kind. A further qualification is that provided the premises are devoted, or capable of being devoted, to the purposes before mentioned, it is of no concern that they are constructed of material which does not ordinarily compose a house or building. *R v Johannes* 1918 CPD 488, Gardiner, J required that "the

principle which our courts have been consistently applying since then.<sup>332</sup> This definition forms the basis of the discussion of this element by Hunt,<sup>333</sup> Milton,<sup>334</sup> and Burchell.<sup>335</sup> Thus the purpose may ultimately be determinative.<sup>336</sup> The ‘premises’ is most often a house, a storeroom, a business premises, an outbuilding or a factory.<sup>337</sup> It has often been said that the ‘premises’ must be the structure in the nature of a house.<sup>338</sup> This proposition is somewhat misleading as a more accurate one would be that there is a structure or part of it that is in the nature of a house or a storeroom.<sup>339</sup>

Hunt<sup>340</sup> adopted the first part of Gardiner and Lansdown definition and proceeded to add “three relevant and closely related factors”, to wit:

- whether what has been broken and entered is a structure or part of a structure in the nature of a house or storeroom, for example, a wardrobe,<sup>341</sup> and a built-in cupboard<sup>342</sup> were not regarded as structures ‘in the nature of a house’;
- whether the structure is, or may ordinarily be, used for human habitation or the storage of property;<sup>343</sup> and
- whether there is some degree of permanency about the purpose to which the thing is devoted.<sup>344</sup>

This explanation has remained in the work under the subsequent authorship of Milton<sup>345</sup> and

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‘premises’ must comprise ‘some structure in the nature of a house or store.....some structure permanently occupied.’  
Hoctor 129 citing Gardiner and Lansdown 1719.

<sup>332</sup> *S v Temmers* 1994 (1) SACR 357 (C); *R v Lawrence* 1954 (2) SA 408 (C); *S v Meyeza* 1962 (3) 386 (N); *Ndhlovu* (note 141 above) 926 (T); Milton (note 3 above) 803; Burchell (note 2 above) 748; Snyman (note 49 above) 544.

<sup>333</sup> Hoctor (note 293 above) 424, cites Hunt *South African Criminal Law and Procedure Vol II: Common-Law Crimes* (1970) 1<sup>st</sup> ed 670-71.

<sup>334</sup> Milton (note 3 above) 803.

<sup>335</sup> Burchell (note 2 above) 748; Hoctor (note 293 above) 422.

<sup>336</sup> Hoctor (note 293 above) 422.

<sup>337</sup> Snyman (note 49 above) 544.

<sup>338</sup> *Meyeza* (note 332 above) 386; Milton (note 3 above) 803.

<sup>339</sup> *Johannes* (note 331 above) 43; Milton (note 3 above) 803.

<sup>340</sup> Hunt *South African Criminal Law and Procedure Vol II: Common-Law Crimes* (1970) 670-1.

<sup>341</sup> *Steyn* (note 234 above) 426.

<sup>342</sup> *Meyeza* (note 332 above) 386.

<sup>343</sup> *R v Lewis* 1929 CPD 43 44 it was doubted whether the Governor-General’s post box constituted premises as it was neither used for human habitation nor storage of property but was plainly a structure ‘in the nature of a house’, however, its purpose prevented it from being a ‘premises’.

<sup>344</sup> The courts in *Thompson* (note 323 above) 127 and *Johannes* (note 331 above) 488 stressed this factor; Hunt (note 340 above) 670-71; Milton (note 3 above) 803; Burchell (note 2 above) 748-49; Hoctor (note 293 above) 424.

<sup>345</sup> Milton (note 3 above) 803.

also features in Burchell.<sup>346</sup>

The fundamental purpose of a dwelling house is as a human habitation.<sup>347</sup> This position remains even though it may temporarily stand empty.<sup>348</sup> A seaside cottage is intended for human habitation.<sup>349</sup> If the house were to be permanently abandoned both for habitation and storage purposes, it would cease to be the ‘premises’.<sup>350</sup> A more solid structure would usually qualify as the ‘premises’, if its permanent purpose is the storage of goods, even if it is movable and fairly small.<sup>351</sup> Our courts have held some structures to be the ‘premises’, namely, an officer’s cabin on a ship,<sup>352</sup> a caravan a motor car can tow,<sup>353</sup> a tent wagon used as a residence,<sup>354</sup> a tent permanently used or intended for human habitation,<sup>355</sup> a built-in cupboard,<sup>356</sup> and a safe acceded to the immovable premises.<sup>357</sup> Other structures have been held not to be qualifying as the ‘premises’, namely, a railway truck used for conveying goods,<sup>358</sup> a motor car, although it is a permanently storing place for a spare wheel and tools,<sup>359</sup> a fence surrounding the ‘premises’,<sup>360</sup> a fowl-run made of tubes and wire netting,<sup>361</sup> a tent standing next to a caravan,<sup>362</sup> and a chest of drawers.<sup>363</sup> A stricter approach or test is applied when the thing is not used or intended for human habitation than when it is.<sup>364</sup> A tent permanently used or intended to be used to store goods may not be the ‘premises’ because it would not ordinarily or reasonably be so used.<sup>365</sup>

The ‘premises’ begin on the interior of the boundary wall, door or window for the purposes

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<sup>346</sup> Burchell (note 2 above) 748-49; hector (note 293 above) 424.

