

as their Equity brethren; they went to their notions of justice—until they took to following their own precedents, and then the Equity men came along and helped them out of the ruts they had themselves cut and swore they were bound to run in.

Distinguish between local customs and notions of justice. Customs have to be proved. They are not law until shewn to conform to the requisites of the legal conception of the custom.

"Usage once recorded upon evidence immediately becomes written and fixed law" (j).

There can be no law without a judicial sanction, and until a custom has been adopted as law by courts of justice, it is always uncertain whether it will be sustained by that sanction or not" (k).

Commenting upon which Mr. Lightwood says (l):—

"We have thus arrived at the result that all law is, in the last resort, the creature of the sovereign, and that it is made immediately either by the sovereign or by a subordinate; but that in the latter case it exists as law by the sovereign's assent, either express or tacit, and it is made either by way of statute or *obliquely by way of judicial decision*. These are decided to be the only modes in which law can be made, and hence it does not exist by virtue of being customary, or of being in accordance with legal opinion, or with natural law. *These facts may be reasons for its adoption as positive law*, but it does not become such until the sovereign has adopted it in the manner above described, either individually or mediately, either directly or obliquely."

Customs, then, we understand, and the best way to contrast them with our notions of justice is to say that it is by notions of justice that customs are accepted or rejected—are declared to be fit or unfit to become law. It is exactly at this point that Professor Burdick (if I may so say) goes wrong. He sees merchants plying their business according to fairly well understood but very general customs of very uncertain definition, and he imagines these customs or methods to have been laws—to have formed, indeed, "a true body of law," not observing that upon any difference of opinion arising between two of the merchants the courts had to determine which of the contentions was the more in accordance with their notions of justice, which was to be declared to be the law, and that in this way the courts

(j) Maine's Village Communities, 72.

(k) Austin's Lectures on Jurisprudence II, 563.

(l) The Nature of Positive Law, 359.