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BUT THE LAW WON**

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The Law and Silent Tom Smith: Seabiscuit's Trainer Fought the Law, But the Law Won

By Bennett Liebman

Millions of moviegoers might currently believe that Silent Tom Smith, the trainer of Seabiscuit, was one of the mysterious geniuses of horse racing. In 1945 and 1946, the Jockey Club and the New York State Racing Commission might have agreed with the mysterious part. They would not have agreed with the genius designation. These organizations found Tom Smith responsible for drugging a horse and ruled him out of racing for a year.¹

In 1945, Tom Smith was the trainer for Elizabeth Graham's Maine Chance Farm. Elizabeth Graham was generally known as Elizabeth Arden, the cosmetics executive, and she ran a powerhouse racing stable for decades. It was never more powerful than it was in 1945. In that year, Maine Chance led the nation in racing earnings, and Tom Smith, training exclusively for Maine Chance, won with a phenomenal 40 percent of his starters. In fact, in 130 starts that year, only 30 percent of Tom Smith's horse's finished worse than third place.² This was the kind of record that begs for complaints from other horsemen.

Marshall Cassidy, the steward for the private Jockey Club, which helped to regulate racing in New York, ordered an investigation of Smith starting in October of 1945. He testified:

We had a report from one of the veterinarians saying that he had seen Mr. Smith spray a horse's nose with a man holding him with a tongue-twitch just before he was to go to the paddock. So we ordered the saliva and urine taken of every winner, and notified the chemist to make every effort to find out, if he could, what was being used, and if it appeared, in the saliva, or urine. We had no success in finding anything.

We then continued the observations, and when it became obvious that he was doing this almost every time he won a race, we decided that we would go right in while he was spraying the horse's nose, take the spray away from him, and have the contents analyzed. But before that, Dr. Gilman got hold of the atomizer that they had used, with only a few drops in the bottle. They couldn't determine what it was but both Dr. Morgan and Dr. Gilman 'stated that it was tasteless, it was clear fluid, and had no taste whatsoever.'³

The opportunity to catch Tom Smith in the act came on November 1, 1945 when he shipped three horses stabled at Belmont Park to run at Jamaica. There was testimony presented that Smith was present in the receiving barn at Jamaica when the nostrils of his first horse scheduled to run that day were sprayed.⁴ More significantly, later in the day, a Jockey Club investigator allegedly observed one of Smith's horses, Magnificent Duel, being sprayed. He entered the receiving barn and called for a state investigator to assist

him. The state investigator uncovered an atomizer. The atomizer was tested by the state laboratory, and it was found to contain a 2.6 percent solution of ephedrine.⁵

The stewards summoned Tom Smith on November 5. He told them he used two atomizers. One contained vinegar, salt and water, and it was administered to horses with bleeding problems. It was, in fact, administered occasionally to horses before they went to the paddock. The other atomizer contained ephedrine. It was only administered to horses with head colds and never on the day of a race. He had never told his help to administer the atomizer with ephedrine, and his assistants had taken and used the wrong atomizer.⁶ Steward Cassidy told Smith, “We have had to have a man stationed at your stable every time you ran a horse. We did that in preference to suspending the stable.”⁷

The stewards forwarded the matter to the Jockey Club, which had the initial say over the licensing of participants in racing. An immediate hearing was held on November 7. Smith was not given any notice, and there were no charges presented against him. He was not present for the cross-examination of witnesses, and he was not given the right to have an attorney. The head of the panel was William Woodward, the Chairman of the Jockey Club. Woodward had for decades used Jim Fitzsimmons as the trainer of his horses, and Fitzsimmons had been the initial trainer of an underachieving colt named Seabiscuit. Woodward asked Smith, “Did you ever use this ephedrine on ‘Seabiscuit’ in the morning or other times?” Smith replied, “No, I did not, because I did not find anything—well, he never had a head cold, or anything. He had leg troubles. That was all.”⁸

The Jockey Club panel unanimously revoked Smith’s license on November 8. Smith then appealed to a Joint Commission composed of the State Racing Commission and two members of the Jockey Club. Here, there were formal charges, and Smith was well-represented by counsel.

Counsel for Smith presented a wide array of arguments. Smith testified that he had begun using the ephedrine solution when he suffered a broken nose.⁹ He then administered the solution occasionally to horses with head colds on the basis that anything that was good for humans was good for horses. Counsel suggested that the investigators could not have witnessed Magnificent Duel being sprayed (although the foreman admitted to spraying Magnificent Duel with the wrong atomizer), that the amount of spray utilized would have no stimulant effect on Magnificent Duel,¹⁰ that Smith had in no way directed the ephedrine spray to be used on Magnificent Duel or any horse on race day, and that the Jockey Club rule making the trainer responsible for any drug administered to a horse was unconstitutional.¹¹

The arguments fell on deaf ears. The Joint Commission unanimously rejected all of Smith’s contentions. It found that, regardless of how much ephedrine was administered, the ephedrine was administered for the purposes of stimulating the horse,¹² and that under the rules of racing, the trainer was responsible for the condition of his horse.¹³ Since this was the first significant challenge to the “trainer responsibility rule,” and there was concern over the constitutionality of the rule, the Joint Commission buttressed its decision by finding that Magnificent Duel was treated “with Smith’s tacit consent,

if not upon his orders.”¹⁴ The Joint Commission based Smith’s tacit consent on (a) the fact that his foreman tried to hide the atomizer, (b) the foreman showed by his demeanor that he would not have treated a horse without a direction or allowance from Smith, and (c) the failure of Smith to call a groom who was present during the incident.¹⁵

