The Supreme Court, no longer required by statute to hear every case, would decide the question of public importance when it decides to grant or deny certiorari. Moreover, with a single procedure for review, litigants would no longer be required to choose between one-judge and three-judge courts on the uncertain basis of "public importance."[41] The party seeking review would be assured of proper jurisdiction.

THE NEW YORK STOCK EXCHANGE GRATUITY FUND: INSURANCE THAT ISN'T INSURANCE*

MEMBERSHIP in stock and produce exchanges frequently involves forced participation in a death benefit plan.[1] Financed by binding assessments

Railways Clauses Consolidation Act, 1845, 8 & 9 VICT., c. 20, § 90; 24 STAT. 379–80 (1887), as amended, 49 U.S.C. §§ 2, 3 (1946). *See* ICC v. Baltimore & O.R.R., 145 U.S. 263, 275–7 (1892); Great Western Ry. v. Sutton, L.R. 4 H.L. 226, 237 (1869); SEN. REP. No. 46, 49th Cong., 1st Sess., 176, 180–2, 198–202 (1886).

Since the common law actions have either been abrogated or strikingly altered and clarified, the constitutional right to jury trial (which is only an incident of the common law action, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48–9 (1937)), should no longer appertain. *Cf.* Grand Trunk W. Ry. v. Industrial Comm'n, 291 Ill. 167, 125 N.E. 748 (1920) (workmen's compensation); State *ex rel.* Davis-Smith Co. v. Clausen, 65 Wash. 156, 210–11, 117 Pac. 1101, 1119 (1911) (same). Whatever doubt may still remain could be clarified by congressional amendment to Section 22 of the Interstate Commerce Act taking away the common-law actions and replacing them with wholly statutory ones. *See* Pennsylvania R.R. v. Puritan Coal Co., 237 U.S. 121, 129 (1915). The right to jury trial would then disappear. *Cf.* State *ex rel.* Davis-Smith Co. v. Clausen, *supra*.

The rights of the plaintiff-shipper in reparations cases pose no problem at present since he waives jury trial when he asks the ICC to award reparations. *See* Baltimore & O.R.R. v. Brady, 288 U.S. 448, 458 (1933). Before the district court a jury is available. But if his alternative were abrogated (see note 39 *supra*), his right to jury trial should be treated similarly to that of the carrier.

41. See note 37 *supra*.

* Estate of Strauss, 13 T.C. 159 (1949).

1. Communications from approximately two dozen stock and produce exchanges indicate that at least one-third, including most of the important ones, have an informal death benefit plan. As adopted, these plans vary widely in their mechanics. For instance, the widows of deceased members connected with the Boston Stock Exchange for more than twenty years are entitled to $50 assessments against all surviving members. BOSTON STOCK EXCHANGE CONST. Art. XX, § 3. The By-Laws of the Omaha Grain Exchange also provide for payments equivalent to the amount collected from assessments against the other members. In this case no principal reserve is kept by the Exchange against which payments may be first made "[i]n order to be not amenable to the Insurance laws." Communication to the YALE LAW JOURNAL from F. P. Manchester, Secretary, Omaha Grain Exchange, dated December 3, 1949, in Yale Law Library. The Gratuity Fund of the New York Cotton Exchange assesses each member ten dollars upon the death of a fellow member, and the death benefit is the equivalent of the total assessments which each

against surviving members, such plans are designed to provide the widows and orphans of deceased members with financial security. The seventy-seven year-old Gratuity Plan of the New York Stock Exchange is typical.[2] The Exchange constitution binds each member to make a fifteen dollar donation to a gratuity fund upon joining the Exchange,[3] and a like payment on the death of each fellow member.[4] If he dies while still a member, his nearest intestate successor [5] receives $20,000 from the fund.[6]

The resemblance of such a plan to insurance is immediately apparent. In *Estate of Strauss*,[7] however, the Tax Court has indicated that in its opinion this analogy is merely superficial. The case arose under Section 811(g) of the federal estate tax which provides for inclusion of insurance proceeds in a decedent's gross estate.[8] The court held that $20,000 received by Mrs. Strauss from the Stock Exchange's gratuity fund on the death of her