<sup>347</sup> Milton (note 3 above) 803; Burchell (note 2 above) 749.

<sup>348</sup> Burchell (note 2 above) 749.

<sup>349</sup> Madyo (note 328 above) 292; Milton (note 3 above) 803.

<sup>350</sup> Milton (note 3 above) 803; Burchell (note 2 above) 749; the courts in *Thompson* and *Johannes* held that the permanent purpose of the truck is not storage but for conveying goods.

<sup>351</sup> Milton (note 3 above) 804; *Botha* (note 327 above) 147.

<sup>352</sup> *Lawrence* (note 326 above) 408.

<sup>353</sup> *S v Jecha* 1984 (1) SA 209 (ZHC); *S v Mavungu* 2009 1 SACR 425 (T).

<sup>354</sup> *R v M'Tech* 1912 TPD 1132.

<sup>355</sup> *Thompson* (note 323 above) 127.

<sup>356</sup> *Meyeza* (note 332 above) 386; *Ndhlovu* (note 141 above) 926.

<sup>357</sup> *Coetzee* (note 141 above) 8.

<sup>358</sup> *Johannes* (note 331 above) 43.

<sup>359</sup> *Madyo* (note 328 above) 292.

<sup>360</sup> *Makoelman* (note 120 above) 194; *R v Ngema* 1960 (1) SA 517 (T); *Ngobeza* (note 49 above) 610.

<sup>361</sup> *R v Charlie* 1916 TPD 367.

<sup>362</sup> *Abrahams* (note 49 above) 655. There was, amongst other things, a fridge from which accused stole food in the tent in this case and the court held that the crime of housebreaking could not be committed in respect of a tent. Snyman 544 submits that this decision is wrong as tent was probably attached to the caravan and was used for human habitation or storage of goods; the fact that the walls were of canvass and not of brick or some more solid material is immaterial.

<sup>363</sup> *Coetzee* (note 141 above) 8.

<sup>364</sup> Milton (note 3 above) 803; Burchell (note 2 above) 749.

<sup>365</sup> Milton (note 3 above) 804.

of entry determination otherwise the distinction between the ‘breaking’ and ‘entering’ would disappear.<sup>366</sup> There may be ‘premises’ within ‘premises’, for instance, each room in a house, and each flat in a block of flats.<sup>367</sup> In a situation where the accused breaks into and enters numerous ‘premises’ as part of one operation, a common-sense approach must be adopted.<sup>368</sup> The question is whether the accused’s conduct considered in all its circumstances, constitutes more than one offence.<sup>369</sup>

It is difficult to deduce from the cases a general principle that can be applied in order to decide whether a particular premises or structure qualifies as one in respect of which the crime can be committed.<sup>370</sup> If the structure is used for human habitation, it does not matter whether it is a movable or immovable; but if it is used for the storage of goods, it must be immovable.<sup>371</sup> This conclusion seems to tally in broad outline with the case law; however, it was explicitly rejected as a criterion in the *Temmers*<sup>372</sup> case.<sup>373</sup> This case brought a new perspective on the problems inherent in defining the boundaries of the ‘premises’ concept.<sup>374</sup> The magistrate had applied the De Wet/Snyman<sup>375</sup> test and decided that the caravan was permanently used as a store and referred to the question of the degree of permanency of the purpose in the utilisation of the structure, and specifically the reasoning in the *Jecha*<sup>376</sup> case; with particular reference to the statement that “there must be some degree of permanence about such purpose for which the structure is used”.<sup>377</sup> On review, the court rejected the distinction suggested by Snyman as unsupported in the case law and derived from the somewhat arbitrary and illogical distinctions.<sup>378</sup> The court saw the extension of the concept of the ‘premises’ as part of a developmental process in the law of housebreaking which has taken place in the courts, primarily in response to the societal factors and the need to combat

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<sup>366</sup> Milton (note 3 above) 804.

<sup>367</sup> *Xabela* (note 153 above) H282; *Lawrence* (note 326 above) 408; *Coetzee* (note 141 above) 8; *S v Tshuke* 1965 (1) SA 582 (C).

<sup>368</sup> Milton (note 3 above) 804.

<sup>369</sup> Milton (note 3 above) 804. In the case of *Tshuke* (note 367 above) 582, different units, in one building under the same roof, were broken into separately, then each breaking was held to constitute a separate offence although the cumulative effect of separate sentences in respect of each offence has to be taken into consideration.

<sup>370</sup> Snyman (note 49 above) 544.

<sup>371</sup> *Ibid* 544.

<sup>372</sup> *Temmers* (note 332 above) 357.

<sup>373</sup> Snyman (note 49 above) 545.

<sup>374</sup> Hoctor (note 297 above) 129.

<sup>375</sup> See below, under sub-heading De Wet/Snyman Perspective.

<sup>376</sup> *Jecha* (note 353 above) 209.

<sup>377</sup> Hoctor (note 297 above) 129.

