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property when he is embarrassed or insolvent; (6) failure of parties to testify If the creditor can show any of the above then he has shifted upon the defendants a burden of explanation.[35]

In conclusion, the rights of a subsequent creditor to set aside a conveyance in Kentucky may be set out as follows: (1) The fact that a conveyance is voluntary under K.R.S. 378.020 – that is, the gift-by-debtors law – affords him no protection at all; he must still show actual fraudulent intent, directed toward his class, subsequent creditors. His problem is mainly one of proof; (2) If a conveyance is attacked by a future creditor under K.R.S. 378.010, on the ground that it was made to "hinder, delay and defraud creditors", he may sometimes win his case by showing actual fraud directed toward present creditors. But, if he is unable to do this, his problem again becomes one of proving actual fraudulent intent directed against his particular class of creditors. In such case the right of these future creditors, in Kentucky as elsewhere, depends upon the salient facts of the individual case.[36] If these facts show an intent to defraud such creditors, protection is in order. If not, there can be no protection. In the final analysis, the entire problem involves a weighing of the debtor's interest in the free use and disposal of his property as opposed to the future creditor's interest in protecting his claim.

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FEDERAL TORT CLAIMS ACT AS APPLIED TO MILITARY PERSONNEL

The Supreme Court of the United States has decided in a recent case[1] which included two other actions[2] that servicemen cannot recover under the Federal Tort Claims Act,[3] for injuries which arise out of or are in the course of activity incident to military service. This

[35] Campbell v. First National Bank of Barbourville, 234 Ky. 697, 701, 27 S.W 2d 975, 977 (1930).

[36] Peyton v. Webb, 29 Ky. L. R. 1151, 1153, 96 S.W 839, 840 (1906) where the court said that each creditor who attacks a conveyance has the burden of showing "by facts or circumstances that the conveyance was made with a fraudulent intent before the property can be subjected. It is the intent and purpose with which the debtor acts that renders the conveyance fraudulent, and this must be determined by the facts of each particular case."

[1] Feres v. United States, 340 U.S. 135, 71 S. Ct. 153 (1950).
Jefferson v. United States, 178 F 2d 518 (C.C.A. 4th 1949); United States v. Griggs, 178 F 2d 1 (C.C.A. 10th 1949).

[2] 60 Stat. 842 (1946), 28 U. S. C. secs. 921-46 (1946). Now contained in the newly revised Judicial Code in secs. 1291, 1346 (b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1948).

decision is predicated upon the theory that since service men receive certain benefits incident to their military service from the government, Congress did not intend the Federal Tort Claims Act as an additional benefit for them.

In the case of *Feres* v *United States*,[4] Rudolph J. Feres, an army lieutenant, while on active duty in the service of the United States was burned to death in a barracks on a military post of the United States in which he had been quartered by superior officers. His death was alleged to have been the result of negligence on the part of said officers who required the deceased to be quartered in barracks which were unsafe due to a defective heating plant, and further negligence on the part of the fire guard and the fire guard's supervisors assigned to that area. The Court of Appeals of the Second Circuit upheld the trial court's order dismissing the action on the ground that it was implied in the decision of Brooks v United States[5] that there could be no recovery where the injury or death was incident to service.

In *Jefferson* v *United States*,[6] the plaintiff sought to recover for personal injuries resulting from a surgical operation performed by an Army surgeon at Fort Belvoir, Virginia. At the time of the operation, the plaintiff was an enlisted man on active duty He had undergone this operation as a result of gall bladder trouble and the operation was performed by the chief surgeon, a United States Army Medical Officer. Later, on March 13, 1946, after plaintiff's discharge, when he was again operated on at the Johns Hopkins Hospital in Baltimore, a towel was found in the lower part of the plaintiff's stomach partly worked into the duodenum. It bore the legend "Medical Department, U. S. Army" and was 2½ feet long by 1½ feet wide. The complaint was dismissed although the court declared there was negligence on the part of the agents or employees of the government at the hospital. On appeal to the United States Circuit Court of Appeals,[7] in affirming the dismissal, the court concluded that the Federal Tort Claims Act did not apply because it was unreasonable to assume that Congress, in passing the Act to provide for the modification of governmental immunity, intended at the same time to subject every injury sustained by a member of the armed forces in the execution of military orders to the examination of a court of justice, if the injured person should make a claim that his injury was caused by the negligence of a superior officer.