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member has contributed during his lifetime. Communication to the YALE LAW JOURNAL from C. B. Jones, Chairman, Gratuity Fund Committee of the New York Cotton Exchange, dated December 1, 1949, in Yale Law Library. And the recently eliminated Gratuity System of the New York Produce Exchange provided for a three dollar assessment against all members and a graduated rate of payment in relation to the number of years the deceased was connected with the Exchange. NEW YORK PRODUCE EXCHANGE BY-LAWS § 57 (1946). The plan of the Kansas City Board of Trade, providing for $5,000 death benefits, is financed through investment of a principal sum of almost $30,000 in the stock of a subsidiary, the Grain Clearing Co. Communication to the YALE LAW JOURNAL from W.R. Scott, Executive Vice President, Kansas City Board of Trade, dated December 9, 1949, in Yale Law Library.

2. For a discussion of the plan see Franklin v. Dick, 262 App. Div. 299, 28 N.Y.S.2d 426 (1st Dep't.), *aff'd without opinion*, 287 N.Y. 656, 39 N.E.2d 282 (1941).

3. N.Y. STOCK EXCHANGE CONST. Art. XVI, § 1.

4. *Id.* Art. XVI, § 2. The fund has always contained sums substantially in excess of that required for current payments. In fact, income derived from investments, unearmarked original donations, and assessment returns above the requisite $20,000, see note 16 *infra*, had so swelled the Fund by 1941 that it contained almost $2,000,000. At that time a constitutional amendment was adopted permitting credits on assessments whenever the Fund contained at least $500,000. N.Y. STOCK EXCHANGE CONST. Art. XVI, § 7. See Franklin v. Dick, 262 App. Div. 299, 28 N.Y.S.2d 426 (1st Dep't. 1941). This obviated the necessity for any assessments for a number of years. And even today, although the surplus reserve has been exhausted, continued unearmarked income permits substantial credits to be given on assessments. Communication to the YALE LAW JOURNAL from D. C. Jones, Office Counsel, New York Stock Exchange, dated November 29, 1949, in Yale Law Library. See note 32 *infra*.

5. The payment is divided between the widow and any surviving issue. If there are none, the proceeds go to the nearest collateral relatives under the New York intestacy laws. N. Y. STOCK EXCHANGE CONST. Art. XVI, § 4.

6. "The faith of the Exchange is hereby pledged to pay, within one year after proof of death of any member, out of the money collected under the provisions of this Article, the sum of twenty thousand dollars, or so much thereof as may have been collected. . . ." N.Y. STOCK EXCHANGE CONST. Art. XVI, § 3. Invariably the amount collected is at least $20,000. See note 16 *infra*.

7. 13 T.C. 159 (1949).

8. INT. REV. CODE § 811(g).

member-husband was not an insurance proceed and therefore not subject to tax.[9]

The basis of the decision was a cryptic test announced by the Supreme Court in *Helvering v. Le Gierse*,[10] where a participant in an annuity-insurance scheme was denied the $40,000 exemption then accorded insurance:[11] "Historically and commonly, insurance involves *risk-shifting* and *risk-distribution*." [12] The Tax Court was forced to rely exclusively on this abstraction, for despite twenty years of stormy litigation in the estate tax field, the statutory term "insurance" has otherwise gone undefined.[13] But the court's application of the test seems clearly wrong.

Of the two aspects of the *Le Gierse* test the Tax Court only concerned itself with "risk shifting." No risk was shifted, said the court, because the Exchange was not bound to a definite liability: the widow's right was en-

9. Estate of Strauss, 13 T.C. 159, 166 (1949).

10. 312 U.S. 531 (1941).