<sup>378</sup> *Ibid* 130 citing *Temmers*.

crime.<sup>379</sup> The alleged distinction was more apparent than real, and the caution of the court in dealing with the ‘premises’ used for storage should not be mistaken for the creation of a principle.<sup>380</sup> The court held that in the absence of any “truly consistent, coherent and logical principle,” the real distinction is between:

- on the one hand, a structure or quasi-structure in which goods are kept or stored to safeguard them from the elements or misappropriation, or placed for functional reasons; and
- on the other hand, structures or quasi-structures in which goods are placed for ease of storage or conveyance like packing cases or containers.<sup>381</sup>

The crime can be committed in respect of the first category and not in respect of the second category.<sup>382</sup> The accused does not commit a crime if he “breaks into a suitcase or even a modern steel container lying on the wharf-side prior to being loaded onto a vessel for conveyance”; however, it could be regarded as falling within the ambit of the crime if it were used as a habitation, a storeroom, an office or a shop.<sup>383</sup> It seems that according to the criterion in the *Temmers* case, the crime can be committed in respect of virtually any structure used for human habitation no matter how flimsy its construction.<sup>384</sup> This criterion may be criticised for its vagueness as goods may be placed in a container or a structure both in order to “safeguard them from the elements or misappropriation” and “for ease of storage”, in which case the structure would fall into both categories.<sup>385</sup> The phrase “or placed for functional reasons” in the formulation seems to be too vague to be workable.<sup>386</sup> It should be noted that whatever criterion one adopts, if the structure is used for storage of goods, it need not necessarily be so large that a person of average height can enter it.<sup>387</sup> The material of which the structure is made is of little assistance.<sup>388</sup> A person who has a right of entry to a house or a building may still commit the housebreaking in respect of a separate room in the

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<sup>379</sup> Ibid 130.

<sup>380</sup> Ibid 130.

<sup>381</sup> *Temmers* (note 332 above) 361b-c.

<sup>382</sup> Ibid 361b-c.

<sup>383</sup> Ibid 361c.

<sup>384</sup> *Snyman* (note 49 above) 545.

<sup>385</sup> Ibid 545.

<sup>386</sup> Ibid 545.

<sup>387</sup> Ibid 545 citing the case of *Ndhlovu* (note 141 above) 929, where an immovable display cabinet separate from, but forming an integral portion of a shop was broken into; and *R v Botha* 1963 where a mine magazine used for storage of dynamite was broken into.

<sup>388</sup> Ibid 545.

same building.<sup>389</sup>

Given the vagueness of the criterion or lack of it to decide whether a structure qualifies as one in respect of which a crime can be committed; it comes as no surprise that the courts experience the considerable difficulties in deciding whether a caravan qualifies.<sup>390</sup> A caravan is defined as a “house on wheels”.<sup>391</sup> Prior to the *Temmers*<sup>392</sup> case, it seemed as if the courts had decided that a caravan qualified as the ‘premises’, even if the ‘breaking’ occurred at the time when nobody was living in it,<sup>393</sup> but that it never qualified if it was used merely for the purpose of storing goods.<sup>394</sup> This construction is perfectly explicable in terms of the De Wet/Snyman criterion according to which a structure used merely for the storing of goods had to be immovable in order to qualify.<sup>395</sup>

In terms of the *Temmers*<sup>396</sup> criterion, a caravan used merely for the storage of goods may qualify.<sup>397</sup> The court held that a caravan used as a shop which was not moved around but was positioned in the particular place “with a relative degree of permanency” qualified.<sup>398</sup> The structure in question in *Temmers*<sup>399</sup> was for all practical purposes an immovable structure hence it would have qualified as the premises in respect of which the crime of housebreaking can be committed even in the De Wet<sup>400</sup> criterion.<sup>401</sup> The crime of housebreaking can be committed in respect of an empty caravan that is displayed for sale.<sup>402</sup> In the most recent case of *Maswetswa*,<sup>403</sup> the court’s difficulties had little or nothing to do with the challenges posed by the elements of the crime; hence this case is not useful insofar as the elements of the crime are concerned.<sup>404</sup>

On the question of whether housebreaking can be committed in respect of a caravan, one

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<sup>389</sup> Coetzee (note 141 above)8; *Meyeza* (note 332 above) 386.

<sup>390</sup> Snyman (note 49 above) 546.

<sup>391</sup> *Ibid* 546.

<sup>392</sup> *Temmers* (note 332 above)

<sup>393</sup> *Madyo* (note 328 above) 292.

<sup>394</sup> Snyman (note 49 above) 546 citing the case of *Jecha* (note 353 above) 215.

<sup>395</sup> *Ibid* 546.

<sup>396</sup> *Temmers* (note 332 above) 357.

<sup>397</sup> Snyman (note 49 above) 546.

<sup>398</sup> *Temmers* (note 332 above) 361e.

<sup>399</sup> *Ibid* 361.

<sup>400</sup> De Wet ‘Strafreg’ 4ed (1985).

<sup>401</sup> Snyman (note 49 above) 546.

<sup>402</sup> *Mavungu* (note 353 above) 425.

<sup>403</sup> *S v Maswetswa* 2014 1 SACR 288 (GSJ).