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[4] 177 F 2d 535 (C. C. A. 2nd 1949).

[5] Brooks v. United States, 337 U.S. 49, 69 S. Ct. 918, 93 L. Ed. 1200 (1949). recovery where the injury or death was incident to service.

[6] 77 F Supp. 706 (D. C. D. M. 1948).

[7] 178 F 2d 518 (C. C. A. 4th 1949).

The third action[8] presented was that of an Army Officer on active duty admitted under official orders to the Army Hospital at Scott Field Air Base for the purpose of surgery and treatment. Death occurred while under treatment and the widow, as executrix, sought to recover damages for his wrongful death, allegedly caused by the negligent, careless, and unskillful acts of members of the Army Medical Corps. A judgment for the defendant was reversed by the Court of Appeals, Tenth Circuit, which held that an action for his death might be maintained against the United States.

The Federal Tort Claims Act[9] was enacted as Title IV of the Legislative Reorganization Act of 1946. In effect it provides a sweeping provision for suits against the United States for injury or death "caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[10]

Twelve exceptions to liability under the Act are set forth, among them, "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,"[11] and "any claim arising in a foreign country"[12] No other specific exception was made affecting military personnel.

The Supreme Court in affirming the *Jefferson* and *Feres* cases and reversing the *Griggs* case pointed out that *Brooks* v *United States*,[13] in which they allowed recovery to two servicemen and upon which appellants relied, was distinguishable in that the death and injuries sustained by the Brooks brothers were not incident to their service in the armed forces.[14] No circumstance existed to take the Brooks brothers out of the scope of the Act. They were not engaged in combat nor were they in a foreign country at the time of their injury, therefore, it was difficult to distinguish their status from that of their father who also secured a personal injury judgment against the government which did not appeal.[15] In fact, the court in the Brooks case felt that Welker Brooks technical status as a soldier should not operate to deny him a right like that given his father as a private citizen to recover damages for the same act of negligence on the part of the United States.

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[8] Griggs v. United States, 178 F 2d 1 (C. C. A. 10th 1949).
[9] *Supra*, note 3.
[10] 28 U. S. C. sec. 1346(b) (1948).
[11] 28 U. S. C. sec. 2680(j) (1948).
[12] *Supra* note 12 subsec. (k).
[13] 337 U.S. 49, 69 S. Ct. 918 (1949).
[14] 337 U.S. 49, 52, 69 S. Ct. 918, 920 (1949).
[15] Note, 35 CORN. L. QUART. 233, 234 (1949).

The question that now arises is whether or not this act applies to servicemen who are on active duty (and not on furlough) with the armed forces in the United States, though not in time of war. Furthermore, is there any distinction between injuries which are service connected in the sense of arising directly out of performance of military duties and those injuries that are less directly a result of military duties and attributable more to military status? The Supreme Court of the United States concluded in the Feres case "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[16] The court distinguished this case as being wholly different from the Brooks case in that "the common fact underlying the three cases is that each claimant while on active duty and not on furlough sustained injury due to negligence of others in the armed forces."[17] The claims were upheld in the Brooks case as they were stated to be within the scope of the act because the injuries were not incident to military service.[18] This seems to indicate that the test as to liability of the government is active duty status and the serviceman s recovery does not depend upon his being "on duty" instead of "off duty" at the time of injury Further, the fact that the injury was not received in the scope of military employment would have no bearing upon the serviceman s right to recover.

The Supreme Court states that precedents have denied any liability in this kind of case and that it cannot impute to Congress such a radical departure from established law in the absence of express congressional command. It found no command in the general provision for making the United States liable as an individual. In the first place the command could be found in the general provision making the United States liable as an individual. The court's argument that individuals don't have soldiers is frivolous. In the second place, the Act classifies military personnel as government employees for purposes of imposing liability on the United States for their negligence.[19] Why should it not allow such persons to be claimants under the Act?

