

THE "JUDICIAL TEMPERAMENT."

Governor ELY's appointment of Professor FELIX FRANKFURTER of the Harvard Law School as an Associate Justice of the Supreme Court of Massachusetts has stirred up a curious little storm. Mr. FRANKFURTER'S position among teachers of and writers on the law is of the highest. As an assistant district attorney under Mr. HENRY L. STIMSON he took an active part in a number of famous cases. His character, legal learning and intellectual power are beyond question. But the Sacco-Vanzetti case is still an Iliad of wrath in some Bay State bosoms. Professor FRANKFURTER ventured to study and analyze the evidence. It convinced him that there should be a new trial. Does it unfit a man for the bench to show courage in a time of popular excitement? Is a careful study of the evidence a disqualification in a judge? Apparently, in some minds.

Former Governor FULLER, with characteristic heat, says that if he were a member of the Executive Council he would "cut off his right hand" before he would vote for confirmation. That body, composed of eight members, will act on the appointment in something less than two weeks. One Councilor, who was in office during the Sacco-Vanzetti trial, disapproved Professor FRANKFURTER'S "position" at the time and will vote against confirmation. Another Councilor, who has not made up his mind, knows two others who will vote for rejection. Others are said to be undecided. There are other grave charges against the appointee. They are true. In politics he is a thorough Independent. He voted for the elder LA FOLLETTE in 1924, for Governor SMITH in 1928. What the politics of a private citizen have to do with the decisions of the judge must be a mystery to us outlanders. But it seems clear that partisan feeling is depended upon in part by Professor FRANKFURTER'S opponents. The Republican majority of the Council naturally finds it easy to be displeased with appointments made by a Democratic Governor.

The Republican Boston Transcript sees the flimsiness of arguments resting on the Sacco-Vanzetti business, and is too wise to mention the political argument. It admits Professor FRANKFURTER'S attainments and capacity, but attributes to him a lack of that elusive quality, "the judicial temperament." When he advocates a cause he advocates it with enthusiasm. Therefore, as a judge, he would incline strongly to one side or the other. This is a delicious theory. Are only tepid and indifferent advocates to be called to the bench? "The characteristic that makes a good judge," The Transcript solemnly continues, "is not alone mental competence but a capacity for decision that is wholly detached from emotions." It may strike the outsider that "the emotions" have most to do with the objections to Professor FRANKFURTER'S appointment.

Former Associate Justice HOLMES has had unusual opportunities for studying "the judicial temperament." He is one of Professor FRANKFURTER'S sponsors. Has that great name lost authority in Massachusetts? Remembering how utterly time turned to scorn the much more widespread fears and prophecies about Mr. Justice BRANDEIS, a more "judicial temperament" would better become Massachusetts in the present instance.