11. The test, as originally formulated, was a device to prevent tax evasion. Previous to 1942, insurance proceeds payable to beneficiaries were granted a forty thousand dollar exemption before inclusion in a decedent's gross estate. Revenue Act of 1918, § 402(f), 40 STAT. 1097 (1919); Revenue Act of 1921, § 402(f), 42 STAT. 279 (1923); Revenue Act of 1924, § 302(g), 43 STAT. 305 (1925); Revenue Act of 1926, § 302(g), 44 STAT. 71 (1927). This was an obvious advantage to a wealthy "prospective decedent." To secure the exemption, persons too old to purchase ordinary insurance contracts with graduated premiums, secured combined life insurance annuity policies. In the *Le Gierse* case, for instance, one month before her death at age 80, the insured paid $25,000 for an annuity-insurance contract. Annual payments until death of a sum slightly less than could have been secured by investment elsewhere were coupled with an insurance policy of $25,000 face value. Since the court felt that this contract was more an investment than an insurance arrangement, the exemption was denied. The proceeds were therefore included in the gross estate as a gift in contemplation of death. See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 10.09 (1942); Note, 13 ROCKY MT. L. REV. 68 (1941).

12. Helvering v. Le Gierse, 312 U.S. 531, 539 (1940) (emphasis added). The Supreme Court has most recently applied the rationale in Goldstone v. United States, 325 U.S. 687, 690 (1945). See Meisenholder, *Taxation of Annuity Contracts under Estate and Inheritance Taxes*, 39 MICH. L. REV. 856 (1941); Notes, 49 YALE L.J. 946 (1940); 42 COL. L. REV. 162 (1942).

13. "Insurance" as used in the statute has not received the benefit of congressional definition. H.R. REP. No. 767, 65th Cong., 2d Sess. 22 (1918); H.R. REP. No. 2333, 77th Cong., 2d Sess. 57, 162–3 (1942); SEN. REP. No. 1631, 77th Cong., 2d Sess. 234–6 (1942). And Treasury expansion of the term has never gone beyond a statement that the act is applicable to "insurance of every description including death benefits paid by fraternal beneficial societies operating under the lodge system." U.S. Treas. Reg. 105, § 81.25 (1942). Moreover, courts have never been faced with the necessity of defining "insurance" under section 811(g). The considerable pre-1942 litigation under the Section was largely concerned with what was then the sole condition precedent to inclusion—that the contract be "taken out by decedent." See note 11 *supra;* Bowe, *Life Insurance, the Forbidden Fruit*, 2 VAND. L. REV. 212–224 (1948). The main question raised—whether Congress intended the condition to mean that the decedent must possess incidents of ownership or merely purchase and pay for the insurance—was settled by a 1942 amendment which incorporated both requirements in the alternative. Revenue Act of 1942, § 404(g), 56 STAT. 944 (1942).

forceable only to the extent of the assessments collected on the occasion of her husband's death.[14] Such reasoning is probably unassailable on the narrowest of legal levels. On the practical level, however, it ignores completely the fact that living members are subject to the loss of their Exchange seats for failure to meet assessments.[15] The force of such a sanction guarantees that funds sufficient to make the $20,000 payment will be available.[16] In the light of this assurance, it is insignificant that the Exchange is "legally" bound to pay out only so much as is paid in. The beneficiaries will in fact receive full payment; therefore the risk of death is effectively shifted.

This conclusion is strengthened when the resemblance of death benefit plans to assessment insurance is recognized.[17] Assessment insurance is commonly employed by mutual benefit societies, notably fraternal organizations. Living policyholders make payments whenever a member dies rather than periodically.[18] Payments are equal for all members of the insured group irrespective of life expectancy. Although the only sanction against failure to meet an assessment is loss of membership in the plan, assessment insurance as a risk shifting device has generally been held to satisfy the most exacting insurance definition,[19] including that of Section 811(g).[20]

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14. 13 T.C. 159, 165 (1949).

15. N.Y. STOCK EXCHANGE CONST. Art. X, § 5. If the seat is sold, either by the member, or his executor, or after confiscation by the Exchange for failure to pay dues, the Exchange has first lien on the purchase money to the extent of unpaid dues, including Gratuity Fund assessments. N.Y. STOCK EXCHANGE CONST. Art. XI, § 3. See ATWOOD, STOCK AND PRODUCE EXCHANGES 40 (2d ed. 1925).

16. The Exchange itself recognizes the force of this sanction since it forwards payments to the beneficiaries even before the living members are assessed for their "contributions." N.Y. STOCK EXCHANGE CONST. Art. XVI, § 5.