The court, however, does not have to rely on mere imputations of congressional intent. Legislative history shows that when the Act was first introduced to Congress it provided that claims "arising out of the

[16] Feres v. United States, 340 U.S. 135, 136, 71 S. Ct. 153, 155 (1950).

[17] *Supra* note 5. In this case Arthur and Welker Brooks were at home on furlough. While riding in the family automobile with their father, near Fayetteville, North Carolina, an Army truck driven by a civilian who was transporting an Army band, struck their car, killing Arthur and severely injuring the other two members of the family.

[18] *Accord*, Samson v. United States, 79 F Supp. 406 (S. D. N. Y. 1947).

[19] 28 U. S. C. sec. 941(b) (1946).

activities of the military or naval forces or of the Coast Guard during time of war" and arising in foreign countries were excluded. By way of an amendment[20] offered by Mr. Monroney during a debate in the House, the word "combatant" was inserted before the word "activities." No explanation was given and this amendment was accepted without further debate. Therefore, it seems that if it were not the intention of Congress to include such torts, the amendment would undoubtedly have been defeated and thereby excluding from coverage all "activities" instead of only "combatant activities." Furthermore, of the eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two contained exceptions excluding relief to members of the armed forces. When the present Act was introduced, the exceptions had been dropped.[21] A thirteenth exception[22] was included along with the other twelve exceptions when the bill was originally introduced in Congress, but was rejected. The World War Veterans Act[23] provides disability benefits to "any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service." This rejection then, of the thirteenth exception, would evidence a congressional intention to include injuries received in line of duty under the Tort Claims Act.[24]

Perhaps the Supreme Court is fearful that if servicemen are allowed to sue and obtain a judgment under the Federal Tort Claims Act they would receive an additional or excessive recovery inasmuch as they are entitled to certain benefits from the United States such as disability pay, pensions, and other related veterans compensation. Although this may be true, it should also be considered that government pensions and other compensation do not include pain and suffering as a measure of the amount awarded, while this is usually an element of damages under the Federal Tort Claims Act.[25] The serviceman should have full recovery less any benefits received. It would be simple for the court to allow an election of remedies or for the judgment obtained under the Federal Tort Claims Act to be reduced by having all benefits previously received for the injury or death to be

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[20] 92 Cong. Rec. 10143 (1946).

[21] Brooks v. United States, 337 U.S. 49, 51, 69 S. Ct. 918, 920 (1949).

[22] "Any claim for which compensation is provided by the World War Veterans Act of 1924, as amended."

[23] 38 U. S. C. A. sec. 701(a) (1949).

[24] Note, 11 LA. L. REV. 125, 129 (1950). Yet, Congress appears to enact specific exceptions when the occasion so demands. Under the Federal Employees' Compensation Act, 5 U. S. C. A. sec. 751 *et seq.*, federal employees are expressly forbidden to sue the United States for injuries received in the course of their duties. Lewis v. United States, 190 F 2d 22 (C.C.A. D.C. 1950).

[25] Note, 1 SYRACUSE L. REV. 87, 89, esp. n. 14 (1949).

applied in mitigation of damages.[26] Under the Federal Employees Compensation Act[27] the civilian employee has an election of remedies against a third party, but as to a veteran's claim, the Veterans Act[28] has no such provision concerning an election of remedy The rule followed in the *Brooks* case is that the amount of any judgment will be reduced by the benefits paid or payable to the serviceman or his beneficiaries.[29]

Another objection raised against allowing the serviceman to recover was that to do so would open the door to a flood of litigation and that every time a member of the armed forces was injured for any reason whatsoever, a suit against the government would possibly follow and as a result it would seriously affect military discipline and morale.[30] This objection is only remotely possible because the Tort Claims Act specifically prohibits all claims arising from servicemen during time of war in actual combat[31] and any claim arising in a foreign country[32] Also the Act provides that all claims for less than $1,000 may be handled by a federal administrative agency[33] It is very likely, therefore, that most claims would be in this latter category since an injured serviceman usually incurs no medical expenses nor suffers any loss of wages, whereas the elements of damages which the Tort Claims Act cover, such as pain and suffering are excluded from the government pensions and other benefits received by the serviceman.