<sup>404</sup> Watney (note 2 above) 612.

must simply follow the common-sense approach which means that the normal purpose of a caravan is to serve as a place in which to stay, although the people seldom stay permanently in a caravan.<sup>405</sup> The court in the *Mavungu*<sup>406</sup> case held that a breaking and entry into a caravan could constitute the crime of housebreaking; that, just as a caravan could be regarded as the ‘premises’ for the purpose of the housebreaking liability, it could be regarded as the ‘building’ for the purposes of trespass liability; and that, a ‘building’ for the purposes of the trespass offence including all habitual ‘structures’.<sup>407</sup> The normal use of a caravan is the human habitation and as such qualifies as a structure in respect of which the housebreaking can be committed.<sup>408</sup> It would only be in the exceptional cases, that is, when it has been converted into a place for storing goods on a reasonably permanent basis, that it, would not qualify as a structure, as where the wheels have been removed and placed on the bricks or other blocks to serve as a dovecote.<sup>409</sup> According to Snyman, a criterion that is more workable, less vague, and therefore to be preferred to that suggested in the *Temmers*<sup>410</sup> case is the one according to which a structure used for the storage of goods or property must be immovable in order to qualify.<sup>411</sup> A trailer that is hooked onto the back of a motor vehicle and which is meant only for the transportation of goods ought according to the *De Wet*<sup>412</sup> criterion not to qualify as a structure in respect of which the crime can be committed, because it is movable and not intended for human habitation.<sup>413</sup>

#### 4.4 De Wet/Snyman Perspective

De Wet was very critical of the crime of housebreaking; however, conceded the fact of its existence, and discussed it in terms of the decided case law, where in relation to the ‘premises’ requirement he surveyed a number of cases relating to the varying structures.<sup>414</sup> On the basis of the cases he noted, he distilled the criterion set out below.<sup>415</sup> De Wet did not

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<sup>405</sup> Snyman (note 49 above) 546 cites the case of *Madyo* (note 328 above) 292 as the court which advocated such an approach to this issue.

<sup>406</sup> *Mavungu* (note 353 above) 425.

<sup>407</sup> *Ibid* [40].

<sup>408</sup> Snyman (note 49 above) 546.

<sup>409</sup> *Ibid* 546.

<sup>410</sup> *Temmers* (note 332 above) 357.

<sup>411</sup> Snyman (note 49 above) 546.

<sup>412</sup> *De Wet* Strafreg 4ed (1985).

<sup>413</sup> Snyman (note 49 above) 546-47.

<sup>414</sup> Hoctor (note 293 above) 420 citing *De Wet* Strafreg 350-51.

<sup>415</sup> The criterion is set out in the next paragraph. *Ibid* 420, Hoctor states that the discussion of this issue in the fourth and final edition of *Strafreg* is identical to that in the third edition.

propose this criterion as workable or desirable, but saw the distinction as unjustifiable and artificial.<sup>416</sup> Snyman has been consistently following this distinction throughout all his six editions of the Criminal Law.<sup>417</sup> It has also been cited with approval in the case of *Ngobeza*<sup>418</sup> where the breaking into an enclosed yard was held not to constitute the crime of housebreaking.<sup>419</sup>

Snyman is critical of the elements of the crime of housebreaking, among other things, the ‘premises’ that they are very artificial and can give rise to the differing interpretations.<sup>420</sup> He is referring to the lack of a general principle which can be applied to determine whether a particular ‘structure’ or ‘building’ falls within the ambit of the crime of housebreaking and in the absence of such a principle he subscribes to the working distinction developed by De Wet.<sup>421</sup> In the one category of the distinction is the structures used for human habitation which may be regarded as the ‘premises’ whether movable or immovable, and in the other category is the structures used for storage which have to be immovable in order to qualify as the ‘premises’.<sup>422</sup>

Snyman regards the cases of *Jecha*<sup>423</sup> and *Madyo*<sup>424</sup> as being consistent with the De Wet distinction and criticised the case of *Temmers*<sup>425</sup> for adopting a contrary approach to that of the De Wet criterion.<sup>426</sup> He found no useful guidance in the *Mavungu*<sup>427</sup> decision in resolving this issue and set out his suggested solution to this matter, consistent with the distinction proposed by De Wet.<sup>428</sup> Snyman states that the reason for the acquittal in *Jecha* appears to be that the court proceeded from the assumptions that since the caravan in this case still had its wheels it ought to be regarded as a movable, and that if the caravan (being a movable, since it still had wheels) was merely used for storage of goods, it could not found housebreaking liability, since a structure used for this purpose is required to be immovable.<sup>429</sup> These

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<sup>416</sup> Ibid 420

<sup>417</sup> Ibid 419.

<sup>418</sup> *Ngobeza* (note 49 above) 613H-J.

<sup>419</sup> Hoctor (note 293 above) 421.

<sup>420</sup> Ibid 419.

<sup>421</sup> Ibid 419 cites De Wet (note 400 above) 366 which is staunchly supported and approved by Snyman.

<sup>422</sup> Ibid 419 setting out De Wet/Snyman criterion.

<sup>423</sup> *Jecha* (note 353 above) 215.

<sup>424</sup> *Madyo* (note 328 above) 292.

<sup>425</sup> *Temmers* (note 332 above) 357.

<sup>426</sup> Hoctor (note 293 above) 419-20.

<sup>427</sup> *Mavungu* (note 353 above) 425.

<sup>428</sup> Hoctor (note 293 above) 420.