When the assessments against all 1374 living members are met, the Exchange has actually received $20,610 from which to make the payments. The likelihood of failure to collect the requisite $20,000 is, therefore, negligible, since this would require default by more than forty members.

17. Assessment insurance reached its height in popularity during the latter half of the nineteenth century. HUEBNER, LIFE INSURANCE 283 (2d ed. 1925). Its contemporary importance, however, is indicated by the fact that the value of existing assessment insurance is $353,000,000. LIFE INSURANCE FACT BOOK 78 (1949).

18. See 1 COOLEY, BRIEFS ON INSURANCE 74 (2d ed. 1927).

19. *E.g.*, Ficklin v. Missouri State Life Ins. Co., 205 Mo. App. 452, 225 S.W. 102 (1920); State v. Matthews, 58 Ohio St. 1, 49 N.E. 1034, (1898); Mutual Life Ins. Co. v. Marye, 85 Va. 643, 8 S.E. 481 (1889). *See* Commonwealth v. Wetherbee, 105 Mass. 149, 161 (1870): "[An assessment insurance policy] is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by assured, and all dividends and credits accrued to him, to be forfeited to the company.

"The fact, . . . that the object of the organization was benevolent and not speculative,

In its concern for the "risk shifting" half in the *Le Gierse* dichotomy, the Tax Court ignored the "risk distribution" half. The implication that the two phrases are equivalent does not withstand examination.[21] Risk shifting emphasizes the individual aspect of insurance: the effecting of a contract between the insurer and insured each of whom gamble on the time the latter will die.[22] Risk distribution, on the other hand, emphasizes the broader, social aspect of insurance as a method of dispelling the danger of a potential loss by spreading its cost throughout a group.[23] By diffusing the risks through a mass of separate risk shifting contracts, the insurer casts his lot with the law of averages.[24] The process of risk distribution, therefore, is the very essence of insurance.

The Exchange Gratuity Plan embodies this essential aspect of risk distribution. The promises of 1374 members to contribute fifteen dollars upon the death of each of their fellow members not only shifts the risk of financial loss from the shoulders of the individual member but disseminates the risk across the entire insured group. Thus the purpose and effect of the Plan is exactly analogous to insurance under the *Le Gierse* test.[25]

A finding, however, that the Plan is insurance in the abstract would not

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has no bearing upon the nature and affect of the business conducted and the contracts made by the corporation."

See also HUEBNER, LIFE INSURANCE 283 (2d ed. 1925); MACLEAN, LIFE INSURANCE 7, 402, 405 (1935).

20. Treasury Decision 5239 applies Section 811(g) to proceeds of insurance in the form of "death benefits paid by fraternal beneficial societies operating under the lodge system." T.D. 5239, 1943 CUM. BUL. 1081, 1092.

21. Although the two concepts have been generally recognized, most writers on insurance, have failed to differentiate clearly between them. See, *e.g.*, 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 10.07 (1942). But see note 23 *infra*.

22. *See* State v. Towle, 80 Me. 287, 289, 14 Atl. 195, 196 (1888).

23. The distinction is ably pointed up by Cooley. His discussion of the risk shifting aspect takes this form: "The primary requisite essential to a contract of insurance is the presence of a risk of loss. The insurer, in return for a consideration paid to him by the insured, assumes this risk, and when such a risk is assumed by one of the parties to the contract, whatever form the contract may take, it is in fact a contract of insurance." 1 COOLEY, BRIEFS ON INSURANCE 7 (2d ed. 1927). On the other hand, he notes the risk distribution aspect thus: "There must, in order that there may be successful insurance, be a sufficiently large number exposed to the same risk to make it practical and advantageous to distribute the loss falling upon a few. . . . [T]he business must be regarded as a system of distributing losses upon the many who are exposed to the common hazard." *Id.* at 8.