In what marked the first appellate level treatment of the trainer responsibility rule, Smith appealed to the courts. Again, a unanimous panel ruled against Smith. The appellate court found that there was a fair hearing, and there was substantial evidence to support the findings of the panel. “While the trainer was not present when the medicine was applied, there was evidence from which his responsibility for the treatment could be found to have been established.”¹⁶

Smith then appealed to New York’s highest court, the Court of Appeals. The Court of Appeals granted leave to hear the case,¹⁷ but the matter was not pursued. Instead, Tom Smith regained his license in 1947. He returned to training for Maine Chance and won the Kentucky Derby for Maine Chance with Jet Pilot in 1947.

There is no way to establish what went on in the receiving barn at Jamaica on November 1. We do not know whether Magnificent Duel accidentally received treatment from the atomizer containing ephedrine, or whether Smith intentionally had his foreman spray Magnificent Duel with ephedrine. What is fairly clear, however, is that Tom Smith did not receive anything close to what in 2003 would be considered a due process hearing. The stewards were certainly prejudiced. In the record of their November 5 interview with Smith, the stewards even inserted the following note: “In the opinion of the Stewards, Mr. Smith is extremely nervous which is entirely different from his usual bearing.”¹⁸

The proceeding before the Jockey Club was a total farce, where Mr. Smith’s license was revoked in the absence of even the semblance of a fair hearing.

The Joint Commission hearing also had a series of problems. Mr. Smith was found guilty of violating provisions of law that he was not charged with. The use of the Joint Commission and the role of the private Jockey Club in regulating state-issued licenses were found unconstitutional four years later by the Court of Appeals in *Fink v. Cole*.¹⁹ There were questions over whether the rules of the Jockey Club had been properly promulgated. The finding in the opinion that Smith somehow consented or ordered the atomizer treatment seems at best far-fetched. The foreman denied any hiding of the atomizer, and even if the atomizer were hidden by the foreman, it is hard to see how his action would implicate Smith. The finding that the foreman’s demeanor showed he would not do anything against Smith’s wishes was pure conjecture. The Jockey Club could equally have called the groom who was present during the treatment, and there was hardly any likelihood that the groom would have testified differently than the foreman who had admitted use of the spray. Everybody present at the receiving barn had previously given testimony to the stewards or the Jockey Club. The record shows no consent of any kind given by Smith to the ephedrine administration.

In any event, the penalty imposed on Tom Smith was way beyond acceptable. In an era of indiscriminate use of narcotics to stimulate horses, the evidence against Tom Smith, considered at its worst, was minor in nature. All the record shows was a mistaken small administration of an ephedrine spray by Smith's foreman. A suspension for one or two months was the maximum penalty in order. Whatever may have actually happened to Magnificent Duel, Tom Smith received especially unfair treatment from the Jockey Club and the Racing Commission. He got a raw deal.

It is possible that the steward Marshall Cassidy was right, and that Tom Smith in the fall of 1945 was in the regular business of spraying an ephedrine solution into horse's nostrils before they raced. The process, however, under which the Jockey Club and the Racing Commission went about proving these violations, deprived Tom Smith of any significant measure of due process.

Endnotes

1. Much of the data in this paper comes from the record before the Appellate Division, First Department in the case of *Smith v. Cole*, 270 A.D. 675, 678 (1st Dep't 1946). The material will be denominated as the "Record" at the correct page.
2. Record at 122.
3. *Id.* at 104–105. The point here is that whatever Smith was administering it was not a vinegar solution which would have had a distinctive taste and smell. Since Smith admitted using an atomizer only to administer a vinegar solution or an ephedrine solution, Cassidy was insinuating that Smith was using the ephedrine solution.
4. *Id.* at 56. This was not the basis of the revocation of Smith's license by the Joint Commission, but it was brought up before the meeting of the Jockey Club.
5. Ephedrine is still considered to have a significant effect on racehorse performance. The Association of Racing Commissioners, International classifies ephedrine as a Class 2 substance. "Class 2 substances have a high potential for affecting the outcome of a race. These substances are not generally accepted as therapeutic agents in race horses or they are therapeutic agents that have a high potential for abuse."
6. *Id.* at 27.
7. *Id.* at 29.
8. *Id.* at 79.
9. *Id.* at 348.
10. Much of the hearing was conducted on the issue of whether the dosage of ephedrine administered to Magnificent Duel could have had a stimulant effect.
11. Counsel argued that the rule was "thoroughly illegal; to say that a man who was not there, who knew nothing about it, and who the evidence shows had never permitted any man to perform the administration of this spray, . . . when Mr. Smith had never permitted any man to spray an animal; there was no authority for it and it was not within the scope of his duties to cause a

man's reputation to be blemished and his livelihood taken from him." Record at 454.

12. *Id.* at 116.
13. *Id.* at 118.
14. *Id.*
15. *Id.* at 118–120.
16. *Smith v. Cole*, 270 A.D. 675, 678 (1st Dep't 1946).
17. *Smith v. Cole*, 296 N.Y. 614 (1946).
18. Record at 30.
19. *Fink v. Cole*, 302 N.Y. 216 (1951).