<sup>429</sup> Ibid 424 quotes Snyman from 2010 THRHR 160-61.

comments by Snyman are entirely unsupported by the judgment.<sup>430</sup>

#### 4.5 The Hoctor Perspective

All the criminal law writers agree that the crime of housebreaking applies to all the ‘structures’ used for human habitation, whether movable or immovable in nature.<sup>431</sup> The practical effect of restricting the ambit of the crime to the immovable ‘structures’ would invariably deprive those who live in the informal dwellings of the protection of the crime and would be in conflict with the decision of the court in the *Madini*<sup>432</sup> case.<sup>433</sup> The scholars differ when it comes to the issue of the ‘structures’ used for storage. There are a number of cases where our courts have focused on the use or purpose of the ‘structure’ to determine housebreaking liability in contrast to the terms of the distinction.<sup>434</sup>

The court in *Thompson*<sup>435</sup> held that “the question is not determined by the nature of the house but by the use to which it is put”.<sup>436</sup> The court defined the test as “the permanency of the occupation, the use to which the structure broken into is put” and on this basis confirmed the housebreaking conviction in respect of a tent used as a dwelling.<sup>437</sup> This test was also applied by the court in the *Piet M’tech*<sup>438</sup> case.<sup>439</sup> The court in *Lawrence*,<sup>440</sup> cited the Gardiner and Lansdowne<sup>441</sup> definition and the *Johannes*<sup>442</sup> and *Thompson*<sup>443</sup> cases where it based its conviction on the ordinary use of the ship’s cabin.<sup>444</sup> The court in *Coetzee*<sup>445</sup> also held that

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<sup>430</sup> Ibid 424.

<sup>431</sup> Hoctor (note 293 above) 422 cites Snyman *Criminal Law* (2008)550; De Wet ‘Strafreg’ (1985)366-7; Burchell *Principles of Criminal Law* 3ed (2005)862; and Milton *South African Criminal Law and Procedure Vol: II Common-Law Crimes* 3ed(1996)803-4.

<sup>432</sup> *S v Madini* [2000] 4 All SA (NC) 20

<sup>433</sup> Hoctor (note 293 above) 422 quotes the passage of the judgment from *Madini* (note 432 above) 25b-c where the court stated “Sight should not be lost of the fact that a substantial number of South Africans, particularly those in informal settlements, live in shanties.....they also require the protection of the law”.

<sup>434</sup> Ibid 423.

<sup>435</sup> *Thompson* (note 323 above) 127.

<sup>436</sup> Hoctor (note 293 above) 423 where he states that the court followed Matthaues in respect of the definition of domus (*De Criminibus ad Lid XLVII et XLVIII Dig Commentarius* (1644), in translation *On Crimes - A commentary on Books XLVII and XLVIII of the Digest* (translated by Hewett and Stoop (1994)) in Books 48, Title IV, IV: “For a house is not established by nature but by the intention of men”.

<sup>437</sup> Ibid 423 citing the passage of the judgment in *Thompson* (note 323 above) 128.

<sup>438</sup> *Piet M’tech* (note 354 above) 1132.

<sup>439</sup> Hoctor (note 203 above) 423.

<sup>440</sup> *Lawrence* (note 326 above) 409F-G.

<sup>441</sup> Gardiner and Lansdowne (note 53 above) 1717.

<sup>442</sup> *Johannes* (note 331 above) 488.

<sup>443</sup> *Thompson* (note 323 above) 127.

<sup>444</sup> Hoctor (note 293 above) 423.

the office was “used for the storage or housing of property of some kind”.<sup>446</sup> In *Lewis*<sup>447</sup> the court held that the Governor-General’s post box was “not used for habitation or to store goods.”<sup>448</sup> In *Jecha*,<sup>449</sup> the court followed suit.<sup>450</sup> In *Madyo*,<sup>451</sup> the court cited with approval the approach adopted in the *Lawrence*<sup>452</sup> and *Jecha*<sup>453</sup> cases.<sup>454</sup> In *Mavungu*,<sup>455</sup> the court cited *Jecha*,<sup>456</sup> *Lawrence*,<sup>457</sup> *Madyo*,<sup>458</sup> and *Temmers*<sup>459</sup> with approval and then concluded that a caravan should be regarded as a dwelling in respect of the crime of housebreaking and that even for the ‘structures’ not used for human habitation it does not matter whether the structure is movable or immovable.<sup>460</sup>

Snyman argues that a caravan can be used for the purpose of storing goods and that in such a case it ought not to be regarded as the premises, particularly if it still has its wheels.<sup>461</sup> He argues further that the position would be different if the caravan has been changed into an immovable structure through the removal of its wheels.<sup>462</sup> It is certainly questionable whether a caravan becomes an immovable when its wheels are removed.<sup>463</sup>

The approach adopted by Hunt reconciles more truly with the case law than does the De

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<sup>445</sup> *Coetzee* (note 141 above) 10

<sup>446</sup> Hoctor (note 292 above) 423.

<sup>447</sup> *Lewis* (note 343 above) 44.

<sup>448</sup> Hoctor (note 293 above) 423.

<sup>449</sup> *Jecha* (note 353 above) 217H

<sup>450</sup> Hoctor (note 293 above) 423, states, the court in *Jecha* case held that “If the very nature of the premises broken into is not decisive of the question of the use to which it is put, then the further evidence may be necessary to resolve the matter to show what it is in fact used for or for what it might ordinarily be used.”