The English Government, in enacting the Crown Proceedings Act of 1947[34] has in effect attained the equivalent of the Federal Tort Claims Act. The English counterpart contains express provisions regarding claims by one member of the armed forces of the Crown against another. The Crown is not liable for the death or personal injury suffered by a member of the armed forces at the hands of another member of those forces in substance:

> (a) when the former is on duty[35] and is either killed or injured by the act of another member of the forces while on duty· or
> (b) when, although not actually on duty, the former is killed or in-

[26] In White v. United States, 77 F Supp. 316 (D.C. N.J. 1948), it was held that civilian employees who received benefits under the Federal Employees Compensation Act were not barred from suing the government under the Federal Tort Claims Act for the same injury, although compensation awards would be applied in mitigation of damages in their tort judgments. See also United States v. Wade, 170 F 2d 298 (C.C.A. 1st 1948); *Contra*: Jordan v. United States, 170 F 2d 211 (C.C.A., 5th 1948).

[27] 39 STAT. 742 (1916), 5 U.S.C. sec. 757 (1946).

[28] 43 STAT. 607 (1924), 38 U.S.C. sec. 421 *et seq.* (1946).

[29] Brooks v. United States, 337 U.S. 49, 53, 69 S. Ct. 918, 921 (1949).

[30] United States v. Brooks, 169 F 2d 840, 845 (C.C.A. 4th 1948).

[31] 28 U.S.C. sec. 943(j) (1946).

[32] *Supra* note 31 (k) (1946).

[33] 28 U.S.C. sec. 921(a) (1946).

[34] 10 & 11 Geo. VI, c. 44, sec. 10 (1947).

> jured by the act of a fellow member of the forces if the event causing the death or injury happens on military premises, or on a ship, aircraft, or vehicle used for military purposes.[36]

It is further provided that the Minister of Pensions must certify that an award be made to the injured person.[37] It must be noted that exemption from liability under this section relates only to death or personal injuries; it does not extend to libel or false imprisonment.[38] The English have arrived at a reasonable solution to the problem by waiving the immunity of the sovereign yet barring military personnel from suing their government for death or personal injuries caused by fellow servicemen when the injured man was on duty, or when the injury or death occurred on military premises, or on a ship, aircraft or vehicle used for military purposes; and only after the Minister of Pensions certifies that an award will be made to the injured person. In comparison with the three cases at bar decided by the Supreme Court it is probable that under the Crown Procedings Act of 1947 all three complainants would be precluded from recovery because the servicemen killed or injured happened to be on military premises at the time, but the exemptions of the English Act are more narrow and certainly more definite.

In conclusion it appears that the court in rejecting the plain language of the Act has been influenced by what it considers to be sound policy Yet, is it for the court to disregard the intention of Congress in view of the presumption that Congress was aware that the broad scope of the act extended to claims of military personnel? It is not plausible to contend that Congress intended to relegate the soldier to an inferior and less privileged status as a tort claimant. The court's distinction between injuries incident and not incident to service is in effect that a soldier on active duty will be denied recovery while one on furlough or absent without leave will be allowed to recover for the same injury The act was drafted with skill and circumspection and at a time when Congress would hardly be said to have been unaware of the rights of servicemen. Thus, one can only agree with the dissenting judge of the Circuit Court of Appeals in the Brooks case that "the language of the act, being clear as it is, the matter is one for Congress and not for the courts."[39]

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[35] However, no decisions have been found which indicate the English meaning of "on duty" It is suggested by the wording of the English provision that their interpretation of a member of the armed forces on duty would be more narrow than the American interpretation under the Federal Tort Claims Act.

[36] *Supra* note 34.

[37] *Ibid.*

[38] *Ibid.*

[39] United States v. Brooks, 169 F 2d 840, 850 (C.C.A. 4th 1948).