24. *Ibid.*

25. The Board of Tax Appeals once found that the Gratuity Fund was "probably" insurance under applicable New York Law. Central Hanover Bank and Trust Co. v. Commissioner, 40 B.T.A. 268 (1939). See note 30 *infra*. But the importance of state definitions of insurance in federal estate taxation has been disaffirmed in favor of controlling "congressional intent." *See* Kernochan v. United States, 29 F. Supp. 860, 866 (Ct. Cl. 1939), *cert. denied*, 309 U.S. 675 (1940); Estate of Wilson, 42 B.T.A. 1196, 1200 (1940). On this basis, the Tax Court in the *Strauss* case held that the *Central Hanover* finding was not controlling. Estate of Strauss, 13 T.C. 159, 163–4 (1949).

alone result in taxability of its proceeds. Section 811(g) applies only to those insurance contracts in which the insured either "possessed . . . incidents of ownership" or, in the alternative, "paid the premiums or other consideration." [26]

But these requirements do not stand in the way of taxability, for the Gratuity Plan membership qualifies under either test. "Incidents of ownership" include the power to sell, mortgage, assign or otherwise control the economic use of the policy.[27] Although a Plan member may not designate his beneficiary [28] or assign the proceeds,[29] he does possess the power, by selling his seat, to realize a financial return and divest his beneficiary of any right to payments. This control, analogous to securing the cash value of ordinary insurance, should qualify as an incident of ownership.[30] Moreover,

26. INT. REV. CODE § 811(g).

The Tax Court held, however, "[i]n view of our conclusion (that the Gratuity plan failed the test of insurance in the abstract), it is not necessary to discuss the payment of premiums or incidents of ownership tests of section 811(g)." Estate of Strauss, 13 T.C. 159, 166 (1949).

27. See U.S. Treas. Reg. 105, § 81.27 (1942), as amended by T.D. 5239, 1943 CUM. BULL. 1081.

28. N.Y. STOCK EXCHANGE CONST. Art. XVI, § 4. See note 5 *supra*.

29. "Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts. . . ." N.Y. STOCK EXCHANGE CONST. Art. XVI, § 6.

30. In Central Hanover Bank and Trust Co., 40 B.T.A. 268 (1939), the Board of Tax Appeals assumed that the Gratuity Plan was insurance in the abstract (see note 25 *supra*) but nevertheless exempted payments from the gross estate. At the time, the incident of ownership test was the only basis of inclusion. See note 13 *supra*. The Board reasoned that the mere power to divest the "vested" right of a beneficiary to proceeds was not an incident of ownership, a conclusion which seems valid in light of the exclusion of more formidable reversionary interests from this category. INT. REV. CODE § 811(g)(2); U.S. Treas. Reg. 105, § 81.27, as amended by T.D. 5239, 1943 CUM. BULL. 1081, 1093. See Bingham v. United States, 296 U.S. 211 (1935). But see Bittker, *The Church and Spiegel Cases: Section 811(c) Gets a New Lease on Life*, 58 YALE L.J. 825 (1949); *Church and Spiegel: The Legislative Sequel*, 59 YALE L.J. 395 (1950) (reversionary interests under 811(c)).

But the Board in *Central Hanover* failed to consider the analogy between selling the Exchange seat and cashing in a traditional insurance policy, both of which result in an economic return to the insured and divest the beneficiary of his right to the proceeds. Moreover, the value of the potential death benefit is frequently a factor which leads a member to continue his control over his seat. Thus, the experience of the Midwest Stock Exchange "seemed to indicate that many individuals holding memberships who were not active in the securities business were inclined to hold their memberships for the gratuity fund benefits if for no other reason." Communication to the YALE LAW JOURNAL from C. E. Ogren, Vice President and Secretary, Midwest Stock Exchange, dated January 17, 1950, in Yale Law Library. In many cases, therefore, a member's reasons for selling his seat will be exactly the considerations involved in turning in a regular life insurance policy for its cash value.

U.S. Treas. Reg. 105, § 81.27 (1942), as amended by T.D. 5239, 43 CUM. BULL. 1081, 1094, indicates that this power to receive the cash surrender value of an insurance policy is an incident of ownership. See H.R. REP. No. 2333, 77th Cong., 2d Sess. 57, 163 (1942); SEN. REP. No. 1631, 77th Cong. 2d Sess. 235 (1942).