<sup>451</sup> *Madyo* (note 328 above) 292d-e.

<sup>452</sup> *Lawrence* (note 326 above) 409.

<sup>453</sup> *Jecha* (note 353 above) 217.

<sup>454</sup> In *Madyo* (note 328 above) 292 e, the court and stressed that the focus of the test was that there be “Some degree of permanence about the purpose for which the premises are used and not that there should be some degree in the user thereof for that purpose.”

<sup>455</sup> *Mavungu* (note 353 above) 425.

<sup>456</sup> *Jecha* (note 353 above) 217.

<sup>457</sup> *Lawrence* (note 326 above) 409.

<sup>458</sup> *Madyo* (note 328 above) 292.

<sup>459</sup> *Temmers* (note 332 above).

<sup>460</sup> Hoctor (note 293 above) 424

<sup>461</sup> *Ibid* 426 quoting Snyman from 2010 *THRHR* 162.

<sup>462</sup> *Ibid* 426.

<sup>463</sup> *Ibid* 426, Hoctor poses some questions in respect of Snyman’s argument, namely, Can it really be said that such a caravan necessarily accedes, through *inaedificatio*, to the land on which it is placed, in terms of its nature and purpose? This reasoning is difficult to follow - if a caravan is by virtue of its ordinary purpose, human habitation, regarded as premises, then why should it matter that it is being used for the storage of goods for any length of time? Why should the issue of whether a caravan is movable or immovable be significant, except that this classification is important to fit into the De Wet distinction supported by Snyman?# Hoctor 426 pointing out some problems in the De Wet/Snyman distinction. It is submitted that this distinction theory is not worthy of support at all as it directly conflicts with the purposive approach which has been applied by our courts as early as the beginning of the twentieth century.

Wet/Snyman distinction.<sup>464</sup> The test employed by Hunt<sup>465</sup> is correct in all respects if the nature of the ‘structure’ is regarded to be a function of its purpose, which is ultimately determinative of whether one is dealing with the premises which properly fall within the protection of the crime of housebreaking.<sup>466</sup> The proposed test in *Temmers* is worthy of support in its adoption of the purposive approach.<sup>467</sup>

The best approach to be applied by our courts is the one of pragmatic common sense.<sup>468</sup> The factor which ought to weigh most heavily with the court is the intention of the user or occupier and that, provided the structure fits the usual common-sense test applied by the court, simple testimony as to the intended use will suffice to bring the structure within the ambit of the crime.<sup>469</sup> The application of this approach should counteract Snyman’s concerns regarding the “vagueness” of the *Temmers* criterion.<sup>470</sup> Motor vehicles may qualify for the protection of the crime of housebreaking in appropriate circumstances.<sup>471</sup> The most important consideration is the intended use of the structure.<sup>472</sup> The structure is required to be used for either human habitation or storage purposes in our law and as such, the intent of the owner, occupier, or user should be definitive in this regard.<sup>473</sup> The common-sense approach is, indeed, the best approach to be applied by our courts compared to the De Wet/Snyman distinction.

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<sup>464</sup> Ibid 427.

<sup>465</sup> Ibid 427 citing Hunt’s work on *Criminal Law and Procedure* Vol. II: Common-Law Crimes 1<sup>st</sup> ed (1970).

<sup>466</sup> Ibid 427.

<sup>467</sup> Ibid 427.

<sup>468</sup> Hoctor (note 297 above) 130.

<sup>469</sup> Ibid 131.

<sup>470</sup> Ibid 131.

<sup>471</sup> Ibid 132.

<sup>472</sup> Ibid 132.

<sup>473</sup> Ibid 132.

## CHAPTER FIVE

### 5. CONCLUSION

The overarching purpose for this dissertation is to demonstrate that the crime of housebreaking is best placed as a common-law crime in South African law. For this to be achieved, the elements that cause most difficulties in the definition of this crime had to be examined, namely, the ‘breaking’ and the ‘premises’ elements.

Chapter one of this dissertation is an introductory chapter that briefly discusses the historical background of this crime which comprised its sources, namely, the Roman and Roman-Dutch law as well as the English law. It also discusses the various aspects germane to this dissertation, namely, early development of this crime, the rationale for the study of this dissertation, the statement of purpose of this study, the research questions pertaining to this study, the methodology employed for this study as well as outline of this dissertation structure.

Chapter two discusses the nature of the crime of housebreaking from South African law perspective. The aspects pertaining to the nature of this crime being discussed are as follows: general definition, purpose, all the elements apart from two, namely, ‘breaking’ and ‘premises’ elements as well as proposed reformation.

Chapter three is dedicated to one element of this crime, namely, the ‘breaking’ element. The various aspects germane to this element are discussed, namely, the current South African law position, the sources of controversy and the significance of ‘breaking’ requirement. The South African law position aspect unpacks what is entailed by the ‘breaking’ concept by defining it and discussing its nature. The sources of controversy involve the English common-law exceptions to the no displacement, no breaking rule; exclusion of the ‘breaking out’ cases from the housebreaking ambit and a right to ‘break’. Both exceptions are discussed at length.

Chapter four is dedicated to the second element that is also subject to criticism, namely, the ‘premises’ element. The original meaning of the term ‘premises’ is discussed; as well as the purpose thereof. Other common-law jurisdictions are discussed relating to their interpretation

of this element and their views. The current South African law position is discussed as well as the De Wet/Snyman and Hoorde perspectives.

This chapter concludes the dissertation. It covers the response to the purpose and aims of this dissertation and answers the research questions as stated in the first chapter.

## **5.1 Concluding Remarks**

Abolition of this crime is not an option, as discussed in chapter two, as this would necessarily leave a vacuum in the substantive criminal law which cannot possibly be filled by some new measures. It is correct that, merely falling back on the offence of trespassing coupled with possible conviction of malicious injury to property would definitely not satisfy the undoubted need to treat housebreaking separately from any other criminal conduct as discussed in chapter two. The existence of the crime of housebreaking is a necessity and all the scholars agree on this aspect. The law relating to the common-law crime of housebreaking has been developing all the time. This development has been taking place concomitantly with the societal needs, so that the crime remains relevant for the purpose it purports to serve. It should be noted that this crime followed its own developmental path; even though the English law offences of burglary and housebreaking closely approximated the equivalent offence in South African law and contributed to its development by way of authorities as discussed in chapter two. Thus our courts began to develop this crime from the stage it was inherited from English law into our law; and for this, our courts should be commended.

The basis for criticisms of this crime has been the fragmentary and technical nature of its elements and lack of overarching rationale for the crime as discussed in the first chapter. The lack of overarching rationale is the thing of the past since Hoorde has given the most appropriate rationale for this crime as “the protection of the owner or occupant against the psychological trauma and sense of violation invariably accompanying a housebreaking” as discussed in chapter two. The elements of the crime have been fragmentary and technical in nature even when the crime was inherited from English law. Our courts have been behind the development every time the need arises as it was the case in the case of *Johannes* where the court brought about the new perspective on the issue of defining the boundaries of the premises concept as discussed in chapter four. Thus despite the fragmentary and technical

nature of the elements, our courts have been applying the same elements without fail. There was a stage when the crime had to be committed in the night time with intent to commit a felony inside the mansion as discussed in the first chapter. The courts, as part of the developmental process at that time, justifiably got rid of these unnecessary requirements.

When the societal need arose that the premises requirement be broadened to include the storage place in the premises requirement as opposed to confine this requirement to the human habitation in the form of a mansion; the courts duly broadened this element to include storage place. In fact, the recent development of the common law in respect of this crime pragmatically took place just before the 1996 Constitution was promulgated through the decision of the court in *Temmers* as discussed in chapter four. The court came up with a new perspective on the problems inherent in defining the boundaries of the concept of the 'premises' as part of the developmental process aimed at developing this crime. The court saw the extension of the notion of the 'premises' as part of a developmental process in the law of housebreaking which has taken place in the courts, primarily in response to societal factors and the need to combat the crime as discussed in chapter four. The court must be commended for developing the common law in respect of the crime of housebreaking in the way it did in the *Temmers* case.

The purpose of this crime is not so much to protect the dwelling as a building but to protect its security that represented the indefinable idea, existent at all times that the home was inviolable: every individual exercised his greatest freedom at home as discussed in chapter two. The purpose of the crime is therefore to preserve the sanctity of the home or habitation against intrusions that involve danger or harm to the inhabitants as also discussed in chapter two. One cannot possibly think of any other crime or offence that can best serve this purpose other than the crime of housebreaking. It follows then, that the crime of malicious injury to property and the trespassory offence cannot serve the same purpose that is served by the crime of housebreaking. The trespassory offence is unsuited to the housebreaking role, as it does not include any requirement that the intruders have any intent to commit a further offence upon entry and is not punishing a preparatory offence but instead the harm being punished is simply an unlawful entry as discussed in chapter two. Thus the crime of housebreaking is irreplaceable.

The issue of development of the common law has been strengthened by the constitutional

provision.<sup>474</sup> Our courts have a constitutional duty to develop this common-law crime where, from a constitutional perspective, development is necessary. The adoption of the 1996 Constitution was a solution to the difficulties and problems relating to this crime remaining a common law. Our courts have a constitutional duty to develop this common-law crime if necessary. Because there is no need for the intervention of the legislature insofar as the crime of housebreaking is concerned, it should remain a common-law crime in South African law. No major difficulties or problems have been experienced by our courts in respect of the crime of housebreaking after Snyman's proposals for reforming the law of housebreaking.<sup>475</sup> All that is required to be done by our courts is to develop the common-law crime of housebreaking in line with the provisions of section 173 of the 1996 Constitution, and to ensure that the rules relating to this crime are consistently applied.

The South African common-law crime of housebreaking is purely a development by the South African courts from the early English with some of the eccentric corners knocked off as discussed in chapter two. This means that the development of this crime is not a new thing since it has been developing from the very early stage when it became part of our law. The courts should be mindful of the fact that the crime is being developed whenever the courts apply the rules relating to this crime. The 1996 Constitution has put weight behind this development for the courts to be constitutionally bound to develop this common-law crime where, from a constitutional perspective, development is necessary.

In respect of the actual breaking, that is, physical and literal breaking, all scholars do not have any qualms with this first category of breaking as discussed in chapter three. The only difficulty is in respect of the second category where there has been no displacement or little displacement, that is, the absence of actual breaking. It may be concluded that whatever solution that might be proposed in respect of the latter category, it should not affect the former category since there is no difficulty or problem in respect of it. The position relating to the first category should not change; all forms of actual breaking should continue to attract housebreaking liability. With regard to the latter category, it may be concluded that the correct approach is the one proposed by Hoctor, namely, that the concept of breaking currently employed by our courts should be extended to include any ingress by unusual

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<sup>474</sup> Section 173 of the 1996 Constitution provides that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

<sup>475</sup> Watney (note 2 above) 615.

means, that is, in any way but through an open door as discussed in chapter three. The adoption of this perspective by our courts would be an important step heading towards the development of this common-law crime in compliance with the constitutional obligation as required by the provisions of section 173 of the 1996 Constitution.

With this approach all irregular ingresses into the building with the intent to commit a crime within the premises would necessarily amount to 'breaking', thereby having satisfied the 'breaking' requirement as contained in the definition of the crime of housebreaking; thus extending protection of private property rights to all whose dwelling or storage space has been invaded. The accused in *Ngobeza* would have been found guilty of the crime of housebreaking had the court adopted this approach since the accused got into the building through the roof and not by creeping through the fence surrounding the premises. It may be concluded that this approach is necessary to cover all the situations where there may be no displacement at all; but the ingress has been obtained through an opening or aperture that the owner or occupant of the premises had never intended to use as a point of human entry. The question of little displacement or no displacement as discussed in chapter three shall only be important when it comes to entry through the door or any other aperture or opening which is used as a point of human entry into the premises. The manner of ingress is so important that the nefarious intent of the accused can be established by the manner in which he has entered; otherwise it may be difficult to establish the intent to commit a crime. A situation like the one that arose in *Mososa* can never arise again with the application of this approach or development.

According to this approach, the situations as discussed in chapter three are covered, namely, ingress through a window, irrespective of whether it was closed or open, a skylight, a chimney, a roof, a space between the window and the door, a space between the roof top and the wall, or any other aperture or opening not designed for human ingress. In *Chalala*, the accused would have been found guilty of the crime of housebreaking with this proposed development.

The position relating to ingress through the door should remain as it is. There have been no difficulties or problems relating to ingress through the door. In our law it has always been 'breaking' where the accused has unlocked and open, then entered through the door or opened a closed door or left ajar door. There is no development that needs to be effected in

respect of this position. Thus the decision of the court in *Moroe*<sup>476</sup> was correct. All forms of the doctrine of constructive breaking should form part of our law as part of the development of the common-law crime of housebreaking. These are most unpleasant forms of the criminal activities since they involve a high degree of dishonesty, for instance, where the accused makes the complainant believe that he is a municipal official coming to work on the instructions of local municipality yet he is a criminal dressed in municipal uniform coming to commit nefarious activities. In this situation, when the complainant allows ingress, he does so innocently. The consent given by the complainant has to be vitiated once it comes to light that in fact it was given as a result of the misrepresentation and the act of the accused is tantamount to that of a housebreaker hence such conduct should suffice for the ‘breaking’. Thus Hoctor’s views as discussed in chapter three should be supported insofar as the adoption of the doctrine of constructive breaking into our law is concerned.

The development in respect of the ‘premises’ requirement occurred from the time this crime was inherited from English law as discussed in chapter four. The original term that was used to describe this requirement was a “mansion house” as discussed in the first chapter. This term has fallen into complete disuse through the development of this common-law crime and the changing of societal circumstances in all common-law jurisdictions. It is as a result of this development that there is no crime of ‘hamesucken’ anymore. For that reason, the approaches adopted by the courts in *Johannes* and *Temmers* advocated by Hoctor is to be preferred to the one adopted by De Wet and supported by Snyman as discussed in chapter four. Our courts have generally adopted the common-sense approach first expressed by Gardiner J, in *Johannes*, and enunciated by Gardiner and Lansdown as discussed in chapter four. The common-sense approach entails that the normal purpose of the structure is determinative in terms of housebreaking criminal liability. For instance, the normal purpose of a caravan is to serve as a place in which to stay, though it is seldom used for that purpose, and for that reason it is a structure for human habitation and thus regarded as ‘premises’ for the purposes of housebreaking liability. The application of this approach will ensure consistency by our courts when dealing with housebreaking cases.

For one to clearly understand the significance of ‘breaking’, one has to painstakingly consider the following two scenarios: a case where a man removes the roof tiles and cuts the ceiling

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<sup>476</sup> *Moroe* (note 136 above) 897.

board, then enters the premises through the hole he created himself and steals some items from inside; and a case where a man simply walks in through the door which had been left wide open and steals from inside. There is no way one can safely say that the scope and the nature of these two completely distinct criminal activities can be same. If the 'breaking' element were to be removed, and not form part of the definition of this crime anymore, then these two completely different scenarios would be treated as one and the same thing, constituting the crime of unlawful entry with intent to steal. The South African law cannot afford to have the distinction blurred, and thus the 'breaking' element and all other elements, currently constituting this crime, for that matter should be retained as they are in the definition of the crime of housebreaking. The crime of housebreaking should be retained in its current form as a common-law crime in South African